RPC

Annual insurance review 2019

Contents

Introduction

Welcome to RPC's Annual Insurance Review – our compendium of the key events and developments from 2018 and those we anticipate to be of importance for 2019.

Once again this year, many of the themes common across multiple sectors are global in nature.

Climate change is a growing influence on a number of sectors. If hurricanes were the apparent symptom of global warming last year, this year it was the Californian wildfires that generated headlines and record losses. More generally, the frequency and economic costs of extreme weather events is increasing, with inevitable impact across a range of insurance sectors – for example changeable and unpredictable weather patterns potentially impacting contingency insurance through cancellation of outside events. More indirectly, the move away from reliance on fossil fuels and the transition to renewable energy represents a change, if not an increase, to risks in the power and energy sectors.

The year has again seen a continued focus on international cyber crime and terrorism – and not just in the context of the US presidency. Various sectors report of the risks of cyber attacks causing business interruption, onward damage to third parties and leaks of personal data – even the risk of network-born security threats to energy companies and power supplies.

As ever, global regulators are making their presence felt and impacting risks across a variety of sectors. By way of example, the continued rise of cryptocurrencies and blockchain has resulted in increased regulatory attention around the world, as well as apparently endless scope for different applications. (See, for example, the potential use of blockchain as an impermeable registry for the provenance of art works.) Here in the UK, the FCA's expansion of the Financial Ombudsman Service's jurisdiction from April 2019 (allowing larger SME businesses to bring disputes before FOS and potentially increasing award limits from £150,000 to £350,000) will mean insurers should review their processes to ensure they are ready to manage an increase in coverage disputes falling to the FOS' "fair and reasonable" decision making process.

Other changes our sector experts are expecting to impact the market around the globe include: the influence of "fake news" drumming up specious group litigation; the use of new technology such as drones and easier-to-access satellite imaging for investigation of insurance losses; the rise of artificial intelligence in healthcare diagnostics; the increase in insolvencies in some jurisdictions, including the UK and China; and the #metoo movement potentially impacting EPL and D&O risks.

What's more, global reach is going to become increasingly important to the various business sectors covered by this review, as it already is for the insurance market. In Brexit Britain trade outside the EU takes on hugely increased significance for businesses, bringing with it the complexities of multiple and differing regulatory requirements, if not actual jurisdictional relocation. Assuming some form of exit from the EU *eventually* does occur, regulatory divergence from Europe must also be a real possibility.

And all this at a time when harmonised global trade appears increasingly under threat from a volatile geopolitical climate, with the rise of individual state protectionism, trade wars, sanctions and of course Brexit resulting in some warning of another global slowdown.

2019 promises to be a year of huge change – we at RPC look forward to supporting you with the challenges and opportunities it will bring, wherever they may arise.

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Supporting a global insurance market

Insurance is a global business. Underlying exposures are becoming ever more complex due to cross-border challenges. And the trigger for exposures span jurisdictional borders (and walls) – as can be seen from the introduction to this year's Review. Insurers need to have an increasingly global outlook when it comes to analysing claims trends and spotting underwriting opportunities.

Over a third of our insurance work relates to overseas losses. We have worked with more than 130 local law firms across over 80 countries. Against such a backdrop, we believe in working with the right people to help our clients deal with the increasingly global nature of their business. The right people with the right expertise to deliver the best solution for the job in hand – that's something no one firm can offer under one brand. Our informal global network of specialist legal providers provides insurers, insureds and brokers access to the right people with the right expertise in the right locations across the globe to achieve the best commercial solution for the job in hand.

Specialism is key. The firms we work with are recognised insurance and/or litigation firms who we know – through experience – share our same service-obsessed philosophy. We manage each instruction from London, Hong Kong or Singapore, taking responsibility for matter management, strategy, billing and MI whilst minimising the risk of duplication of work by agreeing a way of working upfront with insurers. We will be looking to do more with our global law firm relationships during 2019.

To manage the key international law firm relationships, we split the world into six regions. Each region is managed by an RPC partner with a particular practice lean to that region. And for that reason, this year we have introduced a regional overview of claims trends and predictions to the Annual Insurance Review. We are particularly grateful to those overseas firms who contributed to this exercise.

I would like to give special mention to Hinshaw & Culbertson, a US firm headquartered in Chicago, Illinois with 22 offices across 11 States including New York, Florida, Massachusetts and California with whom we are already collaborating closely. Increasingly, our clients need us to have a strong relationship in the US in order to deliver bespoke solutions.

Our close relationship with Hinshaw will see us working more closely across various classes of business, including complex coverage (including arbitration work), D&O, professional liability, medical, marine and more.

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Accountants

Key developments in 2018

The high-profile collapse of some of the UK's most recognisable companies has resulted in a number of the Big Four accountancy firms coming under fire from the Financial Reporting Council (FRC) this year. The FRC has asserted that some audit firms have demonstrated a lack of "professional scepticism" when carrying out their audits of some of the UK's PLCs. Notably the FRC were reported as having presented PwC with a record £6.5m fine for its auditing of retailer BHS before the company's sale for £1. The Competition and Markets Authority (CMA) also announced reforms in December that would result in the splitting of the audit and advisory businesses at the Big Four accountancy firms'. This has prompted much debate as to whether the largest four accountancy firms should be split up to promote competition.

The FRC itself has not avoided public criticism this year. Following the collapse of Carillion some MPs accused the regulator of failing to detect problems with the auditing sector at an earlier date. At an ICAEW meeting this November the Business, Energy and Industrial Strategy ("BEIS") Select Committee also made it very clear its intention was to carry out a thorough review of the so-called "broken" auditing sector in the near future. In December an independent review of the FRC identified the need for a new regulator of accountants labelling the FRC as a "hangover from different era". These developments suggest that the auditing sector will be the subject of further review and the regulator's expectation for firms to adopt "professional scepticism" will need to be kept front of mind by those firms auditing PLCs and smaller companies alike.

Regulatory investigations and disciplinary proceedings have continued to attract attention in Hong Kong over the past year. Following a landmark Court of Appeal ruling at the end of year 2017 overturning a disciplinary tribunal's decision on the basis that its ultimate finding differed from the complaint (an issue of natural justice), accountants have pursued a number of appeals challenging tribunal findings on liability and sanctions. All these appeals were dismissed. In one case, the Court of Appeal emphasised that the facts of each case are different, and that in general, the courts should exercise caution when considering such appeals against sanctions imposed by disciplinary tribunals. As a result, the hurdle for successfully appealing against a tribunal decision, either on liability or sanctions, remains very high.

What to look out for in 2019

Accountants of SMEs are likely to be kept busy in the run up to spring 2019 when VAT records will need to be submitted digitally. It will have taken the best part of four years for HMRC's "Making Tax Digital for VAT" (MTD) initiative to come into force. This will mean that maintaining paper records will cease to meet the legal requirements in tax legislation from 1 April 2019 (and from 1 October 2019 for more complex business structures).

The move to digital accountancy is likely to be welcomed by some practitioners however we envisage that cyber fraud will remain a key risk for many accountants of all sizes. The FCA reported earlier this year that the number of cyber-attacks was up by 80% this year and it is anticipated that accountancy firms will want to ensure that with the move towards paperless working their clients' information and monies remain secure. The move towards digital working is likely to be an issue of global debate in 2019 with some of Europe's central banks identifying that there is an uneven playing field between the central banks and big technology companies' utilising cloud based software when it comes to regulatory requirements.

The Hong Kong Government has introduced a bill which will give the FRC much wider regulatory powers over auditors of listed companies. At present, it only investigates, but cannot take any disciplinary action over, deficient audits. Disciplinary proceedings are currently handled by the Hong Kong Institute of Certified Public Accountants (a professional body). Such approach has long been criticised for lack of independence and falling short of international standards. The new regime will see the FRC (as an independent regulator) inspecting, investigating and taking disciplinary actions with respect to audits of listed companies. The maximum monetary penalty will be increased to HK$10m, from HK$500,000 under the existing regime. The Legislative Council is currently debating the provisions of the bill. One area of particular interest to the profession is sanctions guidelines, which are to be issued by the FRC before the new law comes into force probably in mid-2019. The guidelines are likely be modelled on those issued by the UK FRC.

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Art and specie

Key developments in 2018

Restitution is a growing danger for buyers. In the United States, the Holocaust Expropriated Art Recovery Act 2016 (HEAR Act) effectively extended the limitation period for Nazi-looted restitution claims and requires the return of property where there is "reasonable proof" of a rightful owner. In April 2018, in one of the first cases under the HEAR Act, a New York judge ruled that two artworks by Egon Schiele should be returned to the heirs of Fritz Grunbaum, a Jewish art collector. There was considerable evidence that the new owner knew of the heirs' claims before purchase – the new owner had specifically named the heirs in the title insurance.

Meanwhile in Europe, Christie's was accused of failing to investigate the provenance of a looted painting by Alfred Sisley. The artwork had been stolen from a bank safe in Paris by a Nazi official after its Jewish owner fled the city. Mondex, a Canadian looted art expert, identified the painting in the Einsatzstab Reichsleiter Rosenberg (ERR) database, an inventory of looted or stolen artworks, and contacted the heirs of the original owner. The dealer who bought the painting at auction in 2008 has promised to return it to the heirs, but is suing Christie's for its value, arguing that the auction house had access to the ERR database and should have checked it before the sale.

The enhanced art title risk may impact both demand for and the terms of title insurance. Insurers should continue to emphasise the importance of good title, safeguarding insureds against restitution claims, which, although glamorised in recent Hollywood productions, are expensive, lengthy and mostly avoidable.

What to look out for in 2019

A trend to watch in 2019 will be the impact of blockchain technology on the art market. Its functionality as a secure database on which information can be held without the risk of interference, deletion or corruption, means that a blockchain could in theory act as an impermeable art registry, accessed only by those who have been provided with the means of unlocking it. All information relating to an artwork – including the historic provenance and insurance details – could be easily accessible. This would simplify underwriting and claims handling, and reduce administration – as well as help to resolve provenance or authenticity disputes.

However, a key challenge will be the link between the physical art and its digital record. Some companies are developing ideas to do this, such as Norman Ventures' chainmarks – a type of unique physical fingerprints that are uploaded onto the virtual register – but no consensus has emerged. There is also the question of verification. If incorrect or corrupt information is added to the blockchain in the first instance, the value of the blockchain vanishes. Multiple blockchains, many of which are not connected, mean that we may also see inconsistent platforms or registers appearing simultaneously.

Given the pace at which progress is being made in this area, 2019 may be the year that blockchain takes hold in the art market.

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Brokers

Key developments in 2018

In contrast to the previous few years, insurance brokers came under substantial judicial scrutiny in 2018.

In April, a broker was found liable for damages in excess of £1m for failing to ask its client the correct pre-renewal questions. Had it done so, information about the client's directors would have been revealed that would have resulted in insurance cover being declined. This case, *Pakeezah Meat Supplies Ltd v Total Insurance Solutions Ltd*, is one of the first significant decisions under the Insurance Act 2015.

In July – this time in an unsuccessful claim – the court did not accept that the broker's failure (to provide oral guidance around its client's duty of disclosure) amounted to a breach of the duty. The decision was a further reminder of the importance of adducing expert evidence to support technical claims, and the claimant's failure to do so in this case (*Avondale Exhibitions Limited v Arthur J Gallagher Insurance Brokers Limited*) cost them dearly.

Finally, in October, the court had to decide whether a policyholder can merely assert that its claim under an insurance policy will not succeed as justification for then pursuing its broker in relation to the lack of cover. In *Dalamd Limited v Butterworth Spengler Commercial Limited* – undoubtedly the most significant case of the year – it was decided that the policyholder in those circumstances must go further than mere assertion and actually prove the lack of cover before claiming against the broker. This decision will be welcome news for brokers as the higher burden of proof may well have a positive effect on the number of claims that are made against insurance intermediaries. On the flip side, however, those claims that succeed could, ultimately, end up being more expensive.

What to look out for in 2019

2019 sees uncertainty about the future direction of Lloyd's of London and the consequences that it will have on other parts of the London market and further afield. The Lloyd's profitability review is likely to result in a significant trimming of capacity across all areas of cover and, while there are no targets or predictions for the number of syndicates or the number of classes that will be affected, the most likely to be hit is the MGA market as delegated capacity starts to be drawn back into the carriers rather than being farmed out.

