Annual Insurance Review

2021

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INTRODUCTION

Welcome to RPC's 2021 Annual Insurance Review. No prizes for guessing what we will be talking about this year.

In last year's review, we spoke about geo-political instability, Brexit and the US election's impact on international trade, climate change and insurance as a driver of geo-political change.

In common with governments and businesses around the world, what we did not recognise was the risk of a global pandemic bringing unparalleled disruption to global economies – and lives.

In 2019, we saw what at the time appeared to be unprecedented disruption to global businesses and events due to political uprising and adverse weather conditions, including the cancellation of the Japanese Grand Prix and several Rugby World Cup matches due to Typhoon Hagibis. Of course, this year it's hard to think of a sport, cultural event or business sector that has been unaffected by the virus.

Brexit suddenly seemed to almost be a topic of light relief (until very recently, perhaps).

All in all, it's been one of the most volatile and difficult years in history, not just for the insurance market but for virtually all industries and individuals. It will leave countries, industries, businesses and individuals with unprecedented levels of debt for recent times. Ultra low interest rates look here to stay and whilst uncertainty remains around the detailed terms of the trade deal with the EU and how this will be implemented, Sterling is likely to remain volatile. This makes the longer term economic impact of COVID harder to predict.

The consequences of the virus are likely to be quite far reaching. Industry commentators remain of the view the market will likely continue to harden and that begs the question as to whether new capacity will emerge and, if so, what its approach to underwriting risk will be. The reach of the pandemic on the insurance market goes further though than just claims exposures, pricing and capacity. It is likely to lead to a fundamental shift in customer demand both short and longer term. It might also lead to the re-emergence of reinsurance disputes.

Our review this year will provide you with the usual collection of articles from our business class experts and from around the world's key insurance markets. You can read how COVID-19 has impacted your own market/region, but whilst that is obviously the dominant topic of conversation, there are many other issues that remain of crucial importance.

Key risk issues from previous years have not gone away – they've just been overshadowed temporarily (we hope). So, you can read about how over the coming year:

- there will be re-engagement with climate change initiatives, and a continued drive away from fossil fuels towards renewable energy, with some talking of a green recovery from COVID-19
- tech and artificial intelligence gains, accelerated by mass home working and the needs of a global medical emergency, will be built upon and taken advantage of

- Environmental, Social and Governance (ESG) as a means of evaluating a company's corporate behaviour (including its behaviour whilst under the stress of the last year) will be ever more important
- notwithstanding the UK-EU Trade and Cooperation Agreement signed on 30 December, the full details and impact of the deal will only now begin to be understood, all at a time when businesses are looking to rebuild after this year-of-years and
- perhaps the biggest test of all will likely come towards the middle and end of 2021, as governments' financial support is withdrawn and businesses that have struggled to survive 2020 begin to fall into insolvency.

So there is a great deal for our industry to be thinking about and working on, and all at a time when, more than ever, the insurance market's importance as the essential lubricant for business of all kinds, and indeed for society as a whole, is being recognised. With BI claims and test cases around the world attracting headlines, regulatory, political and societal scrutiny over the insurance industry's provision of products that meet clients' needs and the efficient and fair handling of claims will be more intense than ever.

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

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

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

ACCOUNTANTS

By Matthew Watson, Senior Associate

Key developments in 2020

In 2020 we saw the Financial Reporting Council (FRC) adopt a more robust approach towards implementing its enforcement powers than in previous years. The Kingman Review of the FRC appears to have prompted the regulator to try to shake off the label of not being fit for purpose.

In July 2020 the FRC's "Annual Enforcement Review" showed that its Enforcement Division had grown. The FRC also increased the number of conduct issues identified by "horizon scanning" (ie carrying out pro-active searches of companies' misconduct) by 80% in 2020 compared to 2019. But the FRC's more robust approach to enforcement is unlikely to change the Government's commitment to replace the FRC with a new regulator (the Audit, Reporting and Governance Authority).

The release in 2019 of the Brydon Report, which called for industry wide audit reform, also had an impact in 2020. The report suggested that auditors have *"an obligation to be suspicious as well as sceptical"*. There still seems to be a disconnect between the general public's perception of the role of an auditor and the reality of what an auditor's job entails. The Brydon Report suggests that in the future auditors may be expected to take a more investigative approach to identify corporate fraud in line with the public's perception of the role of auditors. The additional cost of such an approach is unlikely to be welcome to audited entities.

Accountants will no doubt have been kept busy in 2020 advising businesses on the Coronavirus Job Retention Scheme (CJRS) or "furlough" scheme. Auditors will have also needed to keep a close eye on their clients' accounts in cases where support grants have been received. A failure to identify "furlough fraud" may put auditors in the spotlight especially if it could be said they did not adopt enough professional scepticism when reviewing a company's accounts.

What to look out for in 2021

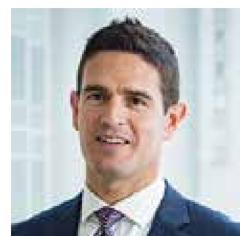
We expect to see more accountancy firms restructure their business models in the next 12 months. The Big Four accountancy firms have until 2024 to separate their auditing practices from other business areas. We have already seen some firms (including those outside of the Big Four) make this change in recent months and we foresee this approach will become the norm for larger firms.

The separation of accountancy firms' audit work from the rest of their business is in line with the recommendations of the Kingman Review and the Brydon Report. We will have to see whether this change reduces auditors' exposure to potential claims for failing to identify discrepancies in companies' accounts.

We anticipate that insolvency practitioners and accountants advising businesses that are facing financial difficulties as a result of COVID-19 may face an increased exposure to claims in the next few years. The number of insolvencies to September 2020 were down by over a third compared to the same period in 2019. However, the eventual withdrawal of the government's support packages for SME businesses is likely to result in more insolvencies. This is likely to lead to an increased workload for insolvency practitioners who may face claims from disgruntled creditors and/or shareholders. Similarly, auditors and accountants for (and professionally qualified directors of) insolvent firms will inevitably face significant scrutiny of their work prior to the businesses' insolvency, even more so following the Court of Appeal's decision in *AssetCo v Grant Thornton* which is seen by some claimant firms as encouragement to pursue claims against auditors for companies' trading losses.

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

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



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

ART AND SPECIE

By Emma West, Senior Associate

Key developments in 2020

The COVID-19 pandemic has had an unprecedented impact on the art market. Auctions and art fairs moved online and galleries closed their doors for a substantial portion of 2020, with mixed success. Sotheby's doubled the average value of items sold in online sales and many galleries reported that they had reached a new generation of buyers. However, there were signs that buyers were not prepared to purchase "big ticket" pieces without seeing them in the flesh.

Art was certainly more stationary in 2020, which may have reduced claims for the loss and damage of works in transportation. Looking ahead, buyers are more likely to have relied on information provided to them when purchasing a piece as opposed to their own inspection. An increase in claims on professional indemnity policies can perhaps be expected as buyers reassess the prudence of their acquisitions in 2020.

What is clear is that the pandemic led to a flurry of claims under business interruption policies, with a class action being launched against insurers on behalf of more than fifty art galleries, museums and sole traders. Museums and galleries forced to close welcomed the outcome of the FCA's test case on business interruption cover in September. Although no art-specific clauses were considered in that case, the court decided that some of the policy wording it reviewed provided coverage if, for example, businesses could not be accessed as a result of government order. At the time of writing, the decision remains subject to appeal, and each policy should be considered on its own terms.

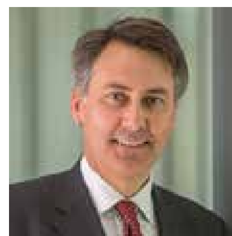
What to look out for in 2021

Technology is being used in increasingly ingenious ways to both create and test the authenticity of art.

Art created by artificial intelligence is a growing area of the market. A new breed of artists is using "generative adversarial networks" to produce original artworks. The software is first trained using a wide range of existing works and then produces its own works until it cannot distinguish between the two. The art produced is surreal, abstract and yet strangely familiar. It also crosses genres: Christie's has auctioned an 18th century style portrait produced by AI; more recently a software called GANsky has created street art murals.

Technology can also be used to detect fakes and forgeries. Software is taught to recognise an artist's work, and then from as little as a single photograph indicates whether the piece is genuine. With some experts estimating that around 20% of artwork in major galleries is fake, this technology is likely to play an increasing role in resolving questions of attribution.

The use of technology in the creation of art has the potential to raise complex intellectual property issues, both in respect of the technology itself and its product. Whilst technology develops, its status alongside more traditional attribution methods is unclear, potentially increasing the scope for claims against professionals.



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

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

BROKERS

By Kirstie Pike, Senior Associate

Key developments in 2020

The hard insurance market, coupled with the effects of COVID-19, has meant that 2020 has been an extremely challenging year for insurance brokers. The pandemic and Government-directed lockdown in March put enormous strain on brokers as a result of the significant volume of health, travel and business interruption claims, with clients desperate to know whether or not they were covered for their losses. The broking community breathed a (short-lived) sigh of relief when the High Court in the FCA business interruption test case (*The Financial Conduct Authority v Arch Insurance (UK) Limited and others* [2020] EWHC 2448 (Comm)) found in favour of the arguments advanced for policyholders on the majority of key issues, which meant that many of them were likely to recover their losses. On 2 November 2020, however, just as businesses had been told that they faced another national lockdown, the Supreme Court granted permission to a number of the insurers to appeal. Whatever the outcome, the Supreme Court's decision will have a major impact on brokers. One thing that is certain is the next 12 months will be as challenging for them as the last.

What to look out for in 2021

If insurers' appeal is successful, brokers may find themselves in the firing line. In difficult financial times, policyholders will look for somebody to blame. Claims against brokers are likely to relate to a failure to arrange suitable business interruption cover or advise on the scope of cover obtained. Causation may well be a significant issue. This could have a substantial impact on the brokers' professional indemnity market and premiums.

If the Supreme Court upholds the High Court decision, customer support will be more important than ever. Clients will seek assistance with their business interruption claims. We anticipate that insurers will react to the decision by tightening up their policy wordings and restricting the scope of cover. Brokers are, therefore, likely to be called upon by their clients to fully understand the policies they are arranging and provide more technical knowledge. When placing policies, it may be prudent for brokers to demand from insurers confirmation as to what cover they will provide and be very careful to explain to clients when their insurance requirements cannot be met.

In order to be able to give that explanation, it is vital for brokers to fully understand their clients' needs. As a result of COVID-19, the risk profiles of a lot of businesses will have changed and so brokers will need to spend time getting to know their clients again. Remote working means that, for many, new and innovative ways to keep in touch with clients and conduct business will need to be developed.

Small businesses will continue to be hit hard for the foreseeable future, putting a strain on brokers' fee income and commission volumes. For those businesses that manage to survive, cost cutting is likely to mean their focus is less on insurance and more on risk management. This is where brokers can really add value to their relationships.

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

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

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

CONSTRUCTION

By Sarah O'Callaghan, Associate

What to look out for in 2020

COVID-19 has dominated the news. However, the construction industry was facing a challenging time before the virus swept the world.

As anticipated in this review last year, the Grenfell tragedy and the subsequent Hackitt Review have led to a host of claims relating to, and investigations into, fire safety and the suitability of cladding on buildings. This made insurers nervous and many decided to pull out of construction insurance. Linked to this, the Lloyd's 2018 Thematic Review into construction insurance revealed big losses for some insurers and required them to take remedial measures or, in some cases, to cease writing construction insurance. The result of these two issues (and we have not even mentioned Brexit) has been a reduction in the availability of construction PI cover and, accordingly, large increases in premiums and more restrictive terms.

COVID-19 has added an extra problem – a cashflow issue. Many construction firms operate without large capital reserves and the pandemic has put many in a vulnerable position; many projects have been delayed or cancelled due to disruption within the supply chains and the practical issue of social distancing on site. In short, many firms are facing insolvency; insurance premiums have increased, COVID-19 has made it (even more) difficult to pay those premiums, and it only takes one company to cease trading for projects to fall into delay or be cancelled.

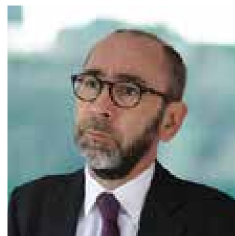
There are, however, reasons to be positive. During Lockdown 2.0 construction workers in the UK were once again allowed to attend building sites, notwithstanding other sectors being told to work from home. In addition, the construction sector brought back almost 75% of those individuals on the Government's Job Retention Scheme by 31 August 2020, faster than most other sectors. The sharp fall in construction work earlier in the year has eased considerably in the last quarter, in the face of enduring economic uncertainty.

What to look out for in 2021

We anticipate that insolvencies in the construction sector will, unfortunately, lead to problems with the progress of certain projects. As a direct COVID-19 related issue, we can see the potential for more claims resulting from Health & Safety on site (potentially against Principal Designers) and a continuation of the number of adjudications in professional negligence claims, as claimants try to recover losses quickly, before either they or the target of their claim become insolvent. More positively, the number of new cladding claims should start to fall away.

Finally, we continue to see a number of disciplinary investigations by the ARB and RIBA (and the RICS). An area for architects to keep an eye on in this regard will be the MHCLG consultation on proposed amendments to the Architects Act 1997. The consultation is seeking a wide range of views on proposed reform to building safety. The recent publication of the draft Building Safety Bill details how the Government intends to deliver the principles and recommendations of the Hackitt Review and includes provisions to improve the competence of architects through amendments to the Architects Act 1997.

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



Peter Mansfield
Partner
T +44 20 3060 6918
peter.mansfield@rpc.co.uk

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

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

CONTINGENCY

By Damon Brash, Senior Associate

What to look out for in 2020

Like much of the insurance market, contingency risks were dominated in 2020 by COVID-19. This was entirely unforeseen, not only by the insurance market but by governments, businesses and individuals worldwide. Last year, the key emerging risk in the contingency market was thought to be adverse weather conditions. COVID-19 has trumped this. The virus has resulted in widespread postponement and cancellation of events, from conferences to concerts to cricket matches. The most high profile amongst these was probably the 2020 Tokyo Olympics, which were rescheduled to commence on 23 July 2021, although it is still not entirely certain that this date will not be moved once again.

Many artists, performers and organisers will have found the consequences of cancellation severe due to communicable disease exclusions that are often contained in contingency policies. Some organisers may even have faced a double hit. Having organised the event once and postponed it from early in the year for a short period (say, 6 months) in the belief that by then the world would have COVID-19 under control, they may now have found that even the rescheduled event cannot proceed.

By the same token, insurers, even those with robust exclusions for communicable diseases, will have found their wordings being placed under intense scrutiny. Some policy wordings that carve out communicable diseases can contain a 'write back' providing cover in certain situations, including, for example, where the Government orders events to close. Government statements in the UK have been notoriously woolly leading to disputes as to whether the cover is triggered. This has led to increased disputes as to whether a claim ought to be covered.

