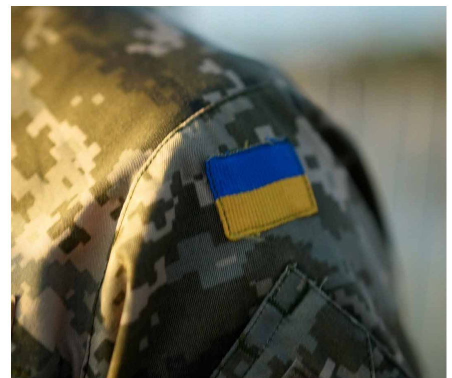
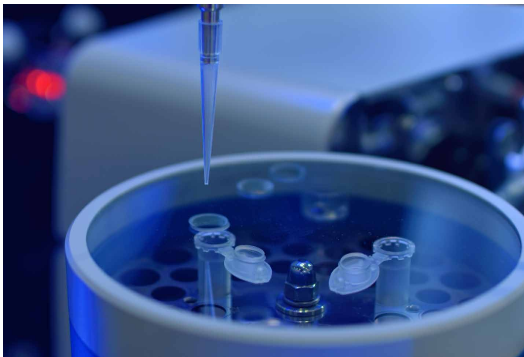
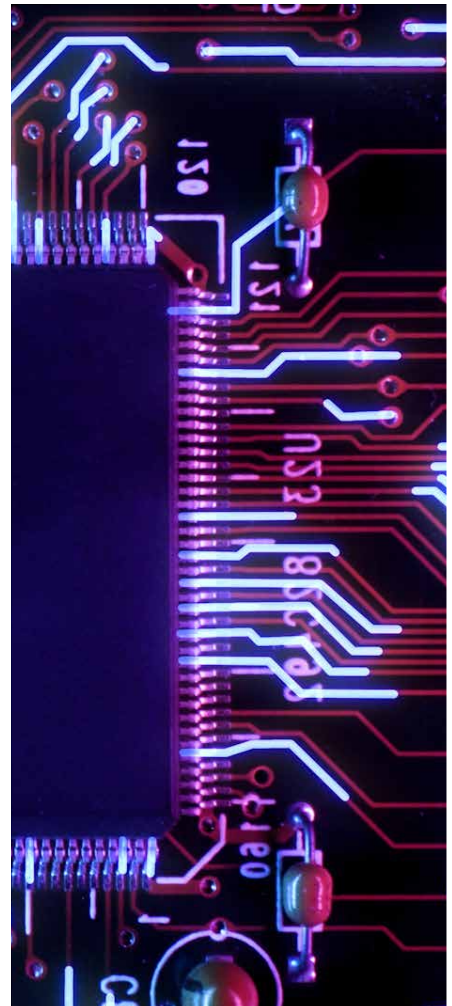
Annual insurance review

2024

Contents

Page

4 Introduction

6 Global Access | Working together

8 Asia

10 Australia

14 Canada

16 France

18 Netherlands

20 Latin America

22 USA

26 Middle East and Africa

28 Business line updates

30 Accountants

32 Art and specie

33 Brokers

34 Class actions and collective redress

36 Climate and biodiversity risk

38 Construction

40 Construction (all risks)

41 Cyber

42 D&O

43 Energy

44 Financial institutions

Page

Page	
45	Financial professionals
46	General liability
47	Health and safety
49	International arbitration
50	Intellectual property (IP)
51	Legal practices
52	Life sciences
54	Marine and shipping
55	Media
56	Medical malpractice
57	Pensions
58	Political risk and trade credit
60	Procedure, damages and costs
61	Product liability and recall
63	Property and business interruption
65	Regulatory
66	Restructuring and insolvency
67	Surveyors
68	Technology
70	Toxic tort and legacy exposures
72	Warranty and indemnity (W&I)
73	**Contacts**

Introduction

Robert Morris | Partner

Welcome to RPC's very own New Year tradition – the Annual insurance review, where we provide insights from sector and jurisdictional experts; considering key events and trends from 2023 and looking ahead to what the insurance market can expect in 2024.

In a blessed relief from the last few years, talk of COVID has finally dissipated. However, public health concerns have been replaced by economic pessimism, continued supply chain concerns, cyber risks, global conflict, activism around climate change and the rise of generative AI.

In last year's review we said: "With the war in Ukraine and increasing economic headwinds vexing global policymakers, economic volatility promises to be the "new normal" in 2023." Sorry to say, that prediction has come true. A key theme from our business-line articles and updates from our Global Access partner firms is that of the impact caused by economic difficulties around the world. Many jurisdictions (not least in the UK) have faced high levels of inflation and raised interest rates, causing significant claims inflation – both in terms of increased claim costs and anticipated claim volumes.