The MGA market is dominated by brokers who either own or manage them and – directly or indirectly – use them to facilitate distribution and enhance front-end profitability. There are already reports of some managing agents starting to close for new business as available capacity dwindles, and this seems likely to be the thin end of the wedge as the reality of the Lloyd's review starts to bite. Quite what this means for brokers seeking to gain access to markets for their customers or to maintain their profitability remains to be seen, but the market certainly looks set for a period of instability prior to the predicted hardening.

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Construction

Key developments in 2018

In 2018, we have seen a rise in regulatory investigations against various construction professionals, including architects and surveyors, alleging that they have failed to comply with their Royal Institute of British Architects/Architects Registration Board/Royal Institution of Chartered Surveyors guidelines. The reason for this is not entirely clear; however, it does offer disgruntled claimants an opportunity to test the strength of any future civil claim without incurring adverse legal costs. Obtaining early legal advice can prevent unwarranted investigations growing legs.

As complaints against professionals appear to be on the rise, insurers need to ensure they are prepared. Insurers should clearly state in the policy whether it is intended to cover regulatory and disciplinary investigations in addition to civil claims, and check to see what the policy covers – for example, does the policy respond only to investigations against the firm or against individual directors and employees. In addition, to avoid incurring the costs of a hearing the matter should be resolved at the investigations stage. Therefore, insurers should try to encourage early notification and obtain legal advice. Lastly, it is important to ensure the policy provides an adequate level of investigations costs cover such that there are sufficient funds should the matter be referred to a disciplinary hearing. A policy offering a relatively low sub-limit could end up causing more trouble than if there was no cover at all.

Cavity wall insulation claims are fast becoming the "PPI of the construction industry". We have seen firms of solicitors/"legal advisers" being set up with the sole purpose of contacting homeowners and then pursuing claims relating to the installation of cavity wall insulation, which was marketed as a quick and simple solution to making houses more energy efficient. It has, however, proved to be unsuitable in many cases, and has resulted in claims for its removal (and, often unjustifiably, for other remedial work and allegedly linked losses). Those claims can, of course, take a policy period or two to materialise.

What to look out for in 2019

We expect to see a continued increase in regulatory investigations against architects and surveyors. We have represented many more construction professionals during 2018 than in previous years, and we expect the number of investigations to increase in 2019.

The consequences of the Grenfell Tower fire will continue to have an effect on the construction industry. We anticipate an increase in claims against "other professionals" involved in construction projects, a move away from the "design and build" method of procurement, particularly towards construction management, and greater scrutiny on the regulation of products used in the construction industry. The solvency of contractors, and the effects of an event of insolvency, will likely continue to be relevant to insurers' risk profile too.

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Contingency

Key developments in 2018

Mentioning the weather in an insurance context most often provokes thoughts of large-scale CAT losses, or wide reinsurance exposure, following a major event such as a hurricane or wildfire. Weather, however, also affects other insurance, not least contingency.

A basic contingency risk covers the risk of an event – a concert, a sporting competition, a conference or an exhibition – being cancelled or disrupted. There are many potential causes of cancellation and disruption but the weather is high on the list and, we would suggest, is likely to become an even more significant factor in this area.

There is a growing consensus that the world is experiencing weather that is both harder to predict and more extreme. This was made clear in March 2018 when the European Academies Science Advisory Council (EASAC) published its statement Extreme Weather Events in Europe. The statement was an update of a 2013 study, made following further analysis. In the statement, EASAC confirmed that the evidence was that both the frequency and economic costs of extreme weather events was increasing overall. The EASAC report noted that climate change "had increased the probability (in some cases substantially) of extreme events" including increased risks of wildfires and rainfall and associated floods. Perhaps ironically, the statement was prepared in part using data on natural disasters obtained from German insurer, Munich Re.

At one level, the EASAC report confirms what many are experiencing in practice. At the time of writing, Britain has had its joint hottest summer on record (the hottest ever for England) and there are severe wildfires burning in California. The EASAC report is, however, part of a growing identification that weather poses significant risks, and this is increasingly likely to be fed into the analysis of the availability of capacity and the pricing of contingency risks. Many insurers already do this in quite a sophisticated way, but more and more are likely now also to need to follow suit.

What to look out for in 2019

Look out for more of the same in 2019. As the data confirms that we are living in a world with a less predictable, more oscillating, weather pattern, the insurance market for certain types of contingency risk may harden. It may be one thing to obtain a contingency policy covering an indoor concert on one night (say) at London's O2 Arena. It may be another thing entirely to obtain cover for a three-day outdoor concert festival or a tennis tournament in an area that can fall victim to hurricanes, such as Florida, if we no longer have a clear picture of when the hurricane season is likely to occur. Such cover, where placed, may also be subject to more stringent restrictions ruling out all but the most extreme weather conditions.

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Directors and officers

Key developments in 2018

Regulatory investigations impacting directors and officers cover have been a feature of 2018, with Serious Fraud Office (SFO) investigations and subsequent prosecutions particularly prominent.

Particularly high-profile has been the prosecution and trial of two ex-Tesco directors over alleged fraud and false accounting (it is alleged they knowingly manipulated figures that resulted in Tesco's profits being overstated by £250m); as well the trial of ex-Alstom UK directors over alleged bribery and corruption.

The investigation and subsequent defence costs can be extraordinarily high – in our experience, in large white-collar crime matters such as the examples above, the defence costs can average £4m per director.

This assumes there is only one trial, but with complex cases such as these re-trials are not uncommon.

When one factors in that often multiple directors are prosecuted, and that at the preliminary stages many other directors or employees will be questioned by the investigating authority (be it the SFO, Financial Conduct Authority (FCA) or police) and will incur their own investigation costs, the total loss in terms of legal fees will not uncommonly exceed £20m. In some cases, considerably greater.

What to look out for in 2019

The FCA has for some time stated "preventing, detecting and punishing market abuse is a high priority for us".

We anticipate that 2019 will be the year when this mission statement really takes hold, with the number of market abuse investigations instigated by the FCA, whether civil or criminal, increasing.

Any market abuse investigation by the FCA is likely to lead to significant legal costs being incurred – both by the individuals being investigated and by any individuals from whom the FCA requests information, whether in the form of documents or through an interview. Like the SFO, the FCA has broad powers to compel information relevant to its investigation.

There is though a further exposure for directors and officers insurers. Where the FCA is investigating market abuse concerning incorrect statements that have had the effect of overinflating a listed company's share price, this alerts investors to the potential for a civil claim against the company under section 90A of the Financial Services and Markets Act 2000 to recover any loss they have suffered by relying on the statements, for example when buying the company's shares at the overinflated price.

In line with our expectation of more FCA market abuse investigations, we expect more section 90A claims during 2019.

Section 90A claims will invariably involve a large number of claimants and be extremely costly to defend. The defendant is the issuer of the shares (the company) but most directors and officers policies cover the company itself against certain types of claims, including claims concerning the company's shares.

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Energy

Key developments in 2018

Following nearly four years of depressed oil prices, 2018 has seen a gradual recovery – culminating in a high of US$85 a barrel for Brent crude in October.

The rise in oil prices is understood to have resulted from increased geopolitical uncertainty, and in particular President Donald Trump's decision to reinstate sanctions on Iran and withdraw the US from the Iran nuclear deal. The resultant effect on supply, coupled with political turmoil in alternative producers (including Russia, Saudi Arabia and Venezuela), has driven oil prices back towards the $100 mark.

Despite the upwards trend in oil prices, there remain a number of factors that continue to exert downward pressure on prices and pose a risk to their recovery. These include reduced demand from major consumer nations, and the transition towards renewable energy sources. For now, these pressures have been mitigated by unpredictable geopolitical events.

In parallel with rising oil prices, the appetite to invest in new projects has also increased. The economic viability of new projects is further improved as a result of the low cost of offshore development and logistical support that has resulted from a lull in field development over the last two to four years.

A June 2018 report by oil and gas consultants Rystad Energy reported that $110bn of investment has been approved for new oil and gas projects over the 18 months preceding the report. This contrasts with $50bn approved during 2016.

These new construction projects and facilities will result in increased activity for underwriters (and potentially claims teams) in the upstream energy market over the coming year.

What to look out for in 2019

The past year saw a trend of insurers divesting or limiting their involvement in the coal industry. In 2018 a number of major European insurance companies (including Allianz, AXA, Generali, Hanover Re, Munich Re, Swiss Re and Zurich) announced an intention to limit the amount of business they underwrite in respect of coal power/energy.

We expect the shift away from coal as a power generation/energy source to remain a pertinent issue within the insurance market during 2019.

A number of insurers have identified concerns over climate change as the basis for their decision to move away from coal-based risks. Burning coal is the most significant contributor to global carbon dioxide emissions, and there is a reasonable consensus within the scientific community that this carbon dioxide production contributes to climate change.

Climate change has been associated with a number of natural catastrophes and extreme weather events during 2018, including the North American cold wave in January, the European heat wave in July, and hurricane Michael in October. Accordingly, there is increased public awareness of the effects of climate change and increased reputational pressure on financial services (including the insurance market) to distance themselves from certain fossil fuels.

The coal industry accounts for a small (and reducing) percentage of the energy/power market. Therefore, the decision by a number of insurers to limit their involvement in the coal industry is unlikely to have a material impact on their businesses, but nonetheless it will likely serve to enhance their reputation with consumers.

It remains to be seen whether these underwriting restrictions on the coal industry will have any impact. However, even if the supply of underwriting services available to the coal industry does constrict, it will invariably create opportunities for insurers that are willing to continue to write coal business.

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Financial institutions

Key developments in 2018

During the year, the Financial Conduct Authority (FCA) has been actively progressing its programme for reforming the asset management industry.

The measures previewed in its June 2017 report include imposing a general duty on fund managers to demonstrate they are acting in the best interests of investors, to report on the value for money they provide and to identify measures to remedy any failures in this regard. Individuals will be personally held to account for any non-compliance with these duties under the Senior Managers and Certification Regime (SMCR), as further explained below.

Policy statements and consultation papers published this year by the FCA have addressed a variety of measures, including: requiring fund managers to assess annually whether their charges are justified; improving the transparency of charges via an “all-in fee”; requiring funds to explain their investment strategies and objectives more clearly to investors; and enabling investors to better compare different funds and monitor performance.

The challenge for the asset management industry is to respond positively to these measures and demonstrate that it is delivering value for money (remedying any value-for-money issues), but without signposting potential issues for investors in relation to past activity. It will need to work with the FCA to provide the required level of clarity on investment strategies, fund objectives and performance targets in its investment reports.

What to look out for in 2019

The SMCR represents a paradigm shift in the UK financial services industry. From next year, this new regime will apply to every FCA-regulated firm, imposing personal accountability on almost all personnel working in the regulated financial services sector.

This is part of a concerted drive by the FCA to improve the culture of financial services, to avoid future financial scandals and to ensure accountability for risk management, compliance and wrongdoing from the top down.

The SMCR therefore demands that all financial services personnel conduct themselves responsibly, since they will be held individually, personally and directly accountable.

The new Conduct Rules will set out a minimum basic standard of conduct and behaviour applicable to all financial services personnel. The key requirements are that all staff act with integrity, due care, skill and diligence, co-operate with regulators, pay due regard to the interests of customers and treat them fairly, and observe proper standards of market conduct.

Senior managers will have additional responsibilities to ensure effective control of the business, compliance with regulatory standards and appropriate delegation of responsibilities. If a firm breaches an FCA requirement, the senior manager responsible for that area can be held directly accountable if they did not take reasonable steps to prevent the breach.

The SMCR implementation date is 9 December 2019 for most financial services firms. Before then, firms must have identified all senior managers and certified persons, and trained them on the Conduct Rules.

Looking ahead, we expect to see a continuing increase in FCA enforcement investigations focusing on senior management responsibility, reflecting the more aggressive and proactive approach signalled in public statements by FCA enforcement director Mark Steward and FCA policy papers issued this year.

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Financial professionals

Key developments in 2018

As predicted in 2017's insurance review, 2018 came to be dominated by a focus on pension transfer advice. Around £1.3trn remains in the final salary pension market and, following pension freedoms, around one in three investors receiving a transfer value quote proceeds to transfer (as opposed to one in 10 previously).

The Financial Conduct Authority (FCA) has understandably been busy in this area, with its oversight culminating in policy statement 18/6, published in March 2018, and policy statement 18/20, published in October 2018. This provided us with a clearer idea of the FCA's expectations of firms offering advice in this area. Key points to be aware of include: a need for the advice process to include consideration of destination assets following transfer; separate assessment of attitude to pension transfer risk from attitude to investment risk; the need to challenge a client's investment objectives against their needs; and the introduction of the new Transfer Value Comparator calculation.