What to look out for in 2021

Despite the emergence of several vaccines, COVID-19 is not going to go away, at least in the short term. Producing and administering a vaccine in large numbers is likely to be a considerable logistical exercise that will take time to implement. In the meantime, COVID-19 may well still lead to tightening of exclusions in contingency policies, especially around communicable diseases. To obtain cover without a communicable diseases exclusion is likely to be very expensive, if it is possible at all.

The upshot of this may well be that in 2021 only very small or very large events will be able to proceed. Small events may proceed either on the basis that the organiser will risk not obtaining insurance for communicable diseases or on the basis that the insurer might consider the risk sufficiently low to write it without a communicable diseases exclusion and still charge only a modest premium. Large events may proceed on the basis that the organiser can afford the premium involved. Oddly, whilst this might hold up in the short term, in the medium term this may have a countercyclical effect. The restrictions on cover could mean fewer events being underwritten as organisers elect not to proceed without cover for communicable diseases. This could drive a glut of capacity in the market, thus pushing premiums down.

A comprehensive roll-out of an effective vaccine might stabilise the position but it would seem likely that COVID-19 will have one lasting effect: broad exclusions for communicable diseases will be part of much contingency cover for the foreseeable future.

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

D&O

By Krista Murray, Associate, and Ben Gold, Legal Director

Key developments in 2020

For D&O insurers, 2020 was all about the hardening market – with rates doubling in some cases and limits contracting – and the underlying causes of that.

A combination of a rise in shareholder class actions, US securities claims, event based litigation, extremely large scale regulatory/criminal investigations, litigation funding and size of settlements all contributed to this hardening. The market had been under-priced for years and was set to correct itself, when COVID-19 shook the global economy.

COVID-19 class actions started to emerge in the US in a number of industries, including the travel, pharmaceutical, manufacturing, retail and technology sectors.

In the UK, high profile criminal investigations by the SFO against D&Os continued to dominate the press, as well as follow-on expensive shareholder actions under Section 90A FMSA 2000 (triggering side C coverage), such as that brought against Tesco Plc.

As we predicted last year, climate change litigation grew, with derivative shareholder actions against the oil and gas industry in the US in particular, posing a significant risk to D&O insurers. Notably, in November 2020, one of Australia's largest pension funds settled a high-profile climate change lawsuit. Whilst the settlement did not set a legal precedent, it will likely spur on similar pieces of litigation around the world.

Against the backdrop of higher social awareness, class action diversity and MeToo claims were on the increase in 2020 – a trend that is set to continue and have an impact on D&O policies.

What to look out for in 2021

We believe the largest source of new claims in 2021 is likely to arise from poor financial performance and the raft of company insolvencies that inevitably lie ahead, occasioned by the COVID-19 pandemic and the related lockdowns, leading to shareholder derivative actions and, more commonly, claims by administrators or liquidators. According to the most recent Office for National Statistics survey, over a third of hospitality businesses are currently at moderate to severe risk of insolvency.

Management may also be exposed to risks related to the way they have dealt with furlough and redundancies and other lockdown related work issues.

Whilst the Corporate Insolvency and Governance Act 2020 temporarily suspended wrongful trading from March to September 2020, to allow company directors to ensure that their businesses could weather the COVID-19 storm, that relaxation was lifted briefly before being reintroduced, and the suspension may itself have had the unintended consequence of increasing creditor losses and the quantum of subsequent claims. Further, all other sources of liability under the Insolvency Act 1986 and Companies Act 2006 remained unaffected, including the summary remedy of misfeasance (under section 212) and claims for breach of fiduciary duty.

Separately, climate change and diversity litigation will, we believe, continue to gain momentum in 2021.

As D&O becomes increasingly challenging to write, insurers will want to carefully consider the scope of coverage offered.

Simon Goldring
Partner
T +44 20 3060 6553
simon.goldring@rpc.co.uk

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

Alison Clarke
Of Counsel
T +44 20 3060 6173
alison.clarke@rpc.co.uk

Ben Gold
Legal Director
T +44 20 3060 6282
ben.gold@rpc.co.uk

ENERGY

By Chris Burt, Senior Associate

Key developments in 2020

In our last Annual Insurance Review we gave some indications of what to look out for in 2020. We hope we can be forgiven for not predicting a global pandemic, but our discussion around insurers looking to renewable energy as an alternative source of premium income has also proved to be a major trend of the past year.

'Black April' saw oil prices turn negative: there was an imbalance between oversupplied oil and a significant fall in demand following the shutdown of major economies and travel routes under COVID-19 restrictions.

Demand for fossil fuels is now widely seen as having reached its peak. According to the International Energy Agency's (IEA) report published in early November, global renewable electricity installation will hit a record level in 2020. The report states that almost 90% of new electricity generation in 2020 will be renewable, with just 10% powered by gas and coal.

Alongside the move away from fossil fuels, the renewable energy insurance market has swiftly hardened in 2020. Capacity is now more restricted; Willis Towers Watson describes the 'balance of power' swinging from an insured to an insurer market, as rates have steadily increased and restrictions of cover have been introduced over the past year.

There have also been some notable strategic investments by insurers in the renewables market. Tokio Marine HCC acquired GCube in March 2020. Chief Executive Barry Cook described this as underlining their *"commitment to the renewable energy insurance market and [their] desire to actively address the issues around sustainability... and offer[s] opportunities for growth and diversification"*.

What to look out for in 2021

The central scenario in BP's annual report for 2020 shows demand for oil falling by 55% over the next 30 years. Renewable energy sources are likely to continue to fill the gap in 2021 and beyond.

There is a growing acceptance and drive for a 'green recovery' to COVID-19. Many governments are including such measures in their pandemic recovery policies in order to ensure the environmental health and resilience of societies. Preliminary OECD estimates suggest these measures amount to US$312 billion.

However, according to the IEA's Sustainable Development Scenario (SDS), renewable capacity needs to grow by over 300 GW average per year between now and 2030 in order to reach the goals of the Paris Agreement.

Therefore, increased investment in and development of renewable energy sources will be required to meet global energy needs sustainably. Technological developments in this area will result in new types of insurance risks and considerations.

For example, hybrid renewable projects that combine multiple forms of energy generation, storage or end use technologies are a potential solution. Lack of loss history in such new projects will present challenges to ascertaining likely insurance risk exposures.

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

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

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

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

FINANCIAL INSTITUTIONS

By Oliver Knox, Senior Associate

Key developments in 2020

The key development in 2020 is again centred upon regulation of the financial services sector. As envisaged in its 19/20 Business Plan, the FCA's focus this year has been upon financial crime controls, in particular anti-money laundering (AML) measures. This has included further consideration of the FCA's oversight of crypto-currencies (the subject of our 2019 key development) given their exposure to money laundering.

In recent years, AML breaches have replaced market misconduct as the driver of the largest fines from regulators. According to a report by consultancy firm Duff & Phelps, global fines for AML breaches in the first half of 2020 are estimated at $706 million, which already exceeds the full prior year total of $444 million. As at 31 March 2020, 11% of the FCA's open cases related to financial crime, whilst this summer has also seen: (i) the EU adopt its AML Action Plan; (ii) the Financial Action Task Force identify trends increasing the risk of money laundering and terrorist financing due to COVID-19; and (iii) the Government announce a £100 million levy on financial institutions to deal with financial crime.

At the time of writing, the FCA is considering proposals to extend its annual financial crime reporting obligation to additional firms irrespective of their total annual revenue. Such additional firms include crypto-asset exchange companies, with the direction of travel (fuelled by AML efforts) suggesting further regulatory requirements being imposed on this sector in the future.

In the words of the Vice President of the EU Commission, Valdis Dombrovskis (as he addressed the European Parliament on 8 July 2020): *"Dirty money should have nowhere to hide"*. The regulation/punishment of financial crime is a unifying cause for international regulators and policymakers such that firms/individuals will be wise to keep on top of their AML obligations to avoid costly sanctions.

What to look out for in 2021

The impact of the COVID-19 pandemic is likely to crystallise for FI insurers in 2021 in the wake of the delayed discovery of fraudulent/wrongful conduct and the turbulence of global financial markets in 2020.

In particular, we foresee a spike in: (i) instances of employee infidelity, social engineering and accounting fraud (financial engineering of company accounts) due to the impact of remote working on internal controls; (ii) the detection of insider trading and Ponzi schemes (historically more prevalent in the 6-18 month period after a market crash); (iii) claims against investment managers for mandate breaches/negligent investment advice driven by volatile stock performance; and (iv) shareholder claims/securities class actions (especially in the US) following drops in share prices (on the basis of inadequate disclosures concerning the impact of coronavirus). In the regulated sector also, scrutiny is high (for example, the FCA/PRA has issued various Dear CEO letters/guidance notes in relation to COVID-19 related conduct/initiatives) and regulatory/compliance breaches will likely be seized upon by regulators, which continue to introduce stricter requirements while giving little credit to over-stretched in-house compliance and regulatory teams.

Certain industry experts have even predicted a further global banking crisis due to USD1 trillion of AAA-rated CLOs containing lower-rated individual leveraged loans to B down to CCC-rated companies. COVID-19, as a global pandemic, is uniquely placed to undermine the risk diversification measures built into such products, leading to significant potential loan defaults and claims/regulatory investigations involving banks and other financial institutions (eg in respect of capital inadequacy and/or reckless lending).

Should these COVID-19 triggered events transpire, they will translate to increased crime, PI and D&O exposures, which in turn would likely contribute to the current hard(ening) market. In this respect, the D&O segment is currently recognised as *"the hardest of all hard markets"* compounded by COVID-19 uncertainty and, as that trend continues, we would expect greater volumes of coverage disputes in the year ahead and measures to limit D&O costs including the use of law firm panels.

Simon Goldring
Partner
T +44 20 3060 6553
simon.goldring@rpc.co.uk

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

Alison Clarke
Of Counsel
T +44 20 3060 6173
alison.clarke@rpc.co.uk

Ben Gold
Legal Director
T +44 20 3060 6282
ben.gold@rpc.co.uk

FINANCIAL PROFESSIONALS

By David Allinson, Senior Associate

Key Developments from 2020

This year has seen a continued focus from the FCA on defined benefit pension transfers. The FCA's view is that too many people continue to transfer from defined benefit schemes with the advice often being unsuitable. In June, the FCA set out a package of measures designed to 'address weaknesses across the defined benefit transfer market', with such measures including a ban on contingent charging. The FCA also produced its 'advice checker' in June, with this document being designed to help customers determine whether they have received poor advice and, if so, what to do about it.

The British Steel Pension Scheme continues to be a specific concern; the FCA's investigations found that only 21% of a sample of advice to transfer from the British Steel Scheme was suitable and they wrote to all 7,700 former members to invite them to revisit the advice received and complain if they had concerns.

There are more dark clouds on the horizon; the FCA sent data requests to 65 IFAs who had advised on transfers from the Rolls Royce pension scheme in October, warning that they would take action if they found unsuitable advice. Also, in what could be a sign of things to come, the Arcadia pension scheme has fallen into the PPF and members of schemes with similarly troubled employers could be tempted to move their benefits. This all comes at a time when advisors are increasingly finding it difficult to obtain PI cover and the market doesn't look likely to soften soon.

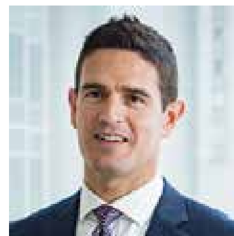
What to look out for in 2021

2020 has seen a large number of claims in respect of interest-only mortgages (largely brought by a firm called Pure Legal). It looks like another type of mortgage product could also be an area of concern in the coming years. The FCA published a review into equity release mortgages in June, with some of the advice reviewed being deemed not to have been in the customers' best interests. In particular, the FCA noted that the reasons why a homeowner wanted to look at equity release were not always challenged and alternative means of raising funds were not always considered. The sums here are significant, with £1.06 billion being released to homeowners in equity release in the first quarter of 2020 alone. This comes as part of a wider review being completed by the FCA on later-lifetime lending.

The most common form of equity release involves a lifetime mortgage, whereby a homeowner takes a loan out against their property, with the capital sum being repayable on their passing. Interest can be paid as it accrues but many borrowers will allow this to roll up and it will then fall to be paid by the borrower's estate, along with the capital sum borrowed. This could significantly erode the sum that can be passed on and could lead to the executors (and/or disappointed beneficiaries) asking whether or not such a loan was actually necessary; in the absence of a firm need to raise capital (without a viable alternative) there is certainly scope for claims to arise, particularly as the interest rates here typically are higher than those available on a traditional mortgage.

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

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



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

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

GENERAL LIABILITY

By Jonathan Drake, Senior Associate

Key developments in 2020

Last year we commented on the implementation of the negative discount rate for calculating lump sums awarded for future financial loss. Although lower discount rates usually increase awards for future loss, this year, in *Swift v Carpenter* [2020] EWCA Civ 1295 the Court of Appeal addressed the unanticipated consequence of a negative discount rate on claims for higher accommodation expense.

Mrs Swift owned a house valued at £1,450,000. She needed a new house, valued at £2,350,000, to accommodate her injuries, and claimed the additional £900,000. In 1989 the Court of Appeal approved a formula for calculating this kind of award, by applying the discount rate (at that time 2.5%) to the additional sum needed, and then multiplied the result by the claimant's life expectancy. On this basis Mrs Swift would have been awarded £623,700. Using the same formula with the current negative discount rate of -0.25% meant that Mrs Swift was £116,887 better off and so the trial judge awarded nothing.

The Court of Appeal decided on 9 October 2020 that the calculation that had been used for the past 31 years was not fair in times of low or negative discount rates. It decided that the appropriate approach was to calculate the value of the reversionary interest of the difference in the value of each property at an interest rate of 5% per year over the remainder of the claimant's anticipated life, using the Ogden table 28 multipliers for pecuniary loss for a defined term, and to deduct that sum from the additional sum needed to buy the new house.

This approach gives rise to significant under-compensation when the claimant has a short life expectancy. Litigants and the courts are likely to adapt their approach to accommodate each individual case.

Underwriters and claim handlers need to remain mindful of the particular circumstances of each claim as it progresses.

What to look out for in 2021

We anticipate the implementation of Part 1 of the Civil Liability Act 2018 and associated Regulations which introduce a new claims procedure for relatively minor whiplash injuries sustained by occupants of cars in road traffic accidents. The Regulations will introduce a tariff of compensation awards for whiplash injuries. The proposed tariff of awards is relatively low when compared to those currently awarded by the courts. The Act prohibits settlement of whiplash claims without a medical report.

Because the Act does not apply if there is additional injury not affecting soft tissue in the neck, back or shoulder, it is likely that those bringing claims will also allege injury to other parts of the body.

A likely related development is the proposed expansion of the small injury claims procedure from £1,000 to encompass claims with a value of up to £5,000. This will mean that the overwhelming majority of claims for whiplash, as well as many injuries arising from accidents at work, will fall within the small injury claims procedure, which in turn is likely to lead to a significant increase in whiplash and other injury claims being made without legal representation. A new on-line claims portal is being introduced to cater for this.

Insurers will likely receive significantly more claims by litigants in person and will need to be prepared for this.

A review of the Court's guideline hourly rates for solicitors is under way and is currently at the consultation stage. Because the current guideline rates have been in place since 2010, the new guidelines might contain significant increases.