A further symptom of these global economic problems is rising insolvency rates. In England and Wales, the last two quarters of 2023 saw the highest number of corporate insolvencies in over a decade, with this trend looking likely to continue in 2024. As ever, higher insolvency rates means a greater risk of insurance policies being called upon across a variety of business lines. Furthermore, following a number of isolated bank failures in 2023, will 2024 see a slow burning and more widescale banking crisis develop?

Many articles discuss extreme weather events impacting various regions. These events, previously discussed in our Reviews as "extreme", are now virtually commonplace, leading to more discussion around how the insurance market and governments can work together to manage and mitigate the damage they cause.

It is unsurprising, then, that ESG continues to be a hot topic, but the desire to gain competitive advantage through demonstration of ESG credentials has been met with an increased focus from those keen to ensure positive ESG claims stand up to scrutiny. You can read about regulatory proceedings brought over allegations of greenwashing as well as claims from advocacy groups, including shareholder derivative actions against directors and officers for breach of fiduciary duty and violation of securities law. (Or, conversely, of claims against companies and directors accused of ignoring profit at the expense of ESG.)

Of course, 2023 has in many respects been the year of generative AI. Nevertheless, whilst ChatGPT's rise has been little short of meteoric, it seems likely that 2024 will see a bigger impact for the insurance market, not only with increased use of AI by insurers themselves but also among insured businesses, giving rise to new risks for the market to anticipate, assess and respond to.

AI is also expected to be used in both perpetrating and defending against cyber-attacks, which continue to occur at record levels internationally.

The European Commission has been the first to propose regulation of AI, but this is just the latest in a seemingly relentless drive for more regulation across many sectors. (For example, in the UK, the introduction of the FCA's "Consumer Duty" and the Economic Crime and Corporate Transparency Act 2023.)

You can find further detail about all these issues, and more, on a sector-by-sector basis below. You can also see international highlights by jurisdiction, with contributions from our Global Access partner firms. Or, of course, you can simply download the whole Review in full and enjoy it at your leisure!

As always, developing areas of risk offer both threats and opportunities for the insurance market, and RPC and all the Global Access firms look forward to working with you to mitigate the former and to take advantage of the latter in 2024.

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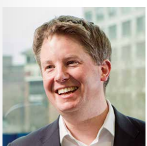

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WORKING TOGETHER

Working together with shared strategic objectives and values and the collective purpose of providing clients with Global Access to the best insurance law advice and client service wherever in the world they might need it.

We are more than a network.

ASIA page 8 | LATIN AMERICA page 20 | MIDDLE EAST AND AFRICA page 26

USA page 22

CANADA page 14

NETHERLANDS page 18

AUSTRALIA page 10

FRANCE page 16

ASIA

RPC
Chris Alderton | Senior Associate

Key developments in 2023

Insurance premiums

Despite variations across insurance lines and regions, overall, insurance premium rates remained broadly flat across Asia during Q1-Q3, notable exceptions being China and Hong Kong, which have reportedly seen a reduction in rates this year. The financial and professional lines markets (including Directors and Officers insurance) have started to soften, however, with premiums decreasing overall, more noticeably during the second half of the year. Cyber insurance premiums on the other hand continued to increase during 2023, albeit more slowly than in 2022.

Cyberattacks

Asia continued to experience a significant increase in cyberattacks, with the World Economic Forum reporting that APAC was targeted more than Europe and North America during Q1 of 2023 and experienced by far the largest year-on-year increase compared with other regions. The reasons are thought to include rapid digitalisation, a new generation of users, hybrid working, increased use of cloud storage and file-sharing platforms, and a large manufacturing industry forming an attractive target. However, although the severity and sophistication of ransomware has increased, in many cases so have companies' cyber security controls and risk management procedures; this likely explains why the first half of 2023 saw a reduction in the number of cyber claims in the region. Demand for cyber insurance remains high, however, driven not only by the high number of attacks but also by increased regulation.

Inflation

Following the highest rates of inflation in more than a decade during 2022, rates across Asia moderated slightly during 2023, tracking below those of Europe and the US. At the time of writing inflation across Asia remains above pre-pandemic lows, and its impact is still being felt. Against this backdrop non-life reinsurance rates have increased, especially in areas affected by natural catastrophe losses (see below); this has led some insurers to retain more risk on their own balance sheets. To counter higher inflation some Asian central banks have raised interest rates which may have increased investment returns for insurers, thereby