While the end of the year has produced some jitters, markets are still holding up relatively well (although we note that, worryingly, a large number of transfers therefore took place when the markets were at or close to record highs). It might be that we do not see any significant claim volume here until either markets drop or the more profligate transferees have exhausted their pension assets. If and when this happens, expect the FCA to be involved, with any firm adopting anything even resembling a commoditised approach being firmly in the cross hairs.

What to look out for in 2019

We will try to get through this section without mentioning Brexit too often – perhaps a hard task but we at RPC enjoy a challenge! In brief, the impact that any terms of withdrawal could have on financial regulation could be significant, especially if we see an end to harmonisation.

Beyond this, one of the FCA's key concerns at the moment appears to be transparency (not least because of pressure coming in the form of MIFID II). This dovetails with its interest in investment management, as discussed in its business plan for 2018–19, under which investment management is one the FCA's stated cross-sector priorities.

The FCA has stated that, by the end of 2018–19, it intends to publish research that looks at the rise of passive investment management in the UK. This should give us an interesting insight into the regulator's focus and the standards it expects of this sector following the implementation of MIFID II and Packaged Retail and Insurance-based Investment Products (PRIIPs) regulation. In very simple terms, the concerns the regulator has around investment funds involve the use of poor-quality products, inadequate disclosure and the risk of financial crime, and we think it's fair to say that it views this area as being one with a potential lack of consumer protection. It could also be that we see some pronouncements from the regulator on expectations of firms using the "agent as client" business model.

As with pensions, this is another area where claim volumes are unlikely to increase significantly unless and until we see market decreases.

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General liability

Key developments in 2018

“Fundamental dishonesty” has remained in the news.

In *London Organising Committee for the Olympic and Paralympic Games v Sinfield*, Mr Justice Knowles ruled that a volunteer injured while working at the 2012 Olympic Games was fundamentally dishonest in exaggerating the costs of gardening and as a result dismissed his entire claim.

At first instance, Mr Recorder Widdup found the claimant had dishonestly created false invoices totaling nearly £15,000 but held that this dishonesty did not contaminate the entire claim and awarded the claimant £27,750 in damages. Overturning this decision and applying section 57 of the Criminal Justice and Courts Act 2015, Mr Justice Knowles dismissed the claim stating “A Claimant should be found to be fundamentally dishonest within the meaning of section 57(1)(b) if the Defendant proves on a balance of probabilities that the Claimant has acted dishonestly in relation to the primary claim and/or a related claim … and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the Defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation.”

The fact that the greater part of the claim may have been genuine is irrelevant where the court makes a finding of fundamental dishonesty. The entire claim must be dismissed, unless the claimant would suffer substantial injustice.

In *Howlett v Davies and Ageas Insurance* from late 2017 it was held that a defendant did not have to specifically plead fundamental dishonesty in order for such a finding to be made if the facts dictated that.

What to look out for in 2019

The Civil Liability Bill will be law and will likely lead to a change in the discount rate being implemented before the end of 2019.

In February 2017, the Lord Chancellor amended the discount rate from 2.5% (the level at which it had stood since 2001) to minus 0.75%. While a review of the rate had been a long time coming, such a drastic alteration had not been expected. The reaction to the change led to a review of the entire rate-setting system by the Government and part two of the Civil Liability Bill sets out the methodology by which the future rate will be set.

The bill requires that the rate be reviewed by the Lord Chancellor at least every three years, with his or her determination being given within a 180-day review period. In determining the rate, the Lord Chancellor must consult an expert panel of four and the Government Actuary. The first review of the current rate shall begin within 90 days of the bill being enacted and must be completed within a further 180 days.

Experts expect the new rate to be set at between 0 and 1%.

Part one of the bill introduces reform of the claims process for those suffering whiplash injuries lasting less than two years as a result of a road traffic accident, with the introduction of a tariff of compensation with figures to be set by the Lord Chancellor. There will also be a ban on seeking or offering to settle whiplash claims without medical evidence. Secondary legislation is set to increase the small claims limit for road traffic accident claims to £5,000.

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Health and safety

Key developments in 2018

As we discussed in last year's insurance review, new sentencing guidelines were brought in on 31 July for gross negligence manslaughter cases. These took effect on 1 November.

The Sentencing Council has placed particular emphasis on harsher sentences in situations where "the negligent conduct was motivated by financial gain" and where the "offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct".

The custodial sentences range from what is termed lower culpability with between one and four years to very high culpability with 10–18 years' custody.

The guidelines state that a factor indicating high culpability is "where the offender was in a leading role if acting with others in the offending". This may indicate that directors of companies with larger responsibilities will be subject to higher levels of sentencing if convicted.

The Independent Review of Building Regulations and Fire Safety: Final Report was published on 17 May 2018 in response to the Grenfell Tower fire. Details of the report and its recommendations can be found in the Construction section of this review.

The International Organisation for Standards published a new standard for occupational health and safety. It aims to reduce the number of workplace injuries and illnesses around the world by providing governmental agencies with effective and usable guidance.

The first ever code of practice to help consumer product safety recalls has been released. The code outlines practical steps a business can take in the event of and/or in preparation for a recall, such as establishing mechanisms to monitor product safety, examine and respond to potential product safety issues and review corrective action procedures. The code is also directed at regulators and market surveillance authorities, and it explains their role in helping businesses fulfil their responsibilities.

What to look out for in 2019

With regards to Brexit, however this is effected, it is not anticipated that there will be any immediate change to health and safety regulations in the UK, which are generally regarded as fit for purpose. The Health and Safety at Work Act 1974 is a UK statute and many of the EU health and safety-related directives have already been implemented into UK legislation.

The Health and Safety Executive (HSE) plans to publish new guidance for employers on work-related stress, with a focus on "assessment and management of work-related mental ill health, including links to new mental health care standards". In addition, to help tackle the issue, the HSE will be working to "improve the evidence base for interventions ... and catalyse improvements in health and safety care standards". The guidance will create awareness for employers of the six core mental health standards recommended in the Thriving at Work review.

In a further initiative, the HSE also aims to "deliver a programme of targeted interventions concentrating on controlling high-consequence risks from legionella, fairgrounds and major construction projects". The HSE will attempt approximately 20,000 inspections – businesses should be aware of this, proactively monitoring their systems and reviewing risk assessments.

The HSE is also targeting issues flowing from what is termed "blue tape", where a burden arises when business-to-business health and safety requirements are unbalanced or result in ineffectual risk control and ownership, particularly in relation to small and medium-sized enterprises. Guidance is planned for publication to help with proportionate implementation.

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Intellectual property

Key developments in 2018

In November 2018, the UK Supreme Court in *Warner-Lambert v Generics (UK) Limited* [2018] UKSC 56 addressed a number of key issues regarding patent infringement.

Warner-Lambert (part of the Pfizer group) marketed a prescription-only drug for three different indications under the brand name Lyrica (patent protection for the drug had expired, bar a medical-use only patent for one of the three indications). It is one of Pfizer's most successful drugs in the UK, used as treatment for seizure disorders.

The defendant intended to sell a generic version of the drug limited to the two indications that were not patented. Warner-Lambert was concerned that although limited to the two non-patented indications, the defendant's product would (in reality) end up being dispensed for medical use (therefore undercutting Warner-Lambert).

The Supreme Court ruled on a number of points, and considered the test for infringement of a patent where a product is manufactured for a limited use. It unanimously decided that this specific claim would not amount to an infringement (had the patent been valid). However, the judges differed on the reasoning. Two of the judges preferred the view that the intention of the alleged infringer was irrelevant – what matters is whether the allegedly infringing product as it emerges from the manufacturing process is presented as being suitable for the uses that enjoy patent protection. The other two judges preferred the view that the test is whether the alleged infringer subjectively intended to target the patent-protected market.

It is likely that the correct test will be subject to future litigation, meaning that although the case is generally seen as positive for generics companies, patentees may still see scope for successfully proving infringement.

What to look out for in 2019

Many of the significant trends in recent years, and proposed changes for 2019, focus on the continued rise in content disputes – an issue we strongly expect to be high on the agenda next year.

One significant change will be the new EU Copyright Directive, which aims to modernise copyright laws across Europe to fit the internet age. It is expected this could spark a rise in disputes between online businesses and rights-holders. Two provisions are currently provoking considerable controversy: articles 11 and 13.

Dubbed the "link tax", article 11 proposes to introduce a requirement for online content-sharing platforms to pay news organisations for snippets of their news content. Article 13 proposes that online content-sharing platforms should be required to proactively restrict users uploading content that infringes copyright (often referred to as the "content filter").

It will also be interesting to see how the UK Supreme Court decision in *Cartier v BT & Ors* [2018] UKSC 28 affects online content disputes. This decided that the costs of complying with a blocking order should be met by rights holders, and not innocent intermediaries.

Content disputes issues are also expected to give rise to ancillary risks, such as an expected continued rise in privacy and/or data protection claims involving intermediaries.

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International arbitration

Key developments in 2018

2018 has been dominated by the slow progress of the Brexit negotiations and the uncertainty as to what any deal would look like in terms of its impact on the UK's legislative framework. The uncertainty caused by Brexit is undoubtedly threating London's role as a commercial and financial hub of the global economy, and the question is whether it also threatens London's position as one of the leading centres for global arbitration.

The UK will continue to be a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so awards issued in London will retain the same enforceability irrespective of Brexit. London has long been the most popular choice for the jurisdiction and situs of international arbitrations, and with the UK's long-cultivated reputation of legal independence, its legislative framework and jurisprudence that is supportive of international arbitration, this should not change. Parties may also now favour London-based international arbitration over the English courts while any uncertainty remains over the applicable regime for enforcement of English judgments in EU member states.

Insurers frequently rely on London-based international arbitration to resolve policy coverage disputes, especially for high-value and global risks, and insurers should take comfort from the protection offered by this choice irrespective of Brexit.

What to look out for in 2019

Appointing arbitrators can often be a source of controversy. Insurance law is undoubtedly a specialised area and, therefore, the pool of arbitrators with relevant legal background is necessarily limited. In such circumstances it is not unsurprising that the issue of multiple and repeat appointments of particular arbitrators, either by insurers or insureds, causes controversy.

In *Halliburton v Chubb* [2018] EWCA CIV 817, the Court of Appeal considered the extent to which multiple appointments give rise to an appearance of bias and issues relating to the disclosure to be made in such circumstances. Halliburton, an oil-field servicing company, issued arbitral proceedings against Chubb to seek coverage in respect of its liabilities arising out of the Deepwater Horizon incident. The case concerned an application by Halliburton to remove the court-appointed arbitrator because the arbitrator had subsequently accepted two appointments as Chubb's party-appointed arbitrator in relation to two policy coverage disputes with Transocean, the oil rig owner, also relating to the Deepwater Horizon incident. This was not disclosed to Halliburton.

The court concluded the arbitrator should have made disclosure to Halliburton when he subsequently accepted the two appointments. Nonetheless, the court decided the non-disclosure of these appointments taken together with other relevant factors would not have led a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator in question was biased.

The implications of this decision have caused general consternation in the arbitral community. Leave to appeal to the Supreme Court is being sought and amicus briefs will be submitted by the London Court of International Arbitration and the Chartered Institute of Arbitrators, so parties and arbitrators should watch this space for developments. In the meantime, insurers should be mindful of this decision when nominating arbitrators.

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International property

Key developments in 2018

A number of our predictions from a year ago came to pass. Renewals in 2018 saw modest rises in property and casualty rates, which were in large part reactive to the significant catastrophe losses of 2017 and demand from emerging markets. However, the rises were tempered by continuing excess capacity.

While 2017 will be remembered as one of the most active and dangerous Atlantic hurricane seasons of recent years, 2018 will be defined by the wildfires in California. The devastation wrought by these events means 2018 is likely to surpass 2017 as the most expensive year ever for wildfire losses. At the time of writing, insured damage from the Camp and Woolsey fires are estimated by RMS to be between $9bn and $13bn.

New and emerging technologies continue to be used in the investigation and adjustment of losses. Drones are now regularly being used to capture high-resolution images of the impact of catastrophic events. Satellite imaging has also been used to good effect throughout the wildfire season in conditions where drones are less effective due to poor visibility caused by smoke, ash and airspace flying restrictions.

In an era where record catastrophe losses are becoming the norm, it is no surprise that (re)insurers are exploring alternative ways in which to transfer or spread their risk through insurance-linked securities (ILS). As we anticipated last year, the catastrophe bond market expanded in 2018 with record issuances. The outstanding catastrophe bond market now sits at more than $30bn.