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

Summer Montague
Partner
T +65 6422 3042
summer.montague@rpc.com.sg

HEALTH AND SAFETY

By Mamata Dutta, Legal Director

Key development in 2020

On 28 September 2020 England saw the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulation 2020 come into force. This Regulation requires people to self-isolate in certain circumstances, such as if they test positive for COVID-19, or if they have had close contact with somebody who has tested positive. The period of isolation is currently 10 days, should an individual test positive, or 14 days, should an individual come into close contact with somebody who has tested positive.

It is important that all employers understand the implications of this Regulation as it also places new legal obligations on employers of workers required to self-isolate as well as the workers themselves. Employers of self-isolating workers must not knowingly allow a self-isolating worker to attend any place, other than the place in which the employee is isolating, during the isolation period. Equally, an employee must notify their employer of any requirement to self-isolate as soon as reasonably practicable. Breach of this Regulation is a criminal offence and may lead to a fine ranging from £1,000 (for a first offence) to £10,000 (for repeated breaches) and these fines can be imposed on both the employee and the employer.

The impact of this Regulation is significant. Simply allowing an employee to enter their place of work when they are obligated to self-isolate may constitute a criminal act warranting a significant fine.

This Regulation only applies in circumstances where an employer is aware of the requirement for their employee to self-isolate. An employer will also not be in breach of the Regulation if the self-isolating employee attends a place other than their self-isolation premises for a permitted reason, such as seeking urgent medical assistance.

Although a large number of employers are likely to recommend that their employees work from home for some time to come, this Regulation is likely to continue to be in force for a considerable amount of time and so it is extremely important that employers understand how best to comply, particularly once people begin to return to the office. Employers are advised to implement procedures to ensure that the self-isolation requirements dictated by this Regulation are followed promptly and accurately, once they have knowledge of an employee's requirement to self-isolate.

What to look out for in 2021

New food labelling and allergen regulations will be introduced in England on 1 October 2021 under new legislation called 'Natasha's Law' following the tragic death of Natasha Ednan-Laperouse in 2016. Under the new law, suppliers must label products which are prepared and packaged on-site with a full ingredient list.

The current Regulation governing the legislative framework in respect of food allergen information requires pre-packed food to provide mandatory information, including details of 14 prescribed allergens. The Regulation governing food pre-packed for direct sale (PPDS) allows providers of PPDS food to provide allergen information by any means chosen by the supplier, including orally.

Following a decision in a January 2019 consultation, the legislative change to allergen labelling requirements for PPDS food will be implemented by the 2019 Food Information (Amendment) (England) Regulations. The amended Regulations will come into force on 1 October 2021. The new Regulations require the labels of PPDS food sold in England to clearly display the following information: (i) the name of the food; (ii) a full ingredient list; with (iii) allergenic ingredients emphasised.

It is vital that businesses supplying PPDS foods, and food products more generally, consider the products they are offering to the public and how they can ensure that details of all ingredients in those products are immediately available to a customer. Training staff and ensuring that they are aware of the allergens contained in food products is also important. Investment in technology which may make it easier for customers to obtain immediate allergen information, such as barcode scanning equipment, may also provide businesses with extra confidence that their customers are provided every opportunity to obtain details of all ingredients contained within their food and drink products and that they are complying with the new legislation.

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

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

INTERNATIONAL ARBITRATION

By Kirtan Prasad, Senior Associate

Key developments in 2020

Last year's Annual Insurance Review started with the words "Technology in motion! As this is being written, the case of *Halliburton v Chubb Insurance* is being argued and aired via livestream direct from the Supreme Court". In a year that has been marked by unprecedented change, the themes for this year's report remain reassuringly similar: technology, *Halliburton v Chubb Insurance* and *Enka v Chubb Insurance*.

On technology, arbitration was further up the learning curve than most national court systems. The arbitration community has well and truly embraced the virtual world (see for example www.virtualarbitration.info and www.remotecourts.org).

This year has also seen the hand-down of two landmark Supreme Court decisions arising out of insurance arbitrations.

In *Halliburton v Chubb Insurance* the Supreme Court considered whether an arbitrator was bound to disclose to one of the parties to a Bermuda form insurance arbitration, his subsequent appointment in two similar cases. All three cases arose out of the Deepwater Horizon disaster, featured overlapping issues and a common party (Chubb).

The Supreme Court held that there was a duty of disclosure but that, in this particular instance, the arbitrator's failure to disclose his multiple appointments on related matters did not justify his disqualification for apparent bias. The court emphasised that context was key.

So, for example, in maritime, commodities, insurance and re-insurance arbitrations, where it is not uncommon for arbitrators to act in multiple cases arising from the same events, regard has to be had to the practice in that particular sector, where there may be a limited pool of expertise. Parties who consent to arbitration of such disputes are taken to accede to the practice in that sector.

In *Enka v Chubb Insurance* the Supreme Court considered the rules on what the governing law of the arbitration agreement ought to be in circumstances where: (i) the governing law of the substantive contract (ie the policy) and the law of the seat are different; and (ii) there has been no express choice of law of the arbitration agreement. This judgment follows a long line of decisions by the Court of Appeal on this issue (including *Kabab-Ji S.A.L v Kout Food Group* in which RPC was involved). Where the governing law of the arbitration agreement has been explicitly provided for, the courts will defer to that choice. However, where this is not explicit, the Supreme Court held that the law chosen to govern the substantive contract will also govern the arbitration agreement.

The best protection is for parties to incorporate a provision as to the law governing the arbitration agreement in their contracts. However, the dawn on the day when dispute resolution clauses are given their full and proper consideration is yet to emerge!

What to look out for in 2021

Will "virtual arbitration" become the norm? Technology has brought greater efficiencies; there are murmurs of fewer airmiles and paper bundles for arbitration practitioners in the future. However, most will welcome some return to in-person hearings and witness examination.

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

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

Charles Allen
Partner
T +852 2216 7167
charles.allen@rpc.com.hk

Yuankai Lin
Partner
T +65 6422 3022
yuankai.lin@rpc.com.sg

INTELLECTUAL PROPERTY

By Hannah Ridzuan-Allen, Associate, and Alessandro Cerri, Associate

Key developments in 2020

In last year's Annual Insurance Review, we mentioned an upcoming CJEU Judgment in *Sky v Skykick*. Ultimately the CJEU diverged from the Attorney General's Opinion, finding that:

- an EU trademark (EUTM) *cannot* be declared wholly or partially invalid on the grounds of lack of clarity and precision of goods and services; and
- a lack of intention to use an EUTM in relation to registered goods and services *can* constitute bad faith if the applicant intended to undermine the interests of third parties or obtain an exclusive right.

The case returned to the High Court with the Judge finding that Sky had registered trademarks in *bad faith* in respect of certain goods and services. He therefore limited the scope of Sky's registration to goods and services that Sky did use (or intended to).

For businesses subject to infringement proceedings (and their insurers) the decision in *Sky v Skykick* provides another possible basis for defendants to bring counterclaims. Commercial consideration should be given to whether it is in insurers' interests in certain circumstances to fund a counterclaim (which may otherwise not be covered) to put pressure on claimants by bolstering defences and creating better commercial leverage in any settlement discussions.

2020 also saw the first UK Court decision (*Response Clothing v Edinburgh Woollen Mill*) applying the CJEU's heavily debated judgment in *Cofemel v G-Star Raw*, which suggested that there is a harmonised EU-wide definition of "work" for copyright purposes which is not restricted by any pre-specified categories and should not take into account any aesthetic considerations.

This means that more functional items such as furniture, clothing and fabrics, which may traditionally only have benefitted from design right protection may now also have copyright protection. We expect that more claims are likely to be brought for both registered design and copyright infringement (or indeed for copyright infringement where the registered design rights have expired). It may also see claims for infringement which may have gone quiet in pre-action correspondence given a new lease of life for opportunistic claimants.

What to look out for in 2021

With 2020 (and now 2021) dominated by references to COVID-19, it's back to the "B" word when it comes to significant developments on the horizon for IP rights holders (and their insurers). On 31 December the transition period ended and with effect from 1 January 2021 the UK Intellectual Property Office (UKIPO) automatically created corresponding UK rights for existing EUTMs and Registered Community Designs (RCDs). There are, however, potential pitfalls – prospective rights holders in the process of applying for an EUTM or RCD will need to apply to the UKIPO by 30 September 2021 in order to get an equivalent UK right. Moreover, rightsholders with existing EUTMs used predominantly in the UK and registered for more than 5 years will become vulnerable to revocation for non-use. It is likely that the IP challenges presented by Brexit will be a feature in future disputes.

A case to watch out for in 2021 is a potential appeal to the Supreme Court in The *Racing Partnership v Sports Information Services* (TRP v SIS). The Court of Appeal was split on a number of the issues, but ultimately found that sports race day data had the necessary quality of confidence to establish a breach of confidence (although found that SIS had not received the information in circumstances imparting an obligation of confidence).

If the Supreme Court is asked to consider the decision of the Court of Appeal, we expect that the market will see a further uplift in breach of confidence claims pleaded alongside and as an alternative to database right infringement actions (particularly in spaces where data is live or near live). We have reported in previous reviews on the increase in trade secrets and misuse of confidential information litigation, and insurers should expect the trend to continue.

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

INTERNATIONAL PROPERTY

By Hugh Thomas, Senior Associate

Key developments in 2020

In 2020 America suffered record breaking hurricanes and wildfires as the effects of global warming continued to make headlines. For only the second time, the official alphabetical list of hurricane names used by meteorologists was exceeded meaning forecasters had to turn to the Greek alphabet. Of the 30 recorded, 12 made landfall in the United States breaking the record of nine recorded previously in 1916.

As hot and dry conditions hit simultaneously, four million acres of land in California went up in flames last year (around 4% of the land area occupied by the state). Several other states also saw wildfires which were unprecedented in either frequency or scale.

Of course, natural catastrophes in 2020 were not confined to the United States. In the Asia-Pacific region Australia was devastated by bushfires which continued to burn well into January and Indonesia suffered flash floods that covered Jakarta and its neighbouring areas entirely.

The Swiss Re Institute estimates that global insured property losses from disasters for the first half of 2020 were US$31 billion, up from US$23 billion a year earlier. Natural catastrophes accounted for US$28 billion of the insured losses. The figures for the second half of 2020 are yet to be confirmed but are expected to be significant.

The COVID-19 pandemic has presented challenges for the entire insurance industry, and property lines were no exception. Property insurers have been presented with vast numbers of BI and DSU claims. Notwithstanding the fact those policies respond to "damage" events, that has not stopped insureds testing the scope and extent of cover under their policies. Policy terms, extensions and exclusions have been poured over with the Supreme Court's decision on the FCA Test Case appeal is still pending at the time of writing.

What to look out for in 2021

Continued rate hardening is expected in response to catastrophe losses. The change in risk exposure also raises the spectre of withdrawal of capacity and challenges in terms of the insurability of specific regions. As a result, we expect the market for catastrophe bonds and other insurance linked securities to remain robust.

Longer term, however, climate change may result in reduced appetite from investors for catastrophe bonds. Some commentators consider the only solution to be stronger public-private partnerships. Insurance "pools" with government support are already being considered as a way of bridging the gap in cover for pandemic related risks, and equivalent facilities for catastrophe exposure may soon be tabled.

Communicable/notifiable disease extensions or exclusions which clarify the scope of cover for pandemic related losses will invariably become common place, with extensions for those risks coming at a premium.

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

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

Summer Montague
Partner
T +65 6422 3042
summer.montague@rpc.com.sg

LEGAL PRACTICES

By Will Sefton, Partner, and Nick Bird, Partner

Key developments in 2020

2020 will obviously be remembered for the pandemic, the consequences of which will continue to reverberate for years to come. It was also a year of increased focus on solicitors' involvement in facilitating dubious investment schemes, such as buyer-funded property developments, leasehold interests in hotel or care home rooms, storage units etc. This involvement carries significant civil liability and regulatory risk: claims or complaints by former clients often giving rise to SRA investigations, which lead to more claims and/or make those claims harder to defend.

In August the SRA updated their warning notice on the dangers of 'dubious or questionable' investment schemes and this topic also featured prominently in their Risk Outlook and Thematic Report. The warning notice is essential reading for practitioners and their insurers. It highlights, and this accords with our experience having been instructed on numerous claims and SRA investigations, how the type of asset and scheme is constantly being adapted in order to attract investment, often from naïve/overseas investors. The investors are promised excellent rates of return, security and the confidence that comes from dealing with a solicitor.

These schemes often involve quite complex ownership and security structures. Accordingly, the level of scrutiny and advice expected by the SRA and the Courts is higher than for the standard property transaction. There are many pitfalls here for the unwary – solicitors and their insurers need to continue to focus their efforts on identifying these risks early, so they can be avoided.

What to look out for in 2021

The seeds for the claims of 2021 and beyond have been sown in fertile soil. The combination of the worst recession for 300 years, home working and significant changes in the volume and type of work being undertaken will bring a fresh set of liability challenges for firms and their insurers. Corporate restructuring work gives rise to large but relatively rare claims in less turbulent times – so too work on re-structuring investments and occupational leases. The continuing increase in volume of this work will bring with it more claims in those areas and touch those with books focusing on large and small firms alike.

This is not an area where mistakes of law are the problem; the errors emerge from translating the client's commercial intentions into long and complex documents. Drafting inconsistencies arise between the different constituent transaction documents where different lawyers are responsible for each and errors emerge in transaction documents in relation to the priorities and rights of the parties. When resolving ambiguities and errors by construction the courts still – unhelpfully in some cases – give some weight to a presumption that where a party has been represented by lawyers they will have used the words intended.

Economic turbulence and impaired assets encourage claims across a broad spectrum of areas; found on breaches which might not generate any losses in a rising market. Experience from the 2008 crash suggests claims will emerge relatively quickly and only tail off as limitation starts to bite.

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

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

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

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

LIFE SCIENCES

By Peter Rudd-Clarke, Legal Director

Key developments in 2020

The prevailing narrative of COVID-19 was interrupted on 8 July 2020 when the Independent Medicines and Medical Devices Safety Review (the Review), chaired by Baroness Cumberlege, published its report. The Review examined the response of the health system to concerns raised over pelvic mesh, sodium valproate and hormone pregnancy tests.

The Review concluded that all elements of the healthcare system share in the blame for failures: the NHS, private providers, regulators, professional bodies, manufacturers and policymakers.

The implications for the healthcare system go beyond just the three products that were scrutinised by the Review.

Two recommendations, if adopted, may affect insurers' exposure to the costs associated with life sciences personal injury litigation.

The Review proposed the establishment of a "redress agency", a non-adversarial process to compensate those injured patients. It also proposed a "cost-of-care" scheme to provide payments for the cost of additional needs incurred by patients where products have failed.

Substituting protracted and costly litigation for swifter methods of redress for patients could save on litigation costs. However, industry will be concerned if overall compensation rates grow and the cost is passed back to manufacturers and their insurers.