What to look out for in 2019

Further modest rate rises are generally anticipated, with continued corrective pricing and ongoing demand from emerging markets. The level of increase is likely to be nuanced across different markets and geographical areas.

The ILS marketplace in the UK, in particular, is expected to continue to grow in importance and scope. The speed with which ILS structures can be approved by regulators in the UK has been a concern. However, recent transactions by Brit and Scor illustrate the ability of UK regulators to grant approvals quickly, and thereby compete with other jurisdictions internationally such as Bermuda.

The focus for ILS to date has been on catastrophe bonds. These bonds represent the most liquid and the most easily approachable part of the market. However, the diversification opportunity of an ILS portfolio ought to drive innovation in allowing (re)insurers to spread other risk categories such as cyber by way of these securities. We expect to see this opportunity seized upon by ILS markets in 2019, but it waits to be seen which jurisdiction(s) will take the initiative.

(Re)insurers' appetite for cyber risk in 2019 is expected to continue unabated. There has in recent years been a level of concern about cyber risks being inadvertently covered by property policies and not priced appropriately. However, property (re)insurers have invested in trying to better understand cyber exposures. For 2019 renewals we can expect to see tailored wordings that seek to address these inadvertent cyber exposures and/or more informed pricing of these "silent" risks.

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Legal practices

Key developments in 2018

The combined *Dreamvar and P&P* appeal judgment has been widely analysed. While the decision makes clear that when a fraudster pretends to sell a property the solicitors for both the innocent buyer *and* the fraudulent seller are liable, we have yet to see how the apportionment/contribution arguments between those solicitors will play out.

Further, neither the judgment nor the associated commentary addresses the liability of a fraudulent seller's solicitor to a *lender*, where the lender's mortgage funds are paid away to the fraudster.

Although a lender may bring a claim against a seller's solicitor in such circumstances, the relevant authorities have not been considered post-*Dreamvar* and, due to the fact-sensitive nature of these claims, significant potential exists for those authorities to be distinguished.

The vexed issue of reliance, which featured prominently in *Dreamvar and P&P*, will be of paramount importance in relation to breach of warranty of authority and breach of undertaking allegations in this context. Similarly, liability for breach of trust in these circumstances is not clear-cut.

In *Dreamvar*, the court took the view that the solicitors were insured and, as such, were better placed to sustain the loss. Where the claimant is a financial institution, not a small (and uninsured) company, we consider that the seller's solicitors will be in a significantly better position to make a claim for section 61 relief from breach of trust, if they are found liable on that basis, provided they have acted competently.

It also remains to be seen if any changes will be made to the mechanics of conveyancing and/or solicitors' professional indemnity insurance to resolve the issues highlighted by these cases.

What to look out for in 2019

The year looks set to bring a host of changes in the regulation of legal services.

In addition to introducing the new minimum terms and conditions (MTC), the Solicitors Regulation Authority (SRA) is set to publish a new code of conduct. The new code includes an obligation on the solicitor to "put matters right" if the client suffers loss or harm – a requirement that will undoubtedly be wielded against solicitors by unsatisfied clients without hesitation. The new code also contains an obligation to notify the client that they may have a claim against the firm, which is likely to be of concern to insurers.

Separately, and notwithstanding strong objections from the Law Society, the Legal Services Board has approved the SRA's plans to introduce revolutionary new rules that will allow in-house legal teams to provide legal advice to members of the public without the need for the employer to be regulated by the SRA or to hold MTC-compliant professional indemnity insurance.

Although certain reserved legal activities (including probate, conveyancing and conducting litigation) are excluded, the changes will weaken the distinction between in-house and private legal practice. They will also offer an opportunity for in-house legal teams to compete with so-called "Big Law" by adopting a new (more profitable?) business model, to enable them to sell specialist advice to other companies and individuals.

The new regime is expected to be introduced in April or May 2019. We expect significant interest from insurers looking to insure these unregulated firms on a non-MTC basis.

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Life sciences

Key developments in 2018

Gee v DePuy was handed down on 21 May 2018 and is a boon for insurers of manufacturers of complex products, particularly medical devices. The judge found that DePuy's "metal-on-metal" hip product was not defective under the Consumer Protection Act 1987.

Manufacturers and their insurers will be encouraged by this decision in the modern era of complex products in three notable respects.

First, the court found that evidence of compliance with regulatory standards will have considerable weight in the successful defence of a product, because those standards have been set at a level deemed appropriate for safety purposes. As regulations tighten, we expect that manufacturers will increasingly rely on this defence.

Second, the court rejected the claimants' reliance on statistics, deciding they were unreliable because they were subject to a number of limitations and confounding factors. As ever more performance data is generated concerning medical products, the judgment provides timely guidance on the dangers of leaping to conclusions based on flawed statistical analysis.

Third, the judgment robustly confronted the issue of fake news, which is increasingly adding to the litigation risk associated with medical products for insurers. There was evidence of "panic engendered by … sensationalist media reporting" that skewed the evidence relied on by the claimants. The judgment suggests that the litigation was triggered and gained momentum because of unbalanced media reporting of medical issues. *Gee v DePuy* is a timely reminder of the importance of media outlets investigating the bigger picture to avoid stories amounting to fake news.

Gee v DePuy has offered product liability defendants and their insurers a genuine cause for optimism.

What to look out for in 2019

Insurers in the life sciences sector will see increasing commercial and governmental support for the use of artificial intelligence in hospitals.

At the turn of the year, the Government published its Sector Deal for Life Sciences, which included a stated intention for the UK to lead the way in developing innovative techniques and devices that make use of advances in computer programming. Over the past few months, there have been further reports of studies demonstrating that machines can perform better than humans when it comes to carrying out reliable, swift and early diagnoses of some conditions. Artificial intelligence brings with it the added advantage that it can reduce the costs associated with healthcare.

Insurers will want to ensure that artificial intelligence, whether algorithms or machine learning used in surgery, is brought to the market with appropriate safeguards to reduce the associated risks. Insurers should ask how easy it would be to establish where liability lies in the event of litigation. Manuals that accompany the products should set out clearly how the products are to be used and emphasise the need for doctors to exercise their clinical judgement in relying on them.

Published data on a product's performance in clinical trials should be collated before the device is released to the market. In the event of concerns being raised, data can be used to demonstrate safety to regulators or to defend speculative litigation.

We expect to see the march of artificial intelligence continue in 2019. Making sure it is deployed with as little risk as possible will require a deft human touch from manufacturers and their insurers.

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Marine and shipping

Key developments in 2018

For the marine community a lot of 2018 was about sanctions – and the United States' withdrawal from the Iran Joint Comprehensive Plan of Action (JCPOA). It had been on the cards for a while. Everyone knew that there was a viable risk of US sanctions "snap back" for Iran. President Trump warned at the end of 2017 that he wasn't going to sign another extension on the JCPOA. So the May 2018 notice of withdrawal cannot have been a massive shock.

From November 2018 all of us – US persons and non-US persons alike – are once again subject to US sanctions on Iran. Non-US persons are now generally prohibited from any dealings with Iran's shipping, petroleum/petrochemical and oil and gas sectors, including the provision of financial services (and insurance/reinsurance) in respect of those sectors. Yes, some countries have been granted specific exemptions in relation to buying/importing Iranian oil and petroleum products. But the international insurance/reinsurance community won't be able to have anything to do with it. In addition, the Office of Foreign Assets Control Special Designated Nationals (SDN) list has gone back up to pre-JCPOA levels (so the 400+ entities removed on 16 January 2016 have gone back onto the SDN list) and no-one can go near them.

With impeccable British timing, just as the US government took us back to pre-JCPOA Iran sanctions, the English Commercial Court gave a helpful decision (*Mamancochet Mining v Aegis Managing Agency*) on how it sees sanctions exclusion clauses operating – and in particular what it means to be "exposed" to sanctions. It is perhaps no surprise that the Commercial Court found that for the exclusion to apply, the insurer/reinsurer will have to establish that claim payment would in fact result in an actual breach of the applicable sanctions and that mere "risk of breach" is not sufficient.

Thanks go to the European Union for re-activating its Blocking Regulation to counter the US JCPOA withdrawal. Good luck to any EU insurer/reinsurer that seeks to rely on the Blocking Regulation to allow it to continue writing Iranian risks. The good news is the English court (at present) doesn't think the standard Sanctions Limitation and Exclusion Clause falls foul of the EU Blocking Regulation.

What to look out for in 2019

Like many of the specialty classes of business, it is likely that 2019 will see continued focus on cyber risks – and the marine and offshore energy sectors are no exception. Expect more attacks and more advertisements for "new" cyber insurance products with specific marine sector focus. However, with most ship-owners now running at the tightest of (sometimes negative) operating margins, and against a hardening marine market, good luck persuading the customers to buy these new covers.

What 2019 may also bring is the first English marine insurance decisions on the "new" insurance law rules. We have now had over two years of policies incepting under the Insurance Act 2015 provisions on warranties and fair presentation. Almost every hull and machinery/increased value/war policy includes at least one express warranty. Historically, the marine market tended to be a fertile ground for findings of warranty breach or of material non-disclosures or misrepresentation (sometimes as alternative ground to deny claims that have a certain "whiff" of unfair play).

We expect the broking community will continue to press hard on wide cover terms. We expect fewer coverage disputes. However, we also sense among the marine insurer community a sense of increased fatigue with unsuitable or ill-presented claims that really are outside the scope of cover and require firm push-back. Cue judges and arbitrators to issue some clarification of the new rules.

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Media

Key developments in 2018

It has been a testing year for broadcasters in their defence of privacy claims.

The BBC was required to pay £210,000 in general and aggravated damages to Sir Cliff Richard after it was held that televising a police raid on his home when he was being investigated for alleged sex offences constituted a misuse of his private information. The special damages figure is yet to be determined, but the court has held that Sir Cliff can recover any sums incurred that represent a reasonable attempt to prevent the foreseeable worsening of his reputation, including money spent to prevent publication of other material and sums incurred preventing social media attacks.

Aside from the obvious risks posed by the remarkable damages award in a privacy action, media organisations also fear the decision has had a stifling effect on press freedom, in particular on the ability of the press to cover police investigations and to identify individuals through that coverage.

Meanwhile, in February Channel 5 was required to pay £20,000 in damages to a couple who were filmed being evicted from their property after they fell into rent arrears. Despite accepting that the programme concerned matters of public interest and that there was scope for editorial discretion, the court found that the infringement of the claimants' privacy rights went beyond what was justified in the circumstances.

Broadcasters should be wary that their coverage is becoming ever more vulnerable to criticism and challenge. Nevertheless, using strong public interest arguments and/or obtaining informed consent from the subjects of any filming remain powerful tools to assist and support investigative journalism.

What to look out for in 2019

Lachaux v Independent Print Limited & another

The seminal case of Lachaux v Independent Print rumbles on through the court system and we can expect a clarifying Supreme Court decision in 2019 on the meaning of the serious harm threshold imported into defamation law by section 1(1) of the Defamation Act 2013.

Section 1(1) provides that "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the Claimant." This provision aims to raise the threshold for bringing a defamation claim in order to create a more balanced legal framework in a jurisdiction previously known for its claimant-friendly attitude to libel actions.

At first instance, Mr Justice Warby held that section 1(1) required a claimant to prove on the balance of probabilities that a statement had caused or was likely to cause serious harm. As discussed in last year's Insurance Review, in 2017 the Court of Appeal overturned the decision of Warby J and held that while the threshold for harm has been raised from "substantial" to "serious", a claimant does not have to prove that their reputation has been seriously harmed at the outset of their claim and the common law presumption as to damage in cases of libel still stands.

Two of the three newspaper defendants successfully applied to the Supreme Court for permission to appeal this decision, which was heard on 13 and 14 November 2018. While a number of other issues were also considered, the main focus by the Supreme Court was on the proper construction of section 1(1). This is the first time the Supreme Court has considered the meaning of the "serious harm" requirement and its practical consequences. It is hoped that its judgment will provide welcome clarity to this contentious issue for both claimants and defendants.

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Medical malpractice

Key developments in 2018

Vicarious liability has been one of the hot topics of 2018. Of course, this fundamental legal principle is relevant to a variety of sectors, but perhaps most interestingly in its application to the medical malpractice sphere. And beyond just the academic development of the law, we've seen how these changes have impacted on industry, whether that be insurers, individual practitioners or private healthcare organisations.

The law in this area is continually developing, perhaps best illustrated by the Court of Appeal's decision in *Barclays Bank v Various Claimants*, handed down in June 2018 (where the bank was held to be liable for the actions of an independent contractor, Dr Bates). And now those developments are starting to impact on the business decisions being made by private healthcare organisations as well as the individual practitioners who, until now, have been contractors holding practising privileges granted to them by the healthcare organisation.

Most notable is the increasing number of healthcare providers electing to formally employ doctors (or other members of staff) who were previously working under practising privileges or agency agreements. And why is this? Quite simply, for certainty. Employing such individuals avoids convoluted legal wrangles over vicarious liability if a claim is brought, and it also means providers and clinicians can be certain of the indemnity being offered to them (particularly at a time when defence organisations are increasingly offering indemnity only on a discretionary basis – with the risk of refusal of cover). The opportunities for the open insurance market are, therefore, growing, as healthcare organisations need wider cover. It might not be long before employing doctors becomes the norm.

What to look out for in 2019

The UK looks set to make some real progress in its approach to medicine over the coming year. And while that presents some great opportunities (for patients and industry alike) there are, of course, some potential pitfalls that need to be negotiated (and avoided) – most potently the issue of prescribing.

On 26 July 2018, the Home Secretary, Sajid Javid, announced that cannabis-based medicines were to be moved to Schedule 2 of the Misuse of Drugs Regulations 2001, based on evidence that cannabis has therapeutic value. He confirmed that "senior clinicians will be able to prescribe the medicines to patients with an exceptional clinical need". On 1 November 2018, that became a reality.

We can expect to see this situation develop over the course of 2019 with, potentially, a spike in prescriptions for cannabis-based medicine. As with the prescription of any drug, however, (and particularly with modern drugs, such as cannabis, or addictive drugs, such as opioids) there is scope for some serious liability, including allegations of over-prescribing, challenges of refusal to prescribe, and consenting issues.

So how can prescribers (especially GPs) and their insurers mitigate these inevitable risks? Well, for those prescribing it will be of paramount importance to record detailed notes of all consultations and decisions made (including if a decision is made not to prescribe). For insurers it will be worth considering the wording of any policy (including, for example, whether the insurer wants to include cover for claims regarding the use or misuse of drugs). In any event, it looks set to be another interesting 12 months for the medical malpractice sphere.

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Miscellaneous professional indemnity

Key developments in 2018

Miscellaneous professional indemnity (or emerging professions) remains a class that eludes trendspotting – by its very nature, those professionals insured within it (and the claims they experience) are diverse in every aspect, from the markets they serve to the ways they operate.

Last year we predicted there would be a growth in claims in this area as claimants began more widely to realise not only that claims were possible against the non-traditional professions but also, crucially, that insurance might be available to cover them. This certainly appears to have been the case, and we are starting to see a surge in claims activity across this class of insurance. What we are also seeing (again as predicted) is a surge in coverage disputes, as insurers in this perennially soft market study their wordings very hard before paying out – miscellaneous professional indemnity wordings are among the most insurer-friendly remaining after the Insurance Act and so declinatures are often relatively easy to sustain. The knock-on impact for insurance brokers and their own E&Os is obvious.

What to look out for in 2019

The rapid growth in miscellaneous professional indemnity will inevitably lead to a change in the way this class is treated. We anticipate that 2019 will herald a move towards sub-division of the sprawling mass of discreet professions and trades that make up the class into more streamlined categories, which will then make it easier for insurers to risk-profile separately. This will then allow insurers to bespoke their wordings and increasingly offer sub-sector specialism, which will help create some competitive advantage in a market that might otherwise start to become as saturated as its more established professional indemnity brethren.

One such sub-specialism is likely to be agricultural professionals – over the past couple of years we have seen an increasing number of claims against animal nutritionists, agricultural architects and agricultural consultants (including fish farming). This appears to be a growth area, with often truly niche claims, and tight local communities, making it an obvious candidate for a more specialised product.

Notwithstanding the drive towards sub-specialism, however, the niche nature of the professional (and the lack of any minimum terms) will continue to require higher levels of due diligence and should, therefore, continue to justify higher premiums. It will therefore remain every bit as attractive as ever to insurers and brokers looking to bolster their balance sheets.

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Pensions

Key developments in 2018

The issue of self-invested personal pension (SIPP) operator liability has hardly been out of the headlines in 2018. The Financial Ombudsman Service (FOS) saw a record number of complaints about SIPP operators and the Financial Services Compensation Scheme imposed an additional levy on the market to meet the rising cost of meeting claims. The extent to which SIPP operators can be held liable for the investment decisions of SIPP members has continued to receive scrutiny, and uncertainty as to the position remains. The Pensions Ombudsman has continued to hold that the duties of SIPP operators are limited but the FOS has consistently held SIPP operators to more onerous standards, expecting them to have undertaken due diligence on proposed investments and any introducers involved.

In a well-publicised case one SIPP operator, Berkeley Burke (BB), judicially reviewed the FOS's decision to uphold a complaint against it. In October 2018 the court held that the FOS had been entitled, under its "fair and reasonable" jurisdiction, to uphold the complaint on the basis that BB should have undertaken further due diligence and refused to accept the proposed investment into the member's SIPP. While each complaint to the FOS will turn on its own facts, this provides helpful guidance on what due diligence the FOS will expect SIPP operators to have undertaken.

The position in civil proceedings remains unclear pending the court's decision in the case of *Adams v Carey*, which is still anticipated at the time of writing following a trial in March 2018. It is thought that the decision in that case will lay down much needed guidance on the civil liability of SIPP operators.

What to look out for in 2019

2019 may see the Government taking further steps towards its stated intention of protecting defined benefit (DB) schemes by further strengthening the powers of the Pensions Regulator (PR). Following the publication of a white paper in March 2018, the Department for Work and Pensions (DWP) undertook a consultation from June to August 2018 on a potential suite of new powers and enforcement options for PR.

These powers are intended to make it easier for PR to intervene when employers or trustees do not comply with statutory obligations or when employers (or those associated or connected with them) are avoiding their pension liabilities. The proposed changes could see PR given the ability to impose fines of up to £1m and to trigger criminal proceedings in certain circumstances. Look out for DWP taking further steps towards this objective during 2019.

Other matters to look out for in 2019 include the Government taking further steps towards the introduction of collective defined contribution schemes (CDCs) once the current DWP consultation closes in January 2019. CDCs are pooled defined contribution schemes designed to allow for an element of risk-sharing and cross-subsidy between members.

Also look out for fallout following the High Court's October 2018 decision in the Lloyds pension trustees case, which confirmed that schemes are required to equalise guaranteed minimum pensions.

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Political risk and trade credit

Key developments in 2018

UK trade credit insurers saw a string of significant domestic bankruptcies, while also preparing for the economic impact of Brexit.

In the UK, insolvencies hit a six-year high – a trend not reflected in the Eurozone. The year stared with Carillion's insolvency, which caused a ripple effect in the construction industry. The retail sector was also badly hit in the UK. Big names that collapsed included Toys R Us, Maplin, House of Fraser and Evans Cycles – the latter two both sold using the pre-pack administration procedure.

On the international front, China was ranked as experiencing the highest increase in the number of insolvencies worldwide, and this will inevitably start to have an impact on other Asian economies that depend on China.

These insolvencies are a timely reminder to be cautious of the perceived protection to be obtained from retention of title clause in underlying contracts. Even if they are valid (noting challenges posed by the nature of the goods, jurisdiction and rules of a particular administration regime), insureds and insurers both need to be aware that action needs to be taken fast if they are to be effective, and this could have implications for the co-operation, monitoring/reporting and mitigation of loss provisions in policies.

Although the Brexit negotiations inevitability lead to considerations about our own national interest, and while the drivers behind the Brexit vote are commonly seen as nationalistic, the butterfly effect of Brexit has been seen internationally throughout the course of 2018. Trade credit insurers have been cancelling limits on obligors involved in EU/UK cross-border trade and the weaker pound has caused issues in surprising sectors like cocoa, which, in turn, has had an impact on the developing nations that depend on those commodities, such as Côte d'Ivoire.

What to look out for in 2019

From a political risk perspective, it seems likely that the trend towards increased protectionism will continue throughout 2019, leading to concerns over trade wars and sanctions.

The escalating US/China trade war and the fall-out from it could present one of the biggest threats to the global economy in 2019, unless the G20 meeting in December 2018 can quell the situation. Trump's tariffs and quotas have targeted not just China, but also sectors such as aluminium and steel – involving traditional allies, the EU and Canada, in the fray. In 2018 alone, China's retaliation involved taxes on US agricultural and industrial products, soya beans, pork, cotton, aeroplanes, cars and steel pipes, and many commentators argue that China has the ability to withstand US tariffs. The effect has been wide-ranging with impacts on Chinese manufacturing, US tech stocks and risk to the slow recovery of the international shipping industry.

From a policy perspective, the imposition of export and import taxes has long been a matter of debate for political risk cover, as taxation in itself is not a political risk. However, if it is to be used for targeted purposes, or at levels that deprive an investor of the total benefit of the investment, the arguments may become less black and white, and insureds and insurers need to work together to understand how the new face of world trade could affect foreign investments.

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Power

Key developments in 2018

The growth of renewables around the world

The power industry's transition from hydrocarbons to a more diverse energy mix continued during 2018. Increased use of renewable energy continued unabated – a trend that is set to increase over the next five years, covering 40% of global energy consumption growth according to the International Energy Agency. While the growth in solar photovoltaic and wind continued in the electricity sector, bioenergy remains the largest source of renewable energy due to its widespread use in transport and heat.

China led the global growth in renewable energy in 2018 as a result of policies to decarbonise all sectors and reduce harmful local air pollution, and is now set to become the world's largest consumer of renewable energy by 2023. Brazil retained the title of having the greenest energy mix. Despite uncertainty about policies under the current presidency, the United States was the second-largest growth market for renewables last year.

In many jurisdictions around the world, prices for energy derived from the renewable sectors continued to decrease in 2018. In the UK, for example, offshore wind energy moved from being one of the most expensive forms of renewable energy to being cheaper than nuclear in some cases.

Another catalyst for the continued renewables boom last year was further significant advances in technology, such as improvements in battery energy storage systems. The issue with wind and solar has historically been the inability to store the energy from these forms of generation and ensure a stable supply. However, developments in Li-ion technologies have significantly reduced implementation costs. In addition, wind turbines of up to 8MW are now also being installed across Europe.

What to look out for in 2019

The importance of cyber security in a connected and digitised grid

Cyber security is a fundamental challenge for the power sector and a top priority for industry leaders. Malicious hacking, ransomware attacks, data leaks and electronic fraud are occurring on a global basis, with motives varying from financial to political, or simply a desire to cause disruption.

The uptake of smart devices for real-time operations management and remote operations, and the adoption of cloud services are likely to continue to drive significant change in 2019. The increased reliance on technology does not come without increased risk – as systems become more interconnected and processes more digitised, energy companies will need to contend with an increased number of network-born security threats in 2019 and beyond.

Regulation relating to cyber and information security has historically been focused on data privacy and data protection issues. However, regulatory scope is expanding to encompass infrastructure and providers/operators of essential services. As with any regulation, this will drive the behaviour of organisations to achieve compliance, because the potential financial and reputational consequences of not doing so can be significant.

To manage cyber risk effectively across enterprises and ensure resilience, organisations will need to develop fully integrated, comprehensive plans and frameworks.

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Procedure, damages and costs

Key developments in 2018

The focus in the drive to reduce the costs of litigation has shifted in the past year from costs themselves to the activities that generate those costs. The disclosure pilot began on 1 January 2019 in most business and property courts (including the Commercial Court and the Technology and Construction Court), and a working group is currently consulting with the profession to reform the rules on witness evidence.

Although we have had a menu of disclosure options since 2013 intended to demote standard disclosure from the default to one of a number of options, it has been largely ignored since its inception with practitioners quickly retreating back into their comfort zone and agreeing standard disclosure in almost all cases. Under the disclosure pilot, that is no longer an option. Litigants must prepare and exchange initial lists of documents with their pleadings, although they do not need to carry out any searches. These documents relate to the case issues. If either party wants extended disclosure (which is not the norm), they must engage in detailed discussions before the first Case Management Conference in order to produce a Disclosure Review Document setting out their proposals. The court will then make an order for disclosure in the form of one of five model orders (ranging from disclosure of known adverse documents only to wide search-based disclosure). If no extended disclosure is agreed or ordered, the parties simply need to certify that all known adverse documents have been disclosed.