Once the Government's attention moves on from COVID-19, campaign groups are expected to renew calls for the Government to implement Baroness Cumberlege's findings. Insurers will be watching to see whether the recommendations lead to significant changes in how patients are compensated where life sciences products allegedly fail.

What to look out for in 2021

COVID-19 has thrown new focus on the potential of Artificial Intelligence (AI) to move healthcare into a new era.

Whilst new vaccines have generated the biggest headlines, AI has been used to analyse large-scale data sets to source better treatments for COVID-19. AI has also reduced the amount of time needed to discover, test and receive approval for repurposing existing approved drugs. AI has also been used at an individual patient level for diagnosis and treatment of COVID-19, particularly in reviewing radiology.

As healthcare budgets are squeezed and waiting lists grow following the pandemic, insurers can expect hospital procurement managers in 2021 to place more emphasis on using AI in the search for faster diagnoses and more efficient treatments.

Insurers of AI manufacturers will want to work closely with their clients to reduce the associated risks of litigation. Claims about performance should be supported by clinical evidence. Insurers should check that guidance accompanying a product covers the systems needed to integrate new technology.

More importantly, insurers should scrutinise contracts that allocate liability between parties involved in the supply chain of bringing AI to hospitals. NHSX (the body with responsibility for setting policy concerning the use of technology in the NHS) now advocates for contracts to include more robust indemnities in favour of hospitals, in the event of allegations that AI causes, or contributes, to injury or death in patients.

2021 may prove to be a year in which AI becomes essential to healthcare and offers a cause for optimism across a range of clinical challenges. Insurers should pay close attention to how their clients bring AI products to the market.

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

Peter Rudd-Clarke
Legal Director
T +44 20 3060 6535
peter.rudd-clarke @rpc.co.uk

MARINE AND SHIPPING

By Iain Anderson, Partner, and Lennon Wu, Associate

Key developments from 2020

Winston Churchill said “never let a good crisis go to waste”. Some of the global insurers will be looking to the difficulties of 2020 as the catalyst for marine insurance growth in 2021 and beyond. With or without the restrictions of the pandemic, 2020 was the year when a number of significant risk carriers finally said “enough” and pulled out of the marine insurance sector. Repeated years of unprofitable rates, non-sustainable claim levels and increased volatility led several insurers – some voluntarily and other less so – to decide time was up for their marine book. Sad days indeed.

Those who chose to hang in there may well reap the benefits from 2021 and beyond. The global lockdown meant reduced global trade and reduced vessel activity – and so reduced premium. But with fewer risk carriers, pricing and coverage terms have already begun to harden and the economic dip of 2020 is unlikely to stem the continued growth in seaborne trade. Less activity in 2020 should also mean less claims. Touch wood 2020 will remain lower frequency in terms of catastrophic marine losses. 2021 and beyond could be a more profitable landscape for the marine insurance community. Something to look forward to.

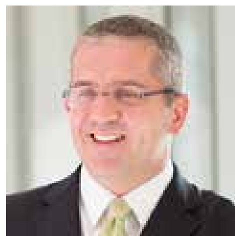
It isn’t without its challenges. It is still early days in the switch over to new sulphur cap rules under IMO 2020 and machinery breakdown remains one of the most significant contributors to marine losses. The shipping industry isn’t exactly lauded for its investment in vessel maintenance and crew. Fire remains a prevalent risk. It is worth remembering that, after the 2018 fire on the *Maersk Honam* (a *“Super-GA”* event), it was estimated that across the near 8,000 containers onboard, some 30% of cargo had no insurance. When Maersk offloaded the cargo in Jebel Ali and invited its owners to come and get it, those without insurance had to stump up a whopping 54% salvage and GA cash security. Bet they wish they’d ticked the insurance box.

We also have an awful lot of oil sitting in floating storage waiting for rising prices. Good news for tanker fleets as day rates go up. A challenge for insurers. Accumulation of risk and very often great difficulty in identifying where the product actually is (and whether it is still there!). 2020 saw yet another oil trader collapse with Hin Leong. Once more the music stopped and there were no chairs. Yes, Mr Insurer of course we know exactly where our oil is and it is definitely our oil and no-one else’s. New Year Resolution #17 – time to re-assess your marine open cover storage terms.

What to look out for in 2021

2021 will probably be remembered as the year when English non-marine insurance law finally got to grips with proximate cause – a concept the marine market has been comfortable with for over a century. There have been a couple of notable decisions. The UK war risks decision in *The Brillante Virtuoso* had everyone in its thrall at the end of 2019. It was a salutary reminder of the residual role that the mortgagee bank plays as a co-assured in many marine property covers. The *Swashplate v Liberty Mutual* cargo decision in Australia reminded us that the Courts still tend to look unkindly on insurers who take technical points as a basis to reject cover. Don’t expect any brownie points.

The end of 2020 didn’t see the marine market in the rudest of good health. But it remains match fit. Like most middle-aged men, the marine sector finally accepted in 2020 that we can all benefit from losing a bit of that extra weight. Hopefully marine insurers will begin 2021 with lower blood pressure, a new wardrobe, and a spring in its step.



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

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

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

MEDIA

By Alex Pollock, Associate

Key developments in 2020

The scope of privacy claims continued to expand. Specifically, the question of whether an individual under criminal investigation has a reasonable expectation of privacy in respect of that investigation was considered by the Court of Appeal. The question was determined in the claimant's favour. The likelihood is that this will result in an increase in privacy claims against the media – not just by individuals under investigation but more generally.

The Court of Appeal's ruling was made in *ZXC v Bloomberg*. ZXC's claim concerned an article which published details of an ongoing criminal investigation into alleged fraud, corruption and bribery and named ZXC as one of the individuals under investigation. At first instance, the Court (following the decision in *Cliff Richard v BBC*) held that the article represented a misuse of the claimant's private information.

The Court of Appeal confirmed that there is, *in general*, a reasonable expectation of privacy in respect of criminal investigations up to the point of charge. This signals a growing acknowledgement by the Courts of the importance of Article 8 privacy rights compared with Article 10 freedom of expression rights.

In reaching this decision, the Court took into account the alleged reputational damage suffered by the claimant when considering whether their Article 8 rights were engaged. This conflation of reputational and privacy rights – traditionally thought to be separate concepts – sets an unwelcome precedent for media organisations, increasing the avenues available for complainants to seek redress for perceived reputational damage.

What to look out for in 2021

The long-awaited (and much delayed) Online Harms Bill is due to be published by the Government in 2021. It is set to introduce a new regulatory framework, underpinned by a statutory, systemic duty of care, aimed at policing user-generated content online.

Following the Online Harms White Paper in April 2019, the Government gave us a flavour of what we can expect from the legislation when it published its initial response to the subsequent public consultation. The duty of care will apply to all online service providers who facilitate the sharing of user-generated content. They will be expected to take reasonable steps to keep their users safe, including by monitoring for, and removing, illegal content. An independent regulator – mooted to be Ofcom – will oversee and enforce compliance with this duty of care and will provide codes of practice for online platforms to abide by.

Several key questions remain unanswered. The scope of the regime has not been defined. The Government has indicated that it could apply to private channels of communications, but the proposed monitoring of such communications raises legitimate concerns as to impact upon users' freedom of expression and privacy rights. Further clarification is also required as to the extent and nature of the obligations placed on online platforms. This includes what (if any) liability will arise if the duty of care is breached. While the duty will be systemic, not individual, online platforms may still be exposed to claims arising out of adverse findings by the regulator.

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

MEDICAL MALPRACTICE

By Natalie Drew, Senior Associate

Key developments in 2020

Handed down on 1 April 2020, the two, separate, Supreme Court judgments on vicarious liability were no April Fool's jokes; in fact, they are a considered response to a serious issue, and have been heartily welcomed by many, including healthcare businesses and their insurers.

In both cases (*Barclays Bank plc v Various Claimants; VM Morrisons Supermarkets plc v Various Claimants*), the Supreme Court overturned the decisions of the Court of Appeal and found that neither the bank nor the supermarket were vicariously liable for the acts of an independent contractor or a disgruntled employee, respectively.

Of course, whilst every case will be determined on its individual facts, the two Supreme Court decisions are helpful in illustrating the general view of the Court in this complicated arena. By refusing to extend the principles of vicarious liability to both independent contractors, or employees acting far outside of the scope of their employment, we, and claimant lawyers have been given a firm steer on this area of law and restored some much-needed boundaries, which will be of great reassurance to businesses and their insurers.

In the healthcare arena, it is encouraging to see the Court give a strong endorsement of the principle that private healthcare providers are not vicariously liable for the activity of independent contractors, such as those with practising privileges. However, care needs to be taken by clinics and healthcare providers as to how they contract with and regulate such individuals – for example, limiting the level of 'control' that is exerted over the contractor, and considering for whose benefit the business is being conducted.

What to look out for in 2021

Whilst the COVID-19 pandemic dominated 2020 (personally, professionally, and legally), we are likely to see more significant repercussions in the medico-legal sphere well into 2021.

Firstly, and perhaps most obviously, we may start to see claims being brought against doctors, clinicians and hospitals in relation to COVID-19 directly; whether that be the treatment received once a patient was diagnosed, or admitted to hospital, or in relation to testing and follow up; it seems almost inevitable that claims will start to emerge.

In addition to claims arising out of the treatment (or perhaps even lack of treatment) of COVID-19 itself, we anticipate seeing a significant increase in claims arising out of the pandemic more broadly. For example, we might find ourselves defending claims against GPs for missing 'soft signs' of physical or mental illness as result of the patient undergoing an online, and remote, consultation, as opposed to a face to face one. Or perhaps we will see claims in relation to the missed, or delayed, diagnosis of other diseases (including, for example, cancer), due to a resourcing focus on the pandemic – at the detriment of other medical care.

Of course, this will cause additional concerns to our healthcare clinicians, providers, and insurers, but it's our view that these claims will likely be defensible (although, of course, matters will be considered on a case by case basis), and, in preparation of any such claims, we would encourage providers to ensure that all decisions, treatments, and reasons for any delays are documented carefully, specifically, and in full consultation with the patient.

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

MISCELLANEOUS PROFESSIONAL INDEMNITY

By Georgina Haynes, Associate

Key developments in 2020

Miscellaneous professional indemnity remains a difficult category in which to identify sector wide trends. Whilst it has become a class of business in its own right, there remain lots of different areas to it, each of which has its own particular trend.

In our last review, we noted that claims against Approved Inspectors may continue to increase in light of (i) the Hackitt Review following the Grenfell tragedy; and (ii) insurers increased desire to target recovery claims from sub-contractors.

However, largely as a result of the decision in *Herons Court v NHBC Building Control Services Limited*, which was supportive to the arguments being put forward by Approved Inspectors, and the consequent difficulties that claimants have in particularising exactly what duty the Approved Inspectors breached, and how this caused loss, we have seen the number of claims against Approved Inspectors dwindle in 2020.

We expect that this trend will continue, following the publication of a draft Building Safety Bill by the Ministry of Housing, Communities & Local Government in July 2020. The draft Bill contains a number of major changes, including the transfer of Approved Inspectors' functions to registered building control approvers. If the Bill is passed, builders and developers will no longer be able to choose their own building control body.

What to look out for in 2021

Predictions for next year are obviously heavily influenced by what has happened during the COVID-19 pandemic. We have highlighted two areas of business, that would fall within the "Miscellaneous" category that we believe risk seeing an increase in claims during 2021: HR consultants and IT professionals.

During the COVID-19 pandemic, HR consultants have been busy. They have been involved in advising on/administering furlough schemes, redundancies, opening offices/premises, health and well-being issues and discrimination claims.

They have had to consider whether employees have a factor which puts them at risk in respect of COVID-19 (age, ethnicity, caring responsibilities etc.) This includes considering whether any of these factors fall within the definition of protected characteristics within the Equality Act 2010. If so, HR consultants may be exposed to claims for aggravated damages in relation to any discrimination claims.

HR consultants have duties in relation to the employees' set up at work – whether at home or in the office. Employees returning to the workplace will need to have COVID-19 appropriate safeguards and protections in place. Those working at home will need to receive "reasonable adjustments", including that they are being looked after in relation to health and wellbeing and that that have an appropriate home working set up.

HR consultants could, therefore, face claims from employers and/or directly from employees should problems arise in relation to any of the above issues.

IT professionals have also been affected by the pandemic. The risks they face relate to IT infrastructure becoming even more business-critical during 2020. An effective IT infrastructure has been critical for a huge number of businesses to function effectively. This has led to increased demand for IT services. IT professionals have therefore become more in demand. However, with that comes a risk that where there are problems with delays for production of IT systems (particularly with time of the essence provisions in contracts), we could see less testing of systems before being put in place and, potentially, an increase in claims.

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

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

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

PENSIONS

By George Smith, Senior Associate

Key developments in 2020

In last year's Annual Insurance Review we highlighted the significant challenges faced by Self-Invested Personal Pension (SIPP) operators as a key development in 2019.

Unsurprisingly, 2020 saw SIPP operators remain centre stage. In particular, in May 2020 the High Court handed down the long-awaited judgment in the case of *Adams v Carey*, which considered the duties and obligations of SIPP operators around due diligence in the context of a civil claim. The decision represented a rare win for SIPP operators as the Court found that the starting point for assessing a SIPP operator's compliance with the Financial Conduct Authority's Conduct of Business Rules required consideration of its contractual arrangements with its client. This more restricted view of SIPP operator liabilities was welcomed in the industry, not least as it contrasted sharply with the much more expansive view of SIPP operator duties taken by the Financial Ombudsman Service (FOS) under its jurisdiction to assess complaints on the basis of what is 'fair and reasonable'. For the moment the FOS therefore continues to represent a far more claimant-friendly forum in respect of SIPP operator due diligence issues.

There remain significant areas of uncertainly for SIPP operators, despite the *Carey* decision. We understand that the decision has been appealed, and it remains to be seen whether the Court of Appeal will uphold the High Court's analysis and conclusions. In addition, *Carey* notably did not address the issue of a SIPP operator's common law duty of care, and the standards to be expected of a reasonably competent SIPP operator. There therefore remains scope for further litigation to address this important issue in the future.

Meanwhile, FOS complaints against SIPP operators have, unsurprisingly, remained at a high level, with around 2,500 new complaints in the 12 months to September 2020. However, complaint numbers are now on a downward trend once again, having peaked at around 4,000 complaints in 2018/19. In any event, the SIPP industry appears likely to keep making headlines for the foreseeable future.

Separately, in November 2020 the High Court handed down a further important judgment on guaranteed minimum pensions (GMPs) in the *Lloyds Banking Group* case. In the original judgment in 2018 the Court held that trustees of DB schemes had a duty to equalise pension benefits for the effect of GMPs accrued between 1990 and 1997 but left a lot of practical questions unanswered around how schemes should go about this. The Court's latest judgment gives further guidance for trustees considering the treatment of members who had previously transferred benefits to other schemes, which would not at the time have been calculated on a basis taking into account GMP equalisation. The Court's judgment provided, in essence, that trustees cannot ignore historic transfers involving GMPs but need to take proactive steps to address these. This will leave many scheme trustees wrestling with the practical difficulties of undertaking such an exercise.