The pilot has the potential to reduce the costs of the disclosure process, but success relies heavily on co-operation between litigants. This is in line with the overriding objective but at odds with our adversarial system. We are likely to see disputes about the necessity of extended disclosure and compliance with orders, and the court will need to take a robust approach to failures to co-operate.

What to look out for in 2019

A working group led by Mr Justice Popplewell was set up in March 2018 to review the current approach to witness evidence. At present, parties prepare and exchange witness statements, which stand as the witness's evidence in chief. The witness is then cross-examined at trial. There have long been complaints that witness statements often do not accurately represent the evidence the witness will give, although views differ on whether the system itself is broken or whether the problem is that litigants do not comply with the current rules.

A number of radical options are under consideration by the working group, including re-introducing examination in chief, introducing American-style video-recorded depositions prior to trial and abolishing privilege over the production of witness statements so that all communications with a witness must be disclosed. While this may reduce costs, it will increase the risk of surprises at, or near to, trial and may encourage more litigants to go to trial.

The working group is currently considering the results of a survey it circulated to users of the Business and Property Courts in November 2018. We should find out more on the next stage of its consultation in early 2019.

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Product liability

Key developments in 2018

Two government initiatives in 2018 have improved the outlook for insurers offering product liability cover.

In January, the Department for Business, Energy and Industrial Strategy (BEIS) announced the creation of a new national oversight body tasked with identifying consumer risks and managing responses to large-scale product recalls and repairs: the Office for Product Safety and Standards (OPSS). OPSS has set out a strategy to support manufacturers and retailers in taking rapid action in the event of any safety issues related to their products.

Then, in March, BEIS published a code of practice on consumer product safety-related recalls and other corrective actions (PAS 7100:2018).

PAS 7100:2018 is likely to be incorporated into a British Standard in the future. It sets out a code of practice to guide manufacturers, distributors and importers in dealing with product safety issues and to assist local authorities and regulators in advising on their legal responsibilities. A key plank of the code of practice is that businesses should prepare a Product Safety Incident Plan (PSIP) that covers: ensuring products are traceable; monitoring product safety; and being prepared to take corrective actions, such as issuing warnings, modifying a product or recalling it entirely.

These initiatives are intended to improve the ability to trace faulty products and correct them. If the initiatives work it is good news for insurers as there will be fewer products in the market risking injury and consequent product liability claims. We expect insurers in 2019 to be scrutinising insureds' compliance with the recommendation to prepare PSIPs.

What to look out for in 2019

Against a backdrop of increasing globalisation, tempered by uncertainty over Brexit, we expect insurers in 2019 to focus increasingly on investigating the liability risks that lurk within supply chains.

At the time of writing, what does appear certain from Brexit is that 2019 will be a year in which product manufacturers are more likely to source components from third parties located in jurisdictions whose standards may be different from those of the UK. This could be because UK manufacturers choose to negotiate supply agreements with third parties outside the EU or because UK and EU manufacturing standards and regulations start to diverge. A supply contract agreed today may still be in place when the trading environment (and its associated regulations) looks very different.

At the same time, the general trend in recent years has been for supply chains to be lengthier and more global in nature as markets open up and products become more complex. The rise of a sophisticated manufacturing base in China, the BRIC economies and elsewhere means that UK manufacturers are incentivised to extend their supply chains well beyond our borders.

Any component in a product has the potential to cause injury to consumers. Injuries could arise from a range of issues, such as manufacturing errors, design faults, malicious tampering or failures in post-market surveillance. Insurers should work with the manufacturers and suppliers of end products to mitigate those risks, including tightening up supply contracts to allocate liability in the event of litigation and investigating overseas manufacturers' compliance with the principles of good manufacturing practice.

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Property and business interruption

Key developments in 2018

The High Court's judgment in *Contact (Print & Packaging) Limited v Travellers Insurance Company Limited* [2018] EWHC 83 (TCC) provided an important illustration of the willingness of the court to find cover under the physical loss section of a policy on the basis of circumstantial evidence.

The insured printer owned an industrial printing press that had failed suddenly and catastrophically. As a result of the policy's mechanical failure and gradual deterioration exclusions, the loss would only fall for cover if the insured could demonstrate that a non-excluded cause, namely subsidence beneath the press, had caused the loss.

The insurers declined the claim, on the basis that the insured had adduced no positive evidence that subsidence had occurred and so had failed to establish that this was the cause of the failure of the press.

Notwithstanding the absence of any direct evidence that subsidence had caused the failure, the court held that it could find that the case was proved on the basis that there was sufficient circumstantial evidence that this was the case, there being no positive evidence to the contrary and each other potential cause having been ruled out as implausible.

The court also clearly regarded as unattractive the insurers' attempt to argue, where it had neither carried out nor pressed the insured to carry out investigations that might have identified whether subsidence had caused the damage, that the absence of such evidence meant that the insured could not prove the failure was due to an insured cause.

What to look out for in 2019

The Court of Appeal will hear an appeal in January 2019 from the High Court's decision in *Haberdasher's Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558. This should provide valuable authority as to the circumstances in which a sub-contractor is entitled to insurance under a contractors all risks (CAR) policy.

The contractor, Lakehouse, had entered into a sub-contract with Cambridge Polymer Roofing (CPR) to carry out works as part of a project to construct school buildings. Hot works carried out by CPR caused a fire, which resulted in extensive damage.

The CAR policy that insured the project was expressed to provide insurance to "all sub-contractors of any tier". The sub-contract between Lakehouse and CPR, however, contained an express term that CPR would arrange its own third-party liability insurance, under which such insurance had been obtained.

The CAR insurers brought a subrogated claim against CPR for a contribution in respect of Lakehouse's liability to the employer. CPR claimed to have a defence to the claim, however, in that it was entitled to the benefit of the CAR policy as a co-insured.

The fact that the sub-contract expressly provided that CPR agreed to obtain its own insurance was held to contradict an intention that the CAR policy should provide a single fund to make good the relevant loss and damage. CPR was, therefore, not insured by the CAR policy and had a liability to Lakehouse.

The Court of Appeal's decision will be keenly awaited.

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Regulatory

Key developments in 2018

2018 represented a significant shift in the regulatory landscape in the UK insurance market.

Rules implemented this year affecting the insurance market have both increased the amount of regulation and made it more prescriptive in nature. This, together with seemingly more energetic regulators and the introduction of new rules on individual accountability in late 2018 and 2019, means that regulatory compliance will be critical both at a firm and an individual level. This increased regulation and other key developments, such as Brexit, are impacting the structure of the market and firms' policies, systems, strategies and business plans. The full effect of this is likely to be felt throughout the course of next year and beyond.

2018 was to begin with the implementation of the insurance distribution directive (IDD) but, given the amount of work required at a regulator and firm level, this was deferred until October. This delay was welcomed by many as an opportunity to focus on the implementation of GDPR, the European General Data Protection Regulation, which came into force in May.

IDD was implemented in October, introducing some significant changes affecting insurers, brokers (retail and wholesale) and other market participants. Among the changes are: revised pre-contract disclosure rules including remuneration disclosures for brokers, other distributors and insurers; new product information rules such as a requirement for consumers to receive a standardised information document (the IPID) and commercial customers to receive a policy summary; a new product governance regime setting out prescriptive rules on how products should be designed, approved, tested and distributed; requirements for employees involved in distribution to be of good repute and carry out professional training; and a new obligation for firms to act in the customer's best interests – an example of rule-based regulation to work alongside the existing, and similar, principle to treat customers fairly.

What to look out for in 2019

Depending on the outcome of Brexit, 2019 may bring less in the way of regulatory change for the insurance market in comparison with 2018. There are still a few significant items to look out for, including the Financial Conduct Authority's (FCA) Interim Report to its Wholesale Insurance Brokers Market Study, due in the first quarter of the year, and the Lloyd's study into broker remuneration practices, which is expected to be completed in 2019. So far, there are no real clues as to the likely outcome of these studies so it remains a matter of speculation as to the impact they may have.

One key development, spanning late 2018 and 2019, is the FCA's Senior Managers and Certification Regime (SM&CR). This places an increased level of personal accountability and obligations on almost all personnel working in the insurance market. It demands that all staff not only have a clear understanding of their role in the business but also that they comply with new conduct rules. A higher level of conduct rules applies to more senior employees. The new SM&CR will represent an enhancement and development for insurers already subject to the Senior Insurance Managers Regime. Brokers and other firms regulated only by the FCA (including FCA-regulated managing general agents) on the other hand will be less familiar and will need to comply by December 2019.

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Restructuring and insolvency

Key developments in 2018

The insurance insolvency and restructuring area has been phenomenally busy in 2018 with firms preparing for Brexit. We have seen large-scale Part VII transfers (the business transfer mechanism under Part VII of the Financial Services and Markets Act 2000) where large groups' business has been transferred to specially established member companies in continental Europe. Lloyd's, for example, chose Brussels as its foothold and many others have chosen Luxembourg, where the regulators have been encouraging and capitalising on the influx of new business and real estate developers have been building new office space. RPC is heavily involved acting for RSA in its cross-border Part VII.

On a much smaller scale but of interest to many in the run-off field, 2018 saw the first proposal for a solvent scheme of arrangement by Stronghold Insurance Limited triggered by Solvency II requirements that came in at the beginning of 2016. This was reminiscent of the 1990s and early 2000s when this court-directed global commutation mechanism was used very widely, creating exit solutions for hundreds of London market insurers. The proposed scheme was examined closely at the first hearing in court, with the judge directing changes to the number of creditors meetings that must be held, separating notified outstanding claims from IBNR (incurred but not reported estimated future claims) on this largely asbestos, health hazard and pollution book of business. This case has set the parameters for the calling of meetings for these categories of claim. Also, the role of the regulators where marginal solvency is caused by Solvency II is now under scrutiny. RPC is acting for a counterparty to this scheme.

What to look out for in 2019

We believe there will be much more Brexit-related activity with, for example, an increased flow of inbound insurers seeking advice on UK regulatory approval including the establishment of subsidiaries where previously there were branches.

The rise again of the solvent scheme of arrangement is a real possibility in the case of those companies in run-off who are feeling the squeeze on margins and might fail or simply do not comply with the capitalisation requirements of Solvency II.

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Surveyors

Key developments in 2018

2018 was a quiet year for surveyors in the courts. Of most interest to insurers, the case of *Moore and another v National Westminster Bank* considered the correct measure by which to assess damages in cases involving negligent (or, here, non-existent) surveys.

The case, an appeal from the county court, involved the claimants' purchase of a flat assisted by a mortgage from the defendant bank. The claimants asked the bank to produce a home buyer's report. Despite not doing so, the mortgage was approved and the claimants assumed, incorrectly, that they had received a favourable survey. The flat was in a poor condition and the claimants successfully brought a claim for breach of contract. At first instance, the cost of repair was held to be £115,000 and the court awarded damages to the claimants in that sum.

The bank appealed, arguing that the correct measure of damages was the diminution in value of the property, on the bank's case £15,000. It relied on the line of authorities involving claims against negligent surveyors but the claimants argued, successfully, that those cases did not create an inflexible rule and that it was open to the judge to award the cost of repair. The court upheld the damages award, almost eight times the flat's alleged diminution in value.

It was clear the judge did not consider £15,000 to be a fair assessment of the claimants' loss, but the only other sum available to him was £115,000. Offering a cautionary reminder to all involved in litigation, the court commented that had a more intermediate figure been advanced in the alternative by the bank, the outcome may have been different.

What to look out for in 2019

New mandatory requirements relating to commercial service charges will come into effect from 1 April 2019.

Launched by the Royal Institute of Chartered Surveyors (RICS) and endorsed by the Law Society, the new professional statement, Service Charges in Commercial Property, will regulate the activities of landlords and their agents and will aim to improve standards and promote best practice, fairness and transparency in the management and administration of service charges.

Among other matters, the new requirements will provide that changes to service costs are made clear to tenants from the outset, with any costs not specifically provided for in a lease not being recoverable. The requirements also incorporate technical advice to ensure the timely issue of budgets and offer guidance on dispute resolution, contract drafting and negotiation.

RICS professionals will only be able to depart from the guidance for a justifiable good reason and any RICS member that fails to comply may face disciplinary or legal action.

While the effect of these requirements remains to be seen, insurers operating in the surveyors' market will welcome the new professional statement. By providing this robust mandatory guidance, RICS will hopefully remove non-compliant landlords and managing agents from the market, offer protection to tenants for the payment of certain repair or maintenance costs and thereby reduce the number of costly disputes between landlords, agents and their tenants.