What to look out for in 2021

For many years there has been a stark divide in UK pensions provision between defined benefit (DB) pension benefits and defined contribution (DC) benefits. DB schemes have generally offered high levels of security and generous benefits to members but in many cases have proven to be unsustainably expensive for sponsoring employers. In contrast, while DC schemes are far more affordable for employers, they place all of the pension investment risk upon the individual member, who may have limited ability to bear this risk and little idea of what their pension will be worth at retirement.

In order to bridge this gap, the Pension Schemes Bill, now under consideration in Parliament, proposes the creation of a third type of pension benefit. Collective Defined Contribution (CDC) schemes will combine elements of both DB and DC schemes, in an effort to create hybrid schemes that are affordable to employers while placing less investment risk upon individual members. Unlike a traditional DC scheme, money would be paid by the employer and member into a collective savings pot, containing all members' funds, rather than into a savings pot specific to the individual member. The intention is that this larger pooled investment pot would allow for more stability of investment return over time. The recent emergence of Master Trusts has already demonstrated some of the benefits of scale. CDC schemes would likely offer a target income at retirement, rather than a guaranteed income as with DB schemes, with the potential for the actual pension to be higher or lower than the target depending on investment performance.

If the proposals become law, at it appears they may well do in 2021, they are likely to represent a significant shake-up of the UK pensions industry. CDC schemes may accelerate the long-term general decline of DB schemes and may introduce new regulatory requirements, for example around CDC scheme members taking advice before transferring or accessing pensions benefits. CDC schemes are also likely to be subject to ongoing scrutiny by the Pensions Regulator, which may be granted additional powers to regulate these schemes. As ever, any such new regulatory requirements have the potential to lead to claims, complaints and regulatory interventions in the future.

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

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

POLITICAL RISK AND TRADE CREDIT

By Paul Baker, Legal Counsel

Key developments in 2020

2020 has been dominated by a subject that features heavily in this Annual Insurance Review – COVID-19. While not experiencing the volume of claims seen in other markets, the Trade Credit market has not been immune to the impact of the global pandemic. The lack of supply/demand during widespread lockdowns and the impact of trade logistics have put Trade Credit underwriters and claims teams on constant alert.

Trade Credit policies contain a variety of protections that enable suppliers, buyers and financial institutions (with the support of underwriters) to reschedule payment obligations. We have seen many such arrangements put in place over the last year with the hope that the impacts of the global pandemic will be time-limited and that companies will bounce back financially once global restrictions are lifted.

But this action has not been limited to private companies. Measures instituted by governments around the world (such as grants and COVID-19-recovery loans) appear, in part, to have succeeded in alleviating the initial shock on many companies. However, this is not to say that the global trading environment was in rude health before the onset of the pandemic. For example, traders were already facing significant pressure with the continued depression in the global oil price. It might be that these government actions, including interventions such as temporary suspensions on the requirements of companies to file for insolvency, have had the effect of postponing difficulties that might, in any event, have been inevitable.

Clearly these measures cannot last forever as private companies look to their own balance sheets and governments yield to the fiscal pressures associated with providing this unprecedented level of

support. While at the time of writing vaccines are beginning to be distributed, a global vaccination program will clearly take significant time, and getting back to an approximation of the "pre COVID normal" even more so.

Therefore, one cannot rule out the possibility of significant claims hitting the market in 2021 even if the vaccine rollout has been successful. To a degree the Trade Credit/Trade Finance market is holding its collective breath and hoping for the best, and crystal ball gazing is likely to be of little comfort.

What to look out for in 2021

From a UK/EU perspective, the Brexit endgame appears to be around the corner. We commented in the 2019 Annual Insurance Review that a year to reach a free trade deal was 'incredibly tight'. This appears to have been an accurate pronouncement given that discussions are going to the wire. Trade disruption seems inevitable at this point regardless of whether a free-trade deal, or any nature, is reached. While the pandemic has shifted global focus, the results of these negotiations will no doubt have an impact on a significant volume of UK and EU-domiciled companies and the fall-out could well find its way to the Trade Credit market.

Brexit also gives rise to considerations of global politics. In the 2019 version of this chapter we highlighted how traditional alliances had shifted across 2019, and the potential difficulties this presented for political risk underwriters. While the US-election may have the effect of calming certain geo-political tensions (such as with Iran and China, though perhaps not as between the US and Russia), the impact of COVID-19 may bring with it greater challenges in the political risk market.

The drivers for protectionism may well be exacerbated by the global recovery from the pandemic. Nations have spent many billions on measures to safeguard populations and economies and the extent to which tax rises and/or domestic cuts are required in order to pay the resulting bill could have a significant impact on domestic policy towards foreign companies.

Tax breaks and subsidies provided to foreign investors, often necessary to make an investment attractive, may no longer be palatable when a domestic population is faced with increased costs and potentially decreased standards of living. Investors may well argue that the removal of such measures is a political risk attracting cover under their CEBD policy. Similarly, governments with a precarious hold on power may seek easy and quick 'wins' in order to shore up support. Foreign-owned assets may represent easy targets in these circumstances – again giving investors cause to examine their CEND cover.

Determining cover for political risk claims is often a complex exercise requiring underwriters to unpick the fact pattern and determine what has actually occurred. Current pressures may add to this; investors determining that a foreign project has not quite developed as planned may see a political risk policy as an escape route. It is critical that full enquiries are undertaken during the adjustment process and consideration is given to whether the loss claimed actually fits within the contours of policy coverage, with the latter often requiring consideration of not just domestic law, but international law.

While the world has been united to a degree during 2020, the recovery may not be as congenial.

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

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

POWER

By Will Jones, Senior Associate

Key developments in 2020

In a (alpha-numeric) word: 'COVID-19'.

Although it is too early to quantify the extent of COVID-19's impact on power generation claims, it is likely that the pandemic has negatively affected both the likelihood of claims arising in respect of power generation facilities and the resultant quantum of those claims.

The increased risk of loss arises, in part, as a result of limitations on the physical attendance of operational personnel. COVID-19 has created resourcing challenges that pose a risk to the safe operation and maintenance of power generation facilities. In addition to the prospect of increased sick-leave due to the virus, operators are also faced with personnel in quarantine, self-isolation, and lockdown. Facilities are also more at risk of going into lay-up (due to personnel shortages, supply chain issues, fall in demand, and/or government restrictions) and will therefore be faced with the increased risks associated with reactivation – particularly in circumstances where adequate/normal maintenance has not been possible.

As concerns the quantum of these claims, the primary contributor to the likely increase in cost is delay. The restrictions on movement that have arisen in response to COVID-19 have made it challenging to get surveyors, adjusters, experts, and repair personnel on site promptly following a loss. Whereas previously a response team could be assembled and transported to a facility within days (if not hours) of loss – it can now take weeks. In some cases, there is no choice but to conduct inspections by video – which is suboptimal. Delays in claim response also arise in the context of supply chain interruption and the provision of replacement parts. The culmination of these delays may result in the erosion of waiting periods – and larger claims exposures for the power market.

What to look out for in 2021

On 5 November 2020, (then) Presidential nominee, Joe Biden tweeted *"Today, the Trump administration officially left the Paris Climate Agreement. And in exactly 77 days, a Biden administration will rejoin it"*. A shift by the United States towards proactive engagement with climate change and carbon emissions chimes with that of other nations – including the UK – with Boris Johnson announcing on 18 November 2020 a new 10-point plan for a green industrial revolution.

Aside from continued COVID-19 disruption, the next 12-months will likely see a renewed global engagement with the climate crisis. This engagement will include a deepening focus on regulation, governance, and transparency with regards to the management of power generation companies (and those companies that facilitate the operation of power generation companies).

Consumers and stakeholders (such as investors, banks, shareholders etc.) are increasingly interested in the environmental credentials of companies with whom they engage. Aside from immediate concerns about the wellbeing of our planet, stakeholders are also conscious that the future financial performance of companies will suffer if they fail to adapt to the changing environmental landscape (be that – physical, political, legal, societal, or economic).

A term that will likely develop in prominence during 2021 is Environmental, Social, and Governance (ESG). ESG is means of evaluating a company's corporate behaviour including in the context of environmental issues. The intent behind ESG is to enhance the accountability of companies in respect of their environmental credentials – through the attribution of ratings. The hope is that power generation companies will seek to enhance their ESG in order to entice investment and broader engagement from stakeholders and consumers alike.

We will be interested to note the extent to which ESG becomes an underwriting consideration when writing power generation business – both from a pricing/risk-management perspective but also in terms of the reputational risks associated with insuring companies with low-rated ESG.

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

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

Summer Montague
Partner
T +65 6422 3042
summer.montague@rpc.com.sg

PROCEDURE, DAMAGES AND COSTS

By Aimee Talbot, Senior Associate

Key developments in 2020

The disclosure pilot continues to be one of the most controversial recent developments that litigators are required to overcome in all Business & Property Courts cases. Following consideration of a report prepared by the official monitor of the pilot (Professor Mulheron), the Disclosure Working Group recommended that the pilot (slightly amended) be extended for another year to the end of 2021. The Civil Procedure Rules Committee will consider these recommendations at the next opportunity. The proposed amendments are aimed at simplifying the Disclosure Review Document (DRD) and addressing two key concerns expressed by practitioners; namely the lack of clarity over when known adverse documents must be disclosed and the requirement to send document preservation notices to former employees (now only necessary if there are reasonable grounds for believing they have any documents).

The proposed changes to the rules make clear that adverse documents need not be disclosed at the pleadings stage (with the parties' initial disclosure), but must be disclosed no later than the deadline for giving extended disclosure (if ordered) or within 60 days of the first case management conference. Whilst its aims are laudable, the disclosure pilot is easy to criticise. Even with the proposed modifications, the DRD is exceptionally laborious to complete in complex cases and unnecessary in simpler ones. The process of complying with the pilot generates very substantial costs (some practitioners report costs three times those of pre-pilot disclosure costs) without a commensurate benefit in terms of reducing the amount of documentation to be disclosed or streamlining the process. With adverse documents still not required to be disclosed until the traditional disclosure stage, it is difficult to see how the pilot will facilitate earlier settlement and, when cases do settle at the disclosure stage, they will do so with higher costs on both sides.

What to look out for in 2021

The COVID-19 pandemic continues to impact the conduct of civil litigation, as it does many areas of our lives. Practitioners and the courts have adapted quickly and ably to the constraints of the lockdowns and other national and local restrictions. A new practice direction 51ZA enabled parties to agree extensions up to 56 days to deadlines without the court's permission, but this expired on 30 October 2020 and, it appears, will not be extended; the expectation being that practitioners should attempt to return to normality as far as possible.

The majority of court hearings continue to take place by video or telephone and we can expect this practice to continue into 2021. Even if it is possible for parties to return to in-person hearings for all cases and issues, we anticipate that expectations will have shifted so that in-person hearings are no longer the default. Although video hearings can be more tiring and are not suitable for determining all issues, they do present an attractive alternative, for example, resulting in substantial savings in travel time and costs for lawyers and litigants based in the regions.

Another unexpected benefit of adapting to remote working and remote hearing is the rise of the electronic bundle. Although many of us may prefer to work from hard copy where available, well-made electronic bundles can be simpler to navigate and result in substantial costs savings. We anticipate that these practices will continue well into 2021 and may permanently reform the way that many of us litigate.

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

PRODUCT LIABILITY

By Peter Rudd-Clarke, Legal Director

Key developments in 2020

In 2020, a final judgment was at last handed down in the long running Seroxat litigation. The litigation began in 2007. The claimants alleged that Seroxat, an anti-depressant manufactured by GSK, was defective.

Whilst the Seroxat litigation rumbled on, two of the most important product liability judgments in recent years were handed down: *Wilkes v DePuy* [2016] and *Gee v DePuy* [2018]. In both cases, the Court departed from previous judgments and stated that a flexible, holistic, approach should be used in determining whether products are defective under the Consumer Protection Act 1987. This allows defendant manufacturers to argue that the benefits of a product should be considered alongside the risks.

In the Seroxat litigation, GSK cited *DePuy* to argue that the claims were legally untenable.

In her 3 July 2020 judgment in GSK's favour (*Bailey and others v GlaxoSmithKline* [2020]), Lambert J stated that the decision in *DePuy* should have made it clear to the claimants in 2018 that their case would not succeed. Lambert J's judgment echoed a Court of Appeal decision on an earlier case management point in the Seroxat litigation, where the Court had also endorsed the approach in *DePuy*.

This trio of judgments (the Seroxat litigation, *DePuy* and *Wilkes*) provide insurers and manufacturers with grounds to deploy a risk/benefit analysis when defending allegations that products are defective. Accordingly, the Court will assess whether a risk of injury is outweighed by the benefits of a product. This can lead to a judgment in the favour of manufacturers, even where side-effects are caused by the product.

Insurers have welcomed this latest decision as an important development in reducing the legal risk of insuring consumer products, particularly medical devices and pharmaceuticals.

What to look out for in 2021

2021 will be the year in which the Brexit transition period is finally over and attention can switch to whether, and how, the UK's lawmakers adapt the product safety regime.

Up until now, the principal UK laws that deal with product safety have been underpinned by EU Directives, including the Product Liability Directive (85/374/EEC), the General Product Safety Directive (2001/95/EC) and sector-specific EU directives, such as those relating to food and drink, toys, medicinal products, medical devices and cosmetics.

EU law will continue to apply in UK law only insofar as they are not modified or revoked under the European Union (Withdrawal) Act 2018.

Government guidance issued towards the end of 2020 dealt with how companies must place goods on the market from 1 January 2020. Certain categories of product will need to bear a new UK Conformity Assessment (UKCA) mark. This paves the way for standards in the UK and EU to diverge.

Insurers will want to see in which direction the UK goes during 2021 and beyond. The Government could avoid reforming the law relating to product safety, so as to reduce the risk of creating friction in its future trading relationship with the EU. Alternatively, the Government may see an advantage in loosening regulations in order to boost innovation and reduce the cost of manufacturing. This approach may seem appealing to support the economy following a year in which COVID-19 pushed the economy into recession. If the latter approach is adopted, insurers may want to consider scrutinising products in more detail, before offering insurance, or else finding comfort in insuring products that are also compliant with the EU regime.

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

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

PROPERTY AND BUSINESS INTERRUPTION

By James Adams, Senior Associate

Key developments in 2020

July 2020 saw the trial of a claim by the FCA against eight insurers involving COVID-19-related business interruption claims. This was the first ever test case under the Financial Market Test Case Scheme. Whilst considering only selected wordings, the aim was to provide guidance of general application.

The test case considered clauses providing business interruption cover for (i) notifiable/infectious diseases ("disease clauses"); (ii) prevention of access to/public authority closure of insured premises ("POA clauses"); and/or (iii) a hybrid form of the two. Issues of causation and application of trends adjustment clauses were also considered.