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Technology and cyber

Key developments in 2018

2018 was the year the General Data Protection Regulations (GDPR) came in to force.

The effects can be seen in the number of self-reported data breach notifications and complaints made to the Information Commissioner's Office (ICO). As of July 2018, these were up 30% and 23% respectively (Annual Report 2017–18).

Our experience, through our breach response service ReSecure, is that a dominant recent and current cause of data protection incidents is mailbox breaches, often through phishing attacks. These take the form of an email with a link inviting the user to enter their login details. Once the hackers gain access, they have a number of avenues to exploit including attempting to perpetrate fraud through impersonation, downloading malware, or further spamming from the hijacked email account to contacts in it.

There a number of steps available to both provide protection as well as limit the damage. The easiest and most effective is multi-factor authentication (MFA). When implemented, before an individual can log in they must verify their identity by an alternative source, often a one-time password that is sent to a trusted device (such as a mobile) that is entered in addition to their usual password.

Almost invariably, when responding to data breaches of this kind we have seen the ICO recommend that MFA is implemented.

What to look out for in 2019

We anticipate a potential increase in group litigation, supported by the growing litigation funding market as well as damage-based agreements and collective conditional fee arrangements.

We have already seen a glimpse of this in the WM Morrison Supermarkets Plc (Morrisons) case. This involved a disgruntled employee posting online the personal and financial information of almost 100,000 employees. Notably, the court found that Morrisons *was not* in breach of its data security obligations to any material extent. Despite this, it held Morrisons vicariously liable for the actions of its employee, acknowledging that in doing so it was furthering the employee's criminal aims.

A decision as to the quantum of damages will be the subject of a separate trial.

Anticipating the potential effects of its decision, the court directly addressed the "many instances reported in the media in recent years of data breaches on a massive scale caused by either corporate system failures or negligence by individuals ... [which] might ... lead to a large number of claims ... for potentially ruinous amounts." The court's proposed solution is to "insure against such catastrophes".

In light of this, and a costs regime where "incurred costs" are not shackled by costs management orders, we expect claimant law firms to try to take advantage by looking to bring claims on behalf of groups of data subjects affected by personal data breaches. The need to be organised and aware in preparation and response will be more important than ever.

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Asia and Australia

Key developments in 2018

Regulatory

Hong Kong auditors' current self-regulatory framework will soon be a thing of the past. Starting 1 August 2019, the Financial Reporting Council of Hong Kong will step in as an independent regulator, taking over the regulation and disciplinary actions of auditors of listed companies from the Hong Kong Institute of Certified Public Accountants. For more details, please see the Accountants section of this review.

Regulators also have their eyes set on the growing, but largely unregulated, cryptocurrency market. 2018 saw the Hong Kong Securities and Futures Commission take its first regulatory action against a local virtual coin issuer. It also published an announcement setting out its proposed approach for regulating the cryptocurrency industry, primarily aimed at portfolio managers, distributors and potential trading platforms. One measure currently under discussion is whether regulatory exchanges should be required to obtain insurance to cover their digital assets. These developments are set to prompt rapid growth in the crypto-insurance space.

Natural catastrophes

Cities in the region are still taking stock of the property damage caused by this year's numerous earthquakes (Indonesia, Japan and Papua New Guinea), major floods (Laos and Cambodia) and, most recently, Super Typhoon Mangkhut, which brought widespread damage to Guam, the Philippines and South China in September 2018. Insurers are expecting record-high claims for Typhoon Mangkhut, set to exceed the HK$1bn mark. This marks a significant hit after last year's Typhoon Hato, which saw insurers exposed to the tune of HK$900m.

Given the trend of increasingly frequent and severe natural catastrophes, it is expected that insurers will need to adapt quickly. While there have been discussions on raising premium rates for weather-related claims, competitive market conditions make this a challenging option.

Cyber security

2018 saw numerous large-scale data breaches across Asia. These included cyber attacks on a Chinese hotel chain (affecting 130 million customers), Singapore's SingHealth (affecting 1.5 million patients), and Hong Kong's Cathay Pacific (affecting 9.4 million passengers). Although Cathay first discovered suspicious activity on its network in March, no disclosures were made until almost six months later.

These incidents are likely to spark further reviews of the current regulations on corporate data breaches. Across Asia-Pacific at the moment, Australia, South Korea and the Philippines are the only countries imposing formal requirements for the notification of data breaches, under which data breaches must be notified to the relevant regulators within reasonable time. China, Indonesia and Taiwan impose some basic reporting requirements (with no stipulations on how and when notifications should be made), although China is reportedly working on draft standards that provide more detailed guidance. Singapore implemented the Cybersecurity Act 2018 on 30 August 2018, imposing mandatory cyber incident reporting obligations on certain types of organisation owning "critical information". In contrast, Hong Kong still carries no explicit notification requirements – but in the wake of the Cathay incident, local authorities have indicated they are keen to remedy this soon.

Introduction of more stringent compliance requirements will greatly improve consumer protection, although insurers underwriting cyber risks need to be prepared for increased exposures as a result (where costs of compliance usually fall for cover). On a positive note, increased sharing of cyber security information will increase the availability of data that insurers can use to assess risk and make more informed underwriting decisions.

Construction

Emerging markets are expected to account for 52.8% of global construction output by 2021, and a large portion of these will be due to large-scale projects in Southeast Asia originating from the Belt and Road Initiative (BRI). The BRI is now in full swing, with infrastructure projects planned or ongoing in Malaysia, Pakistan, Sri Lanka and Vietnam (among others). In response, the Hong Kong Insurance Authority (IA) is actively promoting Hong Kong as a risk management centre for BRI projects and, in December 2018, unveiled the BRI Exchange Facilitation platform, aimed at helping Hong Kong and international insurers to tap into these projects.

Competitive market conditions across Asia over the last few years has led to an average 20% rate reduction in all construction-related insurance. However, complications with these projects – including lack of funding, corruption, delay and mismanagement – are starting to emerge. By way of illustration, a power plant project in Vietnam worth US$1.8bn has been delayed since June 2018 as a result of non¬compliance with local regulations and lack of capital. In an effort to counter some of these issues, Singapore has recently launched a new disputes protocol aimed at minimising time and cost overruns in these projects

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from the start. Nevertheless, project complications are set to give rise to significant claims and impact on insurers' profitability – especially in a soft market – so going forwards we can expect insurers to adopt a more cautious approach to underwriting risks in these projects.

Financial risks

Trade credit and political risk insurers are facing a time of uncertainty. The US–China trade war, combined with China's economic slowdown and political crises in certain Southeast Asian countries, have led to a sharp increase in trade credit disputes. The market has showed a strong appetite for credit risks cover in the past few years and demand for this is only set to intensify in the current climate, with an increased need for geographic and product diversification to meet the differing demands of companies and traders across the region. Meanwhile, as significant claims are starting to surface, insurers are expected to adopt a more prudent approach to underwriting in order to hedge their exposures.

The warranties and indemnities (W&I) insurance market is growing at a steady pace. While it is still a relatively new product in Asia, buyers and sellers are increasingly looking to use W&I insurance as a bargaining tool or to ensure a clean exit. Strong demand has led to more insurers entering this market, and more competitive premiums.

Professionals

The International Monetary Fund warns of another global economic downturn, and expects a drop in the global property market and an increase in corporate insolvencies to hit soon. If this materialises, property owners, investors and liquidators will all look for ways to recover their losses, and experience (specifically the 1997, 2003 and 2008 financial crises) tells us that professionals will be a key target, with lawyers, auditors and surveyors among those expected to shoulder the blame. Cue increased claims exposure to professional indemnity insurers across the region.

What to look out for in 2019

The industry is leaning heavily towards InsurTech, especially in emerging markets and developing countries, as its online consumer base becomes increasingly sophisticated and pressure to save costs is mounting. The Philippines and Malaysia are using InsurTech sandboxes launched in Hong Kong and Singapore to model and develop their own, and it is expected that more countries will soon follow suit.

Regulators are gradually tightening their regimes and taking more aggressive steps to enhance public protection. This is set to increase exposure to regulated entities, thereby triggering an increase in claims under financial institutions liability and professional indemnity policies. In particular, cyber protection is expected to be a priority. Singapore, for example, is already reviewing the recently implemented Cybersecurity Act 2018 to include further mandatory notification requirements, and is pushing for the launch of an Association of Southeast Asian Nations framework on personal data protection in 2019. These measures will help to clarify the recommended approach for dealing with cyber risks, but equally stand to impact on insurers' claims exposure under cyber insurance policies.

More broadly, insurers may wish to keep a keen eye on changes in global trade patterns as political uncertainty in the US and Europe stands to affect global economic performance and, potentially, shift focus towards emerging markets in Southeast Asia, where infrastructure projects are dominating.

In Hong Kong, 2019 will mark the formal implementation by the IA of new direct licensing regimes for insurance intermediaries, and an increase on the premium levy rate to be collected from policyholders from 0.04% to 0.06%. Insurers and intermediaries will have to prepare and implement internal measures to ensure compliance with the IA's increasing regulatory powers.

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Europe

Key developments in 2018

The Netherlands – Kennedy van der laan
With regard to regulation and enforcement action, sanctions was the key topic in the Dutch market in 2018. The Dutch supervisory authority, the Dutch Central Bank, actively engaged and questioned Dutch insurers as well as Dutch branch offices of EU insurers on their compliance with the Dutch Sanctions Act. This reflects the Dutch Central Bank's focus on the Dutch sanctions regulations and we expect regulatory enforcement action to follow.

With regard to the law on avoidance (annulment), the High Court handed down a decision relating to an insurer's "deviating acceptance policy". This is where an insurer wishes to annul a policy when its policyholder does not satisfy a specific acceptance criterion, which other insurers would not insist on. The court ruled that such insurer can only do so it if can demonstrate the policyholder was aware of or should have known about this specific acceptance criterion before entering into the insurance.

Lithuania – Glimstedt
In 2018, the Supreme Court of Lithuania handed down several decisions that developed the law on directors and officers liability. The Supreme Court ruled that the standard by which directors are judged in their discharge of fiduciary duties is measured against the "business judgment rule". In other words, there is a presumption that the directors acted on an informed basis and in good faith when making the business decisions.

This presumption can be rebutted only if the claimant (a company itself or its creditor) proves that: (i) the director had personal financial interest in a transaction; (ii) that he/she acted *ultra vires* and in breach of conflict of interest; or (iii) that harmful effect of his/her decision was obvious. Accordingly, the courts should be slow to interfere with legitimate business decisions – although where a company is de facto insolvent, the directors must then act conservatively and give priority to the interests of the company's creditors, rather than to the interests of the company itself.

Turkey – Ercin Bilgin Bektasoglu
2018 saw a number of cases of direct action against liability insurers, particularly under directors and officers, comprehensive crime and professional indemnity policies. The right to bring such direct actions was introduced as part of the Turkish Commercial Code – specifically, article 1478 stipulates that the party suffering loss may request indemnification of the loss directly from liability underwriters within the limitation period applicable to the insurance contract, and up to the insured sum.

France – HMN
In June 2018, the Cour de Cassation (French Supreme Court) reversed its earlier position regarding the validity and enforceability of an endorsement that is not signed by the policyholder. The previous position was that the non-signed endorsement was not enforceable, notwithstanding any extrinsic evidence that the policyholder had agreed to the endorsement. Now, the Cour de Cassation considers the lack of signature of the endorsement is not an obstacle to its application and, by extension, such endorsements are also enforceable against third parties who have rights under the policy.

The Cour de Cassation's position is seemingly inconsistent with the ACPR, the French Financial Authority. The ACPR has found an insurer to be subject to disciplinary sanctions when endorsements are not signed by both parties. As a result of this apparent inconsistency, it seems the Cour de Cassation ruling allows an insurer who is potentially subject to a fine for a regulatory breach to nevertheless enforce that endorsement against that insured or a third party.

What to look out for in 2019

The Netherlands – Kennedy van der laan
From 1 January 2019, certain surviving relatives of deceased victims of accidents, medical errors or violent crimes will be entitled to compensation of emotional loss. This will be a new head of loss and the amounts of compensation will vary from €12,500 to €20,000 (depending on surviving relatives' personal circumstances), and will be payable by the liable party. This new act comes into force on 1 January 2019 and applies to harmful events taking place after that date.