The Court individually analysed each wording. Careful consideration of the judgment is therefore required when assessing its relevance to other wordings. The disease clauses were triggered by the presence of a person with COVID-19 within the vicinity or a geographical radius, between one and 25 miles. The Court held that they would provide cover for the effects of the pandemic, save for those wordings in which factors such as a reference to there being an "event" indicated an intent to provide local-only cover. Hybrid clauses were viewed similarly.

The Court's findings were more mixed in relation to POA clauses, reflecting the variety of wordings used by the insurers. By way of example, clauses requiring an emergency in the vicinity were found to indicate an intention to cover local-only emergencies. POA clauses requiring an order to close premises, or similar, could be triggered by a legal requirement such as the Regulations introduced the nationwide lockdown in March, but were not triggered by the Government advice which preceded it.

Insurers argued that a "but for" test for causation applied (eg business interruption losses did not occur "but for" COVID-19 within the area specified in certain disease clauses because they would have occurred in any event as a result of the wider effects of the nationwide epidemic). The Court expressed doubt about, but ultimately distinguished, precedent as to the application of a "but for" test. Furthermore, where the disease, POA or hybrid clause was triggered by COVID-19 or a composite peril of which COVID-19 was part, the "but for" test for causation or adjustment for trends would not carve out the wider effects of the pandemic.

An expedited hearing of a "leapfrog" appeal directly from the High Court to the Supreme Court in the test case took place in November 2020, with the judgment expected around the turn of the year. Many (but not all) aspects of the High Court's decision will be the subject of the appeal.

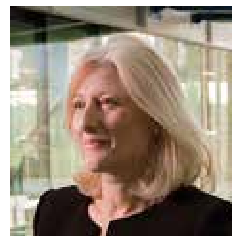
As well as addressing issues arising on particular wordings, the appeal may help answer unresolved questions in connection with causation, including as regards the Court's negative remarks regarding a case in which the "but for" test was previously applied (*Orient Express Hotels Ltd v Assicurazioni Generali SpA* [2010]). This will be of interest not only in relation to COVID-19 claims, but also cases involving wide area damage.

What to look out for in 2021

Further litigation regarding the interpretation and application of Disease, Hybrid and POA clauses is expected. The Commercial Court has set up a dedicated team of Judges headed by Mr Justice Butcher to deal with these. This litigation is expected to expand to include reinsurance issues particularly in relation to aggregation and also binder disputes.

More generally, COVID-19 has brought to the fore a number of interconnected issues that have been simmering for the past few years: the need to review the wording of BI wordings first highlighted by the IIL/CILA Wording Review in 2012, the question of wide area damage and also the issue of insuring systemic risk more generally. As such, we expect to see widescale review and re-writing of non-damage BI policy wordings with emphasis on the limit wording and market discussions about appropriate risk solutions for systemic risk more broadly.

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



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

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

REGULATORY

By Lauren Murphy, Associate

Key developments in 2020

While COVID-19 dominated the headlines in 2020 and the financial services regulators were forced to postpone some activities that were on the agenda, the Financial Conduct Authority (FCA) continued to focus on fair value.

Building on its interim report published in October 2019, the FCA published its 'General insurance pricing practices' final report in September 2020, setting out its final findings on how the home and motor insurance markets were working and its proposed remedies to address the harms it identified.

In essence, the FCA's view was that general insurance markets do not deliver good outcomes for all customers. In particular, it found:

- evidence of firms gradually increasing the price to customers who renew with them year on year (known as price walking);
- that when setting a price, most firms take into account the likelihood that a customer will switch supplier at their next renewal or in the future; and
- that some firms used practices to raise barriers to switching.

The proposed remedies are more prescriptive than its typical 'outcome' focused guidelines and arguably signal a more interventionist approach. Perhaps the most striking aspect was its proposed pricing remedy, that would require firms to offer renewal prices for retail home and motor products that are no higher than the equivalent new business prices available through the same sales channel. Although designed to improve consumer outcomes, this and the other measures proposed will likely have significant implications for the market, not least as insurers and distributors consider and implement required operational changes before new rules come into effect as early as the summer of next year.

The FCA also published its 'General Insurance value measures reporting and publication' policy statement in September 2020. This amends the FCA's:

- Supervision manual, requiring insurers and insurance intermediaries to report data on value measures to the FCA; and
- Product Intervention and Product Governance sourcebook, requiring firms to ensure that their products offer sufficiently good value to customers.

Firms will need to provide value measures data, including claims frequencies, claims acceptance rates, average claims pay-out and claims complaints to the FCA and, on the product governance side, they will (among other things) be required to consider value measures data when monitoring products and consider whether their products are likely to offer sufficiently good value to customers in their target market. These changes may also be operationally significant in terms of collating, analysing and formatting such data for provision to the FCA.

What to look out for in 2021

Expect continued focus on fair value, particularly given the economic uncertainties that have been exacerbated by COVID-19. The FCA noted in its 20/21 Business Plan that, given the digitisation of firms owing to COVID-19, it expects digital markets to deliver fair value and firms to use "data and algorithms ethically to price and have adequate controls to prevent undue bias or discrimination."

Somewhat linked to this, the FCA will be further focusing on operational resilience. Following the 'Building operational resilience' consultation papers published in December 2019, the FCA's proposals expects firms to 'take ownership' of their operational resilience and 'prioritise plans and investments based on their public interest impact'.

Firms will be working to identify their important business services by analysing how disruption to such services could cause harm to their customers or market integrity. Whilst this will likely have been brought into focus even more by coronavirus, firms should ensure that they are setting tolerances for disruption and plans to ensure that they can continue to deliver important business services during severe but plausible scenarios.

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

Andrew Carpenter
Partner
T +852 2216 7140
andrew.carpenter@rpc.com.hk

RESTRUCTURING AND INSOLVENCY

By Will Beck, Of Counsel

Key developments in 2020

The Corporate Insolvency and Governance Act 2020 came into force on 26 June 2020. The changes introduced by that Act were some of the most significant made to English insolvency law for decades.

Under the Act a number of new measures intended to relieve the financial burden on businesses during the COVID-19 outbreak and to increase their chances of survival have been put in place.

These measures include the introduction of two new restructuring processes:

1. a stand-alone moratorium intended to give companies breathing space from creditors; and
2. a restructuring plan procedure. The restructuring plan is similar to a scheme of arrangement but, unlike a scheme, allows for the possibility of cross-class cram-down of creditors. Insurance companies are not eligible to use the moratorium process.

New measures were also introduced to prevent suppliers of goods and services from terminating their contracts with a customer because that customer has entered into an insolvency process. Those provisions do not affect the supply of insurance services.

The three new processes highlighted above are all permanent changes to English insolvency law. In addition to these changes, the Act also introduced a number of temporary measures. These included the suspension of a creditor's ability to bring a winding-up petition or statutory demand where the debtor's inability to pay was due to COVID-19. That suspension applies until 31 December 2020 (unless extended further).

The Act also sought to address the position of directors by exempting them from liability for wrongful trading for any worsening of the company's financial position between 1 March 2020 and 30 September 2020. The suspension for wrongful trading did not apply to directors of insurance companies.

What to look out for in 2021

As at September 2020, the number of company and individual insolvencies remained low in comparison with the figures for the same month in 2019. In the context of the COVID-19 pandemic this may appear surprising. However, the UK government's far-reaching fiscal and legal support for struggling businesses appears (at least in the short term) to have enabled large parts of the economy to weather the storm.

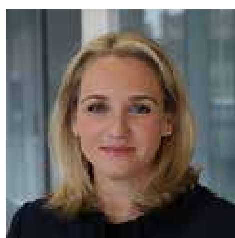
UK government support measures include the provision of loan facilities and credit support schemes, the furlough scheme and the temporary easing measures introduced by the Corporate Insolvency and Governance Act 2020.

It is widely expected that, upon the expiry of these measures, it is likely there will be a significant increase in the number of businesses and individuals facing financial difficulty and potentially insolvency.

The expected upturn in insolvencies in 2021 is likely to have a significant impact upon the insurance industry. In particular, this, together with the impact of COVID-19, may well lead to a considerable increase in insurance claims in areas such as business interruption, events insurance and D&O insurance, all of which are at risk of being engaged when businesses face financial distress and/or enter insolvency.

Many company directors may find themselves exposed to insolvency-related claims. The exemption excusing directors from liability for wrongful trading expired on 30 September 2020. Furthermore, even whilst this exemption was in place, it did not apply to any other claims that could still be brought against the directors (such as claims for breach of duty, misfeasance etc). There is also a risk that under the false belief that directors would be insulated from all claims during the COVID-19 pandemic, that the incidence of challengeable conduct may have increased.

Whilst, for some companies, the temporary measures introduced by the Government may have helped rescue viable businesses, for other weaker companies it may have just delayed the inevitable during which time they may have incurred further liabilities and potential further exposure for their directors and ultimately their D&O insurers.



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

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

Andrew Carpenter
Partner
T +852 2216 7140
andrew.carpenter@rpc.com.hk

SURVEYORS

By Felicity Strong, Senior Associate

Key developments in 2020

The judgment in *Hart v Large* provides important guidance on the scope of a surveyor's duty when advising prospective purchasers, as well as the way in which the Court may assess damages. The surveyor, Mr Large, advised that an RICS Homebuyer inspection and report would be sufficient. His report highlighted some drainage, pipe and guttering problems, but made no mention of the serious water ingress and damp issues that came to light following the claimants' purchase of the property, which required extensive remedial works. The claimants brought a claim in negligence against Mr Large for failure to:

1. recommend a full building survey;
2. identify the significant damp problems; and
3. recommend seeking an Architect's Certificate.

The Court held that Mr Large should have recommended further investigation and found that, had he done so, the claimants would not have proceeded to buy the property. Instead of limiting recoverable damages to the difference between the property's value with and without defects, the Court ordered Mr Large to pay the costs of the remedial works required to remedy all defects that would have been identified if he had properly advised the claimants. The Court also commented that surveyors should keep their advice under continuing review, including whether to recommend a full building survey. A key takeaway from the judgment is the importance of surveyors reporting not only on what they have inspected, but also on what they have *not* inspected, with an explanation as to why, in order to protect their position in the event that unexpected issues arise.

What to look out for in 2021

We previously reported on the EWS1 Form, launched in December 2019, which was originally intended only to be used for buildings over 18m in height. The proposed changes to the Regulatory Reform (Fire Safety) Order (the FSO), due to be introduced in 2021 will create an obligation for owners of all multi-storey, multi-occupancy residential buildings to carry out a fire risk assessment on any external wall system (EWS) on the building, irrespective of its height.

Further, in January 2020 MHCLG released an advice note which combined all advice notes released to address fire safety issues identified since the Grenfell Fire. The Combined Advice Note makes it clear that owners of multi-floor, multi-occupancy residential buildings should not wait for the changes to the FSO before taking action; they should obtain a risk assessment of the EWS now. As a result, many mortgage lenders and valuers have been requesting an assessment by way of the EWS1 Form of buildings under 18m before they will make a loan or value a property for the purposes of secured lending. This has caused a severe logjam due to the lack of people with sufficient expertise to complete the form.

The RICS will be launching a training programme in 2021 to help address this lack of capacity and will also issue a Guidance Note about when a building is likely to fall within the scope of the EWS1 form, to avoid valuers requesting the form unnecessarily. It is to be hoped that both these measures should reduce the logjam in the UK property market.

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

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

TECHNOLOGY

By Ridvan Canbilen, Associate

Key developments in 2020

The ICO continues to demonstrate its willingness to impose heavy fines (theoretically up to €20 million or 4% of a company's global turnover, whichever is higher) for data breaches but has also shown moderation, having reduced intended fines of £183 million to £20 million and from £99.2 million to £18.4 million on British Airways and Marriott Hotels respectively.

Further, the ICO has for the first time provided insight into its approach to regulation and enforcement action, including fines, by way of draft statutory guidance in the UK. This, along with the Regulatory Action Policy (which is under review) will shape the way the ICO will operate. Most notably, in the context of ongoing COVID-19 concerns, is the inclusion in the criteria that the ICO must consider the financial means of the fined entity as well as any economic impact on the sector as a whole, or related regulatory impact of the proposed penalty beyond the organisation or individuals which the penalty is imposed upon. Whilst there is no confirmation that this was the main reason for the reduction of the fine on British Airways and Marriott Hotels, it remains to be seen what the interplay between the effects of COVID and the final version of the statutory guidance will mean for fines and enforcement action going into 2021.

The long awaited decision in *WM Morrison Supermarkets plc v Various Claimants* involving an ex-employee of the supermarket chain maliciously uploading payroll data to a file sharing website and sharing it with various newspapers came as a relief to businesses as the Supreme Court reaffirmed that wrongful disclosure of the data in that manner was held not to be so closely connected with the employee's job as senior IT auditor that it could fairly and properly be regarded as made by the employee while acting in the ordinary course of his employment.

Data subject litigation following a breach is also growing along with the proliferation of claimant law firms and litigation funders suggests that this is a growing risk for corporates both financially and reputationally.

What to look out for in 2021

The UK Supreme Court's decision in the case of *Lloyd v Google* early next year will be seminal in confirming whether opt-out class action is to be permitted for mass data privacy claims under Civil Procedure Rule 19.6 as opposed to Group Litigation Orders (GLOs). The case stems from a "workaround" whereby Google was able to bypass default privacy settings in iPhones to sell information about the user to advertisers.

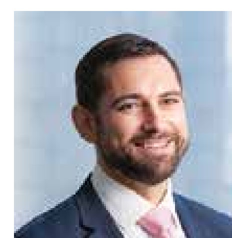
The backdrop shows a slow but steady progress towards establishing a class action regime in England and Wales: the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 came into force on 31 July 2020 and allows group proceedings to be brought in Scotland for all claims and the Consumer Rights Act 2015 permits opt-out collective redress for breaches of competition law. Post-Brexit, if the English system is to remain relevant and at the forefront of legal developments, there appears to be some pressure to permit class actions even if not on the wholesale basis adopted in Scotland.

The wider context is that if victims of mass data incidents have no means of redress as part of a larger group, then, because these claims are typically low value in each individual case, (in the absence of demonstrable and specific financial loss or distress), it is unlikely that victims will go to the effort of seeking compensation.

Whatever the outcome, it will be interesting to observe how the insurance market reacts to the judgment.

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

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



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

WARRANTY AND INDEMNITY

By Amisha Jobanputra, Senior Associate

Key developments in 2020

Before the escalation of the COVID-19 pandemic, 2019 and early 2020 saw a steady increase in the demand for and usage of warranty and indemnity (W&I) insurance, particularly on high-value acquisitions.

COVID-19 inevitably caused a significant decline in the number of mergers and acquisitions (M&A) transactions globally, thereby reducing the demand for W&I insurance, at least in the first half of 2020. For those transactions proceeding with the benefit of W&I insurance, COVID-19 has had a number of effects on underwriting, which we discuss below.

Aside from impacting deal flow, COVID-19 has also impacted the type of M&A activity that is currently taking place, with a marked rise in the number of distressed M&A transactions. This has in turn increased demand for synthetic W&I policies, in which warranties are stapled to the policy itself and negotiated directly with the insurer (rather than being set out in a share purchase agreement). Such policies are often used where sellers, the target management team or insolvency practitioners are reluctant or unable to provide any warranties.