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The Netherlands is becoming an important jurisdiction for collective claims, and there is a bill being discussed by the House of Representatives that might result in a full class action regime. At the moment, an interest group can obtain a court finding of (for example) breach of duty but still require follow-on claims by each claimant individually relying on that generic finding. The new proposal will give the interest group the opportunity to recover damages in a collective action, with the right for claimants to opt out. It is not yet known when the act will come into force.

Lithuania – Glimstedt

There has been a 15% growth in the Lithuanian insurance industry in 2018, and it is expected that the same trend will continue in 2019. Premium income in 2018 is expected to be over €1bn. As in 2018, the largest commercial risks will be covered by international insurance companies (rather than local ones), mostly from other EU countries.

As a result of pending cases before the Supreme Court, we expect there will be clarification of the principle of the utmost good faith at the pre-contractual stage – in particular, how the innocent non-disclosure clauses and severability language, common in the directors and officers wordings used by international insurers, interplays with Lithuanian insurance law.

Turkey – Ercin Bilgin Bektasoglu

In addition to the increase in the frequency of direct actions, we anticipate the claimants in those actions will also claim interim payments under article 1427 of the code. Insurers are required to complete their investigations within three months of the loss and if they fail to do so then they can be liable to pay at least 50% of the loss. We expect these provisions will be further tested by the courts – early indications suggest there is not yet an established practice for such advance payments, particularly where the insurer can argue there is insufficient evidence relating to liability and quantum.

In addition to the Turkish Commercial Code, the other source of Turkish insurance law is the General Conditions approved by the Treasury and published by the General Directorate of Insurance. There are about 54 General Conditions, each relating to specific types of insurance. 2019 will see the publication of General Conditions for directors and officers policies, and this will be an important development for underwriters of such policies.

France – HMN

The fast development of personal transport devices is causing potential insurance issues. Paris has seen the introduction of electric scooters, which can be hired through a smartphone app and have speeds of up to 15 miles per hour. There is no competency requirement, so a complete novice can use these scooters – and it will not be long before we see injuries and property damage claims, which will then beg questions around the responsive insurance products.

To the extent these scooters are deemed to be motor vehicles, they will be subject to compulsory motor insurance. Clearly, this will come as a surprise to the casual users – most of whom are young adults who may not have their own motor policies and may not be insured under a household policy. We are sure this point will be clarified in 2019.

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Latin America

Key developments in 2018

There is an emerging trend for major (re)insurance companies to delegate authority via local branches or by creating local hubs to deal with claims in the region. In addition, it is now more common to find reinsurance placements placed in different regional markets, ie not London markets only. We have encountered situations in which most of the placement is reinsured in the London market but with a local reinsurer taking the biggest share, resulting in the local reinsurer being the overall leader of the placement and London market reinsurers together covering the largest percentage of the risk. Several practical difficulties arise from such situations, notably a lack of co-ordination between the overall leader and co-reinsurers, particularly if those various London market reinsurers each have their own slip. We have also faced reluctance from some brokers to allow direct contact between reinsurers and cedants when dealing with claims.

In those instances, we have noted a degree of reluctance on the part of local reinsurers to join the appointment of a London law firm made by their co-reinsurers in London. If the insurance policy and the reinsurance contract(s) are subject to local law and jurisdiction, local reinsurers prefer the appointment of a local lawyer to advise on their share.

In our experience, this approach presents several challenges. In the same way a London lawyer needs a local lawyer to assist on local matters, local lawyers need a London lawyer to handle and advise on London market practices and standards. Local lawyers lack daily and direct exposure to London market intricacies, and London-based lawyers don't have the same local exposure. Different backgrounds mean that London and local lawyers' approaches to things differ, and this has been the classic cause of problems over the years – even if those lawyers are part of the same law firm. Wrong advice contributes to building a bad reputation and it is common to hear complaints about bad experiences dealing with both the London market and Latin American jurisdictions.

What to look out for in 2019

The London market has the opportunity to consolidate and enhance its leadership and presence in the region. However, if the London market wants to maintain its leadership in the region, London reinsurers need to look at ways to promote and improve direct communication with local players. In our experience of dealing with complex claims in the region, there is nothing better than direct communication between the relevant parties.

The London and Latin American markets have evolved in different ways, shaped by different factors. Both sides need to work on common strategies and to learn from each other. An effective and productive interaction between the London and Latin American markets will be only possible if it is made from an approach based on the acknowledgment of diversity (ie there is no unique and standard insurance practice).

As regards the handling of claims, choosing the appropriate experts with experience in both markets and implementing channels of direct communication among the relevant parties will be of crucial relevance in order to successfully adjust and pay a loss without delay, engage with the insured in mitigation actions if required or reject coverage when appropriate.

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US

Key developments in 2018

The 2018 Camp Fire in Northern California and the Woolsey Fire in suburban Los Angeles – which resulted in dozens of deaths and destroyed thousands of structures – are expected to result in losses exceeding the billions in insurance claims reported for the California wildfires of 2017.

The opioid epidemic has resulted in numerous suits brought by states, political subdivisions, third-party payors, hospitals and individuals against pharmaceutical manufacturers, distributors and others, seeking a variety of damages allegedly resulting from the diversion and misuse of prescription opioids such as hydrocodone and OxyContin. Multiple million-dollar settlements have been reached, with hundreds of cases pending (most consolidated in federal court in Ohio). Government plaintiffs seek to recoup response costs for providing law enforcement, courts, corrections, and health and human services. The White House Council of Economic Advisers estimated total economic losses at $504bn for 2015 alone, and others have prognosticated overall losses of $1trn.

Most of the opioid insurance coverage determinations to date have been limited to duty to defend issues, with courts reaching divergent results. One significant issue is whether the complaints – most of which allege intentional, egregious conduct – allege an "accident" or "occurrence". Another is whether governmental claims seeking restitution of response costs seek "damages" or "damages because of bodily injury".

Talc litigation continues, with thousands of cases pending against a much more limited universe of defendants. This litigation represents another instance of litigation outpacing the science in the US. The most interesting development concerned reports that a talc manufacturer knew its talc contained asbestos.

The public nuisance liability theory failed in lead paint litigation across the US for years until 10 California cities and counties scored a $1.15bn abatement award in California. After the state appellate court limited the abatement to pre-1951 homes, the trial court reduced the amount of the abatement fund to $409m.

The American Law Institute approved its Restatement of the Law – Liability Insurance this May. Although some sections accurately restate the law, other sections actually misstate the law and evince notable pro-policyholder bias.

Allocation of losses continues to be an issue driving long-tail coverage claims in the US. A majority of states have applied a pro-rata approach over the inferior "all sums" approach for allocation of continuing or progressive injuries or damages among multiple periods. In most pro-rata jurisdictions, policyholders are responsible for damages during periods of no insurance, regardless of whether or not insurance was available for purchase in the market. A couple of pro-rata states relieve the policyholder for responsibility where coverage cannot be purchased for some types of losses (notably asbestos or environmental) due to the presence of exclusions. In 2018, the New Jersey Supreme Court adhered to its so-called "unavailability of insurance" exception, while New York's highest court flatly rejected any unavailability of insurance exception and required the policyholder to bear responsibility for uninsured periods regardless of any alleged inability to purchase insurance for the risk. The treatment of "non-cumulation/prior insurance" clauses has resurfaced and has been contested in numerous coverage actions.

On the first-party side, last year's 10 hurricanes (including Irma and Harvey) continue to dominate the claims activity. Hurricanes Michael and Florence in 2018 produced substantial losses, but are expected to be earnings rather than capital events for the US and global insurance and reinsurance sectors.

Cyber security laws, regulations and best practices abound for insurers and their policyholders, and have evolved quickly. Numerous coverage claims are being asserted for data breaches under traditional general liability policies, with many decisions involving issues and analysis presented under coverage B (personal and advertising injury). Several coverage decisions have been rendered under business and crimes policies involving social engineering scams, in which fraudsters attempt to trick or induce employees to take actions that compromise corporate security or finances. In 2018, the United States Court of Appeals for the Second and Sixth Circuits held there was coverage with respect to the claims before them. Previously, the Fifth and Ninth Circuits held against coverage under business and crime policies.

In cases of first impression, one federal district court recently held that an "aircraft" exclusion barred coverage for a drone crash. Another ruled that a homeowner's insurer must defend a wrongful death action brought by the parents of a teenage girl who committed suicide after receiving repeated vengeful texts from a fellow student.

What to look out for in 2019

Insurers writing in California will be forced to confront how to address the severity and frequency of fire-related losses against a regulatory framework that limits insurers' ability to raise rates.

Many financially strapped governmental entities may find the potential for a large fund to abate lead paint to be too tempting to avoid pursuing recovery under a public nuisance theory.

The American Law Institute's Restatement of the Law – Liability Insurance is not binding or precedential in any court in the US. Yet it may have a greater impact than any single decision. Policyholder advocates have cited to the restatement even prior to its approval, and some court decisions have relied on it. Insurers must have a strategy to address this advocacy piece and be prepared to educate courts on the limitations of the document, the bias of the process and reporter who ultimately prepared the document, and rely on the applicable body of case law on the issues at hand.

Cyber and data breach claims will continue to flourish, and coverage litigation under cyber policies will proliferate. The lack of standardisation of cyber policies among companies and the numerous revisions companies made to their policies over a short period of time have prevented any clear trends from emerging. With more litigation under cyber policies in the future, trends and precedent will begin to emerge.

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Middle East and Africa

Key developments in 2018

The UAE is home to an increasingly important and expanding global insurance market. The decision of Lloyd's of London to position its regional hub in the Dubai International Financial Centre (DIFC) in 2015 cemented the importance of the region, and particularly Dubai, as a hub for international (re)insurance investment. The success of the region is shown in the results for listed insurance companies in the UAE, which, according to Badri Management Consultancy, show a collective increase in profits of around 35%.

The DIFC's largest markets in the region include the UAE, Qatar and Saudi Arabia, but it is open about its desire to increase its share of foreign reinsurance business coming from outside the Middle East and Arab North Africa. IGI Jordan has a long-standing London presence, but more recently Qatar Re and ADNIC have established London bases.

The insurance industry in Africa remains one of the least tapped in the world. However, there is significant scope for development. African governments continue to welcome foreign insurance investors in a bid to promote growth. Investment in the region by specialty lines (re)insurers has increased as many African countries, such as Nigeria and Kenya, move from compliance to a risk-based model of supervision.

By way of example, Allianz acquired an 8% stake in Africa Re in May. In the same month it was announced that Swiss Re was granted a licence in South Africa for property and casualty business, relocating its office for this line in the region from Europe to South Africa.

What to look out for in 2019

Both the government in the UAE and the insurance regulators have demonstrated a commitment to securing future investment and continuing their upward growth trend. Earlier this year the Government approved the Innovation Strategy in the Insurance Sector for 2018–2021. The intention of the strategy is to encourage and support young Emerati talent and entrepreneurship within the sector, as well as promote investment.

In a bid to further strengthen its captive insurance offering, Abu Dhabi's Financial Service Regulatory Authority recently awarded Marsh the first licence to provide captive management service in Abu Dhabi. Marsh's long-standing experience in captive management will invariably assist in developing Abu Dhabi as a serious player on the captive landscape. It waits to be seen whether it can begin to rival more traditional captive jurisdictions such as Bermuda.

To secure further future development, insurance companies in Africa will need to find innovative ways to entice consumers, many of whom are yet to be convinced by the benefits insurance products hold. Technology and digital innovations, such as mobile applications and artificial intelligence, have the capacity to revolutionise the distribution of insurance in Africa. The continent has the highest broadband growth rate in the world and increasingly, therefore, a platform for the exploitation and dissemination of digital insurance innovation.

In South Africa, new insurance rules restrict the ability of foreign underwriters to do business locally without opening a branch and meeting minimum capital requirements. Foreign underwriters were known previously to operate a "fly in, fly out" practice to conduct local business. However, with the new rules we can expect to see more foreign underwriters "on the ground" in South Africa in the coming months and years.

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Offshore

Key developments in 2018

Qualified recognised overseas pension schemes (QROPs) are likely to continue to attract claims. QROPs are in effect offshore self-invested personal pensions. The issues we are seeing with QROPs are not indifferent to those before Financial Ombudsman Service claims in the English courts, where issues have arisen due to investments made within QROPs that have turned out to be a scam or have since lost their value. QROPs providers have tended to conduct minimal to no due diligence on investments made within their QROPs products or the entities that have referred business (including whether or not advisers are authorised).

What to look out for in 2019

We anticipate that we will see further complaints and claims arising against QROPs providers. These can be particularly expensive when they involve a transfer from a UK final salary scheme.

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