From a claims perspective, both the frequency and severity of claims continue to increase. This is certainly reflected in the uptick of W&I claims we were instructed on in 2019-2020. Some underwriters have estimated that a claim is now made on 1 in every 5 policies, with larger claims (exceeding US$10 million) making up an increasing number of total claims. Breaches of tax, material contract and financial statements warranties continue to represent the main areas of breach. To date, COVID-19 does not appear to have had an identifiable impact on claims.

What to look out for in 2021

COVID-19 has already had an impact on underwriting and will continue to do so over the course of 2021.

Underwriters are likely to place increased weight on due diligence and particularly on areas impacted by COVID-19 such as financial statements; the treatment of employees; supply contracts; banking covenants and COVID-19 specific measures (such as government support obtained by target companies). Underwriters will also be keen to understand how COVID-19 has impacted target company financials and the purchase price.

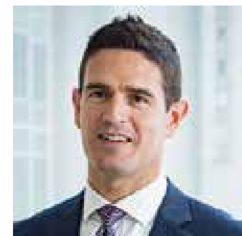
On policy wordings, the evolution of COVID-19 related exclusions will also prove to be an important feature of W&I insurance in 2021. While a large number of underwriters adopted "blanket" COVID-19 exclusions at the start of the pandemic, a number of underwriters are now adopting a more nuanced approach, whereby a COVID-19 related exclusion has been narrowed down to apply to certain areas of concern only. As the pandemic evolves, we expect to see the wording of COVID-19 related exclusions to continue to develop too.

Although the initial reduction in M&A deal flow arguably led to some downward pressure on pricing across the market, this is likely to be temporary. 2021 may well see a pricing correction reflecting increased deal flow (driven forward by private equity funds) coupled with some capacity leaving the W&I market and the impact of claims, which we discuss above.

Leaving the impact of the pandemic to one side, we can expect to see the continued evolution of and increasing demand for W&I insurance (such as the use of W&I insurance on public to private deals) and related transaction liability insurance products.

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

Simon Goldring
Partner
T +44 20 3060 6553
simon.goldring@rpc.co.uk



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

ASIA AND AUSTRALIA

By Sumyutha Sivamana, Senior Associate

Key developments in 2020

Over a year since the first outbreak of COVID-19 was reported in Wuhan, China, many countries across Asia Pacific and globally continue to struggle to contain the virus, resulting in a protracted path to recovery for many economic sectors impacted by the pandemic.

Insurers have seen an increase in claims across many commercial lines of business, including under business interruption, trade credit and surety, D&O, and event cancellation policies.

However, while many businesses have been hit hard by the economic repercussions of the pandemic, relatively few BI policies have ultimately responded to interruption losses. Legal proceedings have already been commenced in relation to claims in certain jurisdictions in Asia to determine questions of policy application. As was the case with SARS, it is likely that certain claims will be hotly contested before courts and tribunals.

In Australia, policyholders won a test case before the New South Wales Court of Appeal. This is the first of a number of test cases being brought in relation to COVID-19 related business interruption losses. In a unanimous judgment, the Court found in favour of policyholders, ruling that insurers could not rely on certain disease exclusion clauses to deny claims by policyholders for loss caused by BI due to COVID-19.

The policies considered by the Court provided cover for interruption caused by outbreaks of certain infectious diseases within a 20km radius of the insured's premises, subject to an exclusion for *"diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908* (Quarantine Act) *and subsequent amendments"* (Exclusion Clause). However, the Quarantine Act was repealed in June 2016 (ie before the commencement of the relevant periods of cover) and replaced by the Biosecurity Act 2015 (Biosecurity Act). The Court determined that on a proper construction, the Exclusion Clause did not refer to the Biosecurity Act and therefore did not exclude insurers' liability with respect to interruption losses resulting from COVID-19.

The Court held that whilst there was a suspected mistake on the part of the insurers in not amending their policies to refer to the Biosecurity Act, suspicion was not enough to correct a mistake and there was no basis to suspect that the insureds had overlooked anything. The Insurance Council of Australia (ICA) has announced that it will appeal the ruling.

Aside from the pandemic, the pace of regulatory change across Asia and Australia has continued over 2020. Restrictions on foreign ownership of life insurance companies in China were lifted in January 2020, meaning that investments in life insurers, reinsurers or intermediaries are no longer subject to any foreign ownership restrictions.

What to look out for in 2021

It is likely that many countries will continue to see increased company failures due to the impact of the pandemic, which will continue to impact the insurance industry, particularly in areas such as trade credit and surety. Continuing economic downturns will likely result in further D&O claims. There are also likely to be further proceedings filed in relation to policy disputes arising out of COVID-19 related business interruption claims.

Insurers are likely to continue to review policy wordings, in a hardening market, in tandem with rate increases.

The digitalisation of businesses and the increase of employees working from home, has increased the risk for cyber-attacks, and may well lead to increasing demand for cybersecurity insurance in 2021. The pandemic may also serve as a catalyst for insurers to embark on further digital transformation of their organisations, to become more agile and connected.

An increased investment in InsurTech is expected in 2021. Jurisdictions, such as Hong Kong and Singapore, have introduced expedited licensing or 'sandboxes' (in which products can be tested) to encourage new market entrants. Opportunities will continue to grow for InsurTech start-ups, as certain existing products reliant upon legacy systems may struggle to keep pace with changing trends.

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

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

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

FRANCE

By Gerard Honig, HMN Partners

Key developments from 2020

On 24 September 2020, the French Supreme Court "*Cour de cassation*" rendered its decision in the relation to the aggregation of claims in PI insurance, in the case of breach of the duty to inform and advise committed by an insured towards its clients. The *Cour de cassation* itself marked this decision as important given its public interest.

It is widely accepted that multiple damaging events in the present matter are the breaches of duty to inform and advise committed by the insured against each of its clients. The point discussed was to determine whether these damaging events have a common technical cause and are then deemed a unique damaging event.

In a quite dogmatic way, *Cour de cassation* closed the door for discussion, deciding that "provisions of article L.124-1-1 of French Insurance Code confirming claims aggregation are not applicable to liability incurred by a professional in case of breach of the duties to inform and to advise, these duties being individualised by nature and excluding that there is a technical cause, under article L.124-1-1, allowing to deem them a unique damaging event".

This decision is open to criticism. Though the duty to advise is indeed "individualised by nature", it is much less true regarding the duty of information. And individualisation of a duty does not exclude that multiple breaches of this duty have a common technical cause, for example a defective analysis made by the professional or a failure to seek information or to proceed to a verification, from which derives a series of wrong advices provided to the clients.

One should also keep in mind that excluding aggregation of claims is not in favour of the insured and the third party. Even when the law allows applying the limit per claim on multiple occasions, the liability of the insurer remains capped by the limit per period of insurance. And refusing aggregation can be detrimental to the insured (and eventually the third party) when the numerous claims are of a small amount and there is a significant deductible per claim.

What to look out for in 2021

Last year, we mentioned coverage of operating losses when there is no physical damage as a likely trend to watch out for. The issue will continue to be a key theme in 2021, in particular exacerbated by the COVID-19 pandemic.

The key question will be whether there is coverage of operating losses sustained by professionals following the lockdown. Answers provided by insurers varied from cases to case.

Some insurers declined coverage which was subsequently challenged by some insureds (especially by restaurant or hotelkeepers).

Several courts of first instance (commercial courts) rendered decisions that appeared to contradict earlier decisions.

Some judges ruling on summary proceedings decided that they could not rule upon its validity and application of the exclusion, the court ruling on the merits having jurisdiction.

Some courts ruling on the merits found that the exclusion is valid and applicable, and therefore dismissed the insured.

Some judges on summary proceedings and some courts ruling on the merits decided that the exclusion is invalid.

This variety of decisions leaves an impression of chaos. Appeals were lodged. We may add that certain decisions were harshly criticised by legal scholars for their defective motivation.

The impression of chaos is aggravated by the fact that some insurers made great publicity about the fact that they spontaneously pay a lump sum to their insured (this being presented as a commercial gesture made although they are not liable to pay under coverage).

ACPR (French authority supervising insurance) conducted an audit of damage insurance contracts available in France and as at 23 June 2020, the result was the following:

- 93% of the contracts expressly excluded an event as exceptional as the pandemic;
- Only less than 3% of the contracts covered an event like the COVID-19 pandemic (contracts covering operating losses without making distinction as to the cause, and containing no exclusion aiming epidemic or pandemic risk);
- In 4% of the contracts, the contractual provisions could not allow a definitive opinion as to coverage of operating losses caused by COVID-19 epidemic.

Thus, the pandemic risk was largely not insured and the COVID-19 pandemic aggravates this situation, as insurers are now inserting specific exclusion in their new contracts.

Capacity on the insurance market for this kind of risk being limited, FFA (French Insurance Federation) suggested that an "exceptional disaster" guarantee fund is created, similar to the "natural disaster" fund.

Gérard Honig
Partner
T + 33 (0)1 53 57 50 37
ghonig@hmn-partners.com

ITALY

By Anthony Perotto, NCTM

Key developments of 2020

The spreading of the first wave of the COVID-19 pandemic during the first half of 2020 has impacted the Italian insurance sector both from a commercial and from a regulatory standpoint. Among the most relevant developments it is worth mentioning the quite unique shift in the Italian personal accident insurance landscape.

With the introduction of Art. 42 of the Law Decree n. 18 of 17th March 2020 (the so-called *Decreto Cura Italia*) death or sickness caused by COVID-19 was deemed as an "accident" for the purposes of the compulsory personal accident policy for employees provided by the "National Institute for Insurance against Accidents at Work" (INAIL). This was essentially aimed at extending the statutory mandatory insurance system for employees to COVID-19 related death or illness.

This new statutory provision led to controversies over whether this inclusion of the COVID-19 infection among the "accidents" relevant for INAIL insurance should have been considered extended by analogy to private "personal accident" insurance as well. Such debate is quite relevant for this area of the Italian insurance sector, as it would imply that death or illness due to COVID-19 infection would end up being covered under "personal accident" insurance policies, rather than under the health insurance policies normally covering death or personal injury due to illnesses or diseases.

While there are serious doubts that the "extension" to private "personal accident" policies is viable and possible, the debate is open and it will be interesting to see court rulings on this matter.

What to look out for in 2020

The business interruption (BI) covers are likely to be one of the main areas of concern for insurers in Italy in 2021, following the lockdown measures which, in the spring of 2021, either introduced strict limitations or forced closure. Enterprises have, as a direct or indirect result of such measures, incurred significant losses of revenue and additional costs, for which cover may (and is starting to) be sought.

Although in comparison with other European countries, Italy has less policies covering this risk and, thus, a lesser exposure for insurers. The pandemic has induced a rise in awareness and sensitivity to the BI risk of the Italian Insurance market and an appetite to insure the relevant risk (even more so in a moment when a new wave of lockdown measures are implemented). According to recent studies, it appears that in 2020 BI ranked as the number one risk by Italian enterprises. Considering this data as well as the magnitude of the loss of profit caused by the Italian containment measures, the Italian insurance sector seems to be expecting a rise in both BI-related claims and demand for cover.

As to the expected legal controversies, since Italian BI policies or extensions do not generally provide for specific exclusions of losses determined by pandemics, it is reasonable to believe that at least some of the expected BI claims will revolve around the cover for COVID-19 under the BI policies (or BI extensions) currently offered by the Italian insurance market and, particularly, under the "*denial of access*" and "*civil order authority order*" clauses.

Whether a loss of profit relating to the COVID-19 is covered depends, more often than not, on the specific wording and on the interpretation of the policy; in Italy BI coverage is usually offered as an extension of Property or All-Risks policies and coverage is normally – but not always – triggered only if the BI is caused by "*direct physical loss or damage*" to the insured property (ie damage businesses interruption). However, non-damage business interruption covers are less frequent but not uncommon. In the absence of precedents and past experiences, attempts at extending to the extent possible the scope of BI cover (including "damage BI") is to be expected.

Even when "*civil authority order*" or "*denial of access*" clauses come into play, physical damage to the insured or their adjoining properties or areas are sometime required by the policy and – even when BI cover is "non-damage" – disputes are likely to arise as to the existence or extent of the specific local lockdown measure and on whether the Authority's order was sufficient to trigger cover (especially in absence of outbreaks at the insured premises and following contamination of the insured site).

Disputes are expected and – though maybe in a smaller number compared to other countries – will most probably start in the course of 2021. It will have to be seen how Courts will rule, also considering that in many cases (especially of non -damage BI cover) interpretation of the wording will be frequently necessary and that the *contra proferentem* principle embodied in Italian Insurance Law is likely to favour insured-oriented interpretations of policy clauses which – invariably – have been designed to operate in situations very different from the pandemic outbreak of early 2020.

Anthony Perotto
Equity Partner
T + 39 02 725511
a.perotto@nctm.it

Nctm

LATIN AMERICA

By Alex Almaguer, Senior Associate, and Chris Burt, Senior Associate

Key developments in 2020

The year 2020 has of course been marked by the COVID-19 pandemic and the lockdown restrictions imposed to stop the spread of the virus and Latin America is not an exception. Indeed, Latin American countries have seen some of the highest levels of infection and the most stringent lockdown restrictions.

Potentially very substantial losses could arise due to COVID-19 related business interruption. The energy sector has to some extent been protected as a "key" sector. However, even if insureds have been able to continue to operate, contractors – such as the contractors required to carry out repairs – can be affected by lockdown restrictions.

Insurers have in our experience sought to adopt a consistent approach across different jurisdictions, which can be driven by English or US legal requirements. However, the civil law jurisdictions in Latin America have strict rules on the handling of claims, in particular, timelines for stating a position on coverage and consideration should be given to the requirements of the particular jurisdiction.

It is also the case that Latin American jurisdictions can have different rules on causation which have to be applied to COVID-19 related losses. For example, Colombia applies the doctrine of "adequate" cause and seeks to determine whether a potential cause was the "adequate" cause of the loss – was the loss a foreseeable consequence of that cause?

Latin American jurisdictions also adopt a different approach to negligence, less generous to insureds in imposing the requirement to act as a good "paterfamilias". Their more robust approach to recognising "force majeure" can also affect COVID-19 related claims.

What to look out for in 2021

The impact of COVID-19 and its economic effect is going to run into 2021. The economic situation is also being affected by weather events and social and political unrest. As a result, we foresee a significant rise in the number of insurance claims originating in the region as insureds are likely to be in difficult financial circumstances and any insurance claim will have greater value to them than in normal operating conditions.

(Re)insurers are looking at incorporating exclusions to address COVID-19 in policies going forward. New exclusions in most jurisdictions have to be approved by the insurance regulator. This means that it cannot be assumed that (re)insurers will be able to adopt a consistent position throughout Latin America.

Insureds in Latin America as in other parts of the world will be pursuing claims for business interruption losses as a result of COVID-19 lockdown restrictions where there may be no physical damage typically required under all risks property policies.

Consequently, as elsewhere, insureds will seek to rely on non-damage extensions of cover such as infectious diseases, ingress/egress and civil and military authorities extensions, which may not be fully worded in the policies.

Regulators are seeking clarification on the application of these extensions. Regulators are also considering, for example in Colombia, whether insurers should be required to return premium in circumstances where insureds have not been carrying on business.

Alex Almaguer
Senior Associate
T +44 20 3060 6371
alex.almaguer@rpc.co.uk

MIDDLE EAST AND AFRICA

By Georgia Durham, Trainee Solicitor

Key developments in 2020

Middle East

Last year we predicted that the UAE government's commitment to investment in the non-oil economy over the coming decades would be a driver of premium growth in the Middle East. Unsurprisingly, however, premium levels contracted over the year primarily due to the drop in economic activity as a result of government enforced lockdowns. Non-oil GDP declined by 7.4% as relevant sectors struggled with the region's relatively stringent lockdown measures in response to the COVID-19 pandemic and the resulting economic pressures. Swiss Re estimate a 3% decline in 2020 in non-life premiums.

Despite economic pressures caused by COVID-19, it seems that pandemic-related claims in 2020 have been manageable for most insurers. Associated claims in property and casualty lines have been largely concentrated on business interruption, although only a few primary insurers provide such cover in the region and most policies are purchased as part of fire or property insurance with damage as the trigger for cover.

Africa

Last year we highlighted Africa as being at the forefront of an 'energy revolution' due largely to its use of solar power. The October 2020 African Energy Forum had a large focus on solar power emphasising that Africa is the most 'solar rich' continent in the world. Although substantial growth was expected in solar in 2020, growth levels have been hampered in part by the pandemic, but also by constrained procurement processes and delays in infrastructure developments.

However, investors and industry leaders remain optimistic about, and committed to, the exploitation of the solar potential on the continent. The implication being that there continues to be opportunities for local insurers to offer products covering small to large scale solar infrastructure.

What to look out for in 2021

Middle East

Like many other economies, the region is predicted to go into recession in 2021 as oil-exporting countries continue to face the triple-hit of COVID-19 related lockdowns, related economic slowdowns, and low and falling oil prices. It is likely that this will result in the market seeing further depressed premium growth.

However, there are hopes for a recovery starting in 2021. As the global rhetoric around a 'green recovery' from COVID-19 gains pace, divestment in the oil industry is likely to be pushed further as investors expand into greener alternatives and renewable energy. The Middle East Solar Industry Association reported that Saudi Arabia plans to invest up to US$50 billion in the renewable sector by 2023 to reduce reliance on oil income and diversify its energy mix.

Africa

COVID-19 has highlighted the value of technology and the digitisation of insurance processes. The AIO has placed digitisation at the centre of its action for 2021. Several African insurers have fast-tracked their existing plans for digitisation, whilst others are also exploring other methods to aid in the remote delivery and operation of insurance products. A likely trend that will continue to increase in 2021 is investment by insurers in InsurTech companies, such as Africa Re's investment in B3i, a Europe-based blockchain technology provider whose platform can be used by insurers and brokers to create and administer digital contracts on distributed ledgers. The early introduction of technology by insurers in developing economies in Africa may help the market to avoid legacy inefficiency issues that insurers in developed economies may be facing now.

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

NORTH AMERICA

USA

By Kevin Burke, Hinshaw & Culbertson LLP

Key developments in 2020

The worldwide COVID-19 Pandemic dominated every aspect of American life in 2020, including the insurance industry and insurance coverage litigation.

Not long after the COVID-19 shutdowns and government "stay-at-home" orders began in mid-March, businesses across the US began submitting insurance claims, predominately claims for business interruption losses, extra expenses, and civil authority losses under first-party property policies.

As of mid-November, more than 1,300 coverage actions have been filed in state and federal courts across the US. Nearly 400 of these cases were filed as class actions and over 400 include bad faith claims against insurers.

Coverage lawsuits have been filed by various businesses with restaurants, bars, hotels, barbers, ambulatory health care services, amusement/recreation, and professional service providers leading the charge. Efforts for multi-district litigation joinder have largely failed meaning the issues will be resolved largely through individual coverage actions. The initial phase of the litigation has been dominated by motions to dismiss, with insurers prevailing in approximately two-thirds of the less than 70 rulings as of mid-November.

In some instances, policyholders have leave to replead their claims. Most of the dismissals have been based upon COVID-19 claims not satisfying the "direct physical injury" requirement for business interruption and civil authority coverage under most US policy wordings and the application of exclusions such as virus and pandemic exclusions. Courts denying motions to dismiss generally have done so to permit factual discovery of the clams.

There are numerous state and federal legislative proposals that could impact coverage, but none have passed to date. Although the early results have favored insurers, the COVID-19 coverage wars have only just begun and will impact insurers substantially. As of the time of preparing this summary, there have been no substantive appellate court rulings.

Protests that give rise to rioting and looting caused significant property damage which resulted in first-party claims and, when coupled with COVID-19 related shutdowns, presented concurrent causation issues. Wildfire, hurricane, and tornado activities continued to impact insurers.

Cyber insurers saw a steep increase in claims in 2020, driven primarily by ransomware claims. The costs associated with ransomware claims rose dramatically due to increased ransom demands, threats to disclose extracted data, and related business interruption costs. As a result, a hardening of the cyber insurance market, as well as increased premiums and underwriting scrutiny are anticipated.

In the absence of comprehensive federal privacy laws in the US, individual states continue to adopt privacy regulations. For example, the groundbreaking California Consumer Privacy Act (CCPA) went into effect in January 2020. Similar to the EU's General Data Protection Regulation, the CCPA created a number of privacy rights for California consumers and obligations for businesses that collect and process personal information. Several class action lawsuits already have been filed pursuant to the CCPA's limited private right of action. California residents voted in November to approve the California Consumer Privacy Rights Act (CPRA), which further expands the privacy rights afforded to California consumers. Most of the substantive provisions of the CPRA will go into effect in 2023.

The CPRA also creates a statewide privacy agency that will be charged with enforcement of privacy laws. This likely will lead to increased enforcement actions for privacy violations in California. In July 2020, the New York Department of Financial Services instituted its first enforcement action over alleged violations of its first-in-nation 2017 cybersecurity regulation.

In addition, comprehensive privacy laws, as well as biometric privacy laws, have been proposed in several states. These proposed laws often provide for substantial statutory damages and/or private rights of action. The Illinois statute enacted several years ago has produced substantial litigation and coverage claims.

The opioid epidemic continued to result in numerous suits brought by states, political subdivisions, third-party payors, hospitals and individuals against pharmaceutical manufacturers, distributors and others seeking a variety of damages allegedly resulting from the diversion and misuse of prescription opioids such as hydrocodone and OxyContin. Multiple million-dollar settlements have been reached, with hundreds of cases pending (most consolidated in federal court in Ohio).

In November of 2020, it was reported that three major drug distributors and a large drug manufacturer were closing in on a $26 billion deal with state and local governments that would end thousands of lawsuits over the companies' role in the opioid epidemic. The deal is $4 billion more than the offer rejected last year by many

states and municipalities. Some predict overall losses may reach $1 trillion.

Talc litigation continued, with thousands of cases pending against a much more limited universe of defendants. The multi-district litigation focused on expert testimony and causation issues. The most interesting development concerned reports that a talc manufacturer knew its talc contained asbestos. A talc mine company filed for bankruptcy court protection. The stay of the New Jersey insurance coverage dispute over Johnson & Johnson talc claims has been lifted and discovery is ongoing.

The public nuisance liability theory failed in lead paint litigation across the US for years until ten California cities and counties scored a $1.15 billion abatement award in California, later reduced to $409 million. Resulting coverage litigation is pending in California, New York, and Ohio. In the Spring of 2020, a judge in San Francisco California ruled that paint manufacturer ConAgra's insurers did not have to pay ConAgra's $102 million share of a settlement in a suit over the widespread use of lead paint in California, finding that coverage is barred by a state law prohibiting insurance for intentional acts. An appeal is pending. There is concern over a potential broadening of the tort of public nuisance in other areas.

Allocation of losses continued to be an issue driving long-tail coverage claims in the US such as asbestos and environmental claims. Most states have applied a *pro rata* approach over the inferior "all sums" approach for allocation of continuing or progressive injuries or damages among multiple periods. Some states that previously ruled in favor of the "all sums" approach have reversed course based upon updated policy language.

What to look out for in 2021

Courts will continue to address numerous COVID-19 business interruption (BI) claims under first-party property policies in 2021 and some appellate court decisions likely will be rendered. The activity level on other lines of policies such as general liability, professional liability, and D&O policies will increase. More SEC enforcement activity is likely to follow as the SEC's Enforcement Division has formed a "Coronavirus Steering Committee."

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

Climate change will continue to be a major topic for insurers in a variety of contexts.

Insurers are taking steps to prepare for the opportunities and challenges on the claims and underwriting sides that may result from policy changes associated with a Biden administration.

Kevin Burke
Partner
T + 1 312 704 3488
kburke@hinshawlaw.com

NORTH AMERICA (continued)

Canada

By Mark R Frederick, Miller Thomson LLP

Key developments in 2020

Like everywhere else in the Western world, 2020 was dominated by the prospect of litigation to determine what obligations insurers would have to their insureds on COVID-19 related losses.

Nursing Home and Private Business Liability

The most profound effect in Canada of COVID-19 related deaths arises from the operation of Canadian nursing homes, where some 80% of Canada's fatalities due to COVID-19 were recorded, the highest rate in the OECD.

The Government of Ontario has announced that it will provide liability protection to some workers, businesses and non-profits against COVID-19 exposure-related lawsuits.

The bill, if passed, would ensure anyone making an "honest effort" to follow public health guidelines while working or volunteering not be exposed to liability in civil proceedings. The bill will not prevent lawsuits against those who willfully, or through "gross negligence", endanger others.

Several class actions have already been brought against nursing homes and home operators, including public homes operated by municipalities.

Ontario Class Action Reforms

The Government of Ontario, Canada's largest province and whose legislation often inspires other Canadian provinces, has proposed changes to the *Ontario Class Proceedings Act, 1992*. Proposed legislation may restore some balance for insurers and insureds in litigating these matters by making it easier for defendants to narrow issues prior to certification, and correspondingly, make it easier to obtain dismissal of such matters. Other proposed provisions would also prevent duplication of proceedings in other provinces, improve appeal access and provide for costs liability for funders of class action litigation.

The highlights of the legislation include:

- Certification will only be granted if "the questions of fact or law common to the class members predominate over any questions affecting only individual class members." It is thought currently that too many cases with individual as opposed to class interests are being approved as part of class proceedings, thus defeating the legislation and slowing the courts. The Courts will be directed to Striking Actions Prior to Certification or narrowing issues will be permitted. Parties wrongly named in Class Actions or those facing suits that show no cause of action will have the opportunity of moving for judgment prior to certification. While this amendment will be useful in many cases, there is recognition that many judges do not like striking pleadings before all evidence is presented. Additional provision is made to move to strike proceedings for want of prosecution
- Multijurisdictional Canadian Class Actions if brought in other provinces may, upon motion, seek an order from the Ontario Superior Court to require determination of whether it or the Courts of another province would be preferable for some or all of the claims or common issues. As the Ontario courts are generally more familiar with Class Action proceedings, this change should be good news for insurers and insureds alike
- Certification Orders will be able to be appealed directly to the Ontario Court of Appeal instead of having to undertake an initial appeal in the province's Divisional Court
- Third-Party funders would be made subject to costs awards to the extent that the funder undertook to provide indemnity protection to the representative Plaintiff.

It is generally thought that these initiatives will restore some balance to the Class Action Proceeding process and promote more cautious claims.

What to look out for in 2021

So far the courts have not had sufficient proceedings before them to issue many pronouncements, but as we move into 2021, and the courts adjust themselves to the new reality of virtual hearings, we can expect that several key issues will be decided, including:

- whether business closure due to interpretations of orders of "Civil Authorities" are sufficient to trigger business interruption insurance policy provisions;
- whether insurance brokers will have been negligent in failing to recommend pandemic coverage in past policy sales;
- whether pandemic exclusion clauses will be upheld;
- whether physical damage need be present to trigger standard insurance coverage language in insurance policies; and
- whether the rationale in the UK test case in *FCA v Arch et al*. will be implemented in Canada.

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

OFFSHORE

By Richard Booth, Senior Associate

Key developments in 2020

In what commentators have described as a landmark decision, 2020 saw the Commercial Court in the British Virgin Islands (BVI) sanction a claimant party's use of a third party litigation funding agreement. This means that, as a matter of law and as in other Commonwealth jurisdictions, litigation funders are now permitted to fund the legal costs and expenses of proceedings issued in the BVI. The decision (In the Matter of *Exential Investments inc (in liquidation) and in the Matter of the Insolvency Act, 2003*) opens the gateway for claimant parties to pursue litigation which, absent sufficient financial means to otherwise sustain it, may either not have been progressed at all or which would have stalled by defendant parties out spending their opponents to early withdrawal or acceptance of lower value settlements. The background facts to the case will be familiar to insurers involving companies found to be operating a fraudulent FOREX trading Ponzi scheme. Regulatory and criminal investigations followed alongside criminal prosecutions. Between them thousands of investors lost a combined sum of US$250-500 million. In jurisdictions where litigation funding is already an established feature of the litigation landscape, liquidators of insolvent investment funds with meritorious claims but limited liquid assets to pursue them have turned to the support of professional funders. As RPC reported in 2020 capacity in the funding market has increased significantly in recent years and we can expect this trend to continue. The *Exential* decision is seen as an important step for BVI as it positions itself as a leading offshore jurisdiction for disputes. By approving the principle of third-party funding insurers can naturally expect professional funders to now take a close look at BVI as a new territory for investment. From a claimant perspective many will see the judgment as timely given market volatility arising from COVID-19 is expected to increase insolvency related and other claims activity.

What to look out for in 2021

In 2020's offshore review we noted the Cayman Islands case between Primeo Fund and HSBC regarding, amongst other issues, the principle of reflective loss as one to look out for with an appeal to the Privy Council expected to take place in the coming 12 months (the principle acting to prevent claims by shareholders to recover loss considered reflective of loss sustained by the subject company). Instead the appeal by Primeo was 'bifurcated' meaning that (i) Primeo's appeal concerning reflective loss will now be heard in 2021; and (ii) should the appeal on this aspect succeed, the balance of the appeal is then scheduled to take place later in the year. The case very much remains one for insurers to watch out for not least because of the UK Supreme Court's 2020 decision in *Sevilleja v Marex Financial Ltd* which scaled back the scope of the reflective loss principle (having been expanded over several years). In Marex the Supreme Court chose not to overturn the principle entirely albeit a minority of Judges would have done so. Marex very much sets the stage therefore for the issues presented by Primeo's 2021 appeal. Whilst the issues are different, we wait to see what effect the Supreme Court's decision to reign in the scope of the reflective loss principle will have on the Privy Council's preferred approach. The decision will determine whether the balance of Primeo's appeal, and ultimately the prospects of Primeo's stakeholder's recovery action, survives to be heard later in 2021.

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

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

rpc.co.uk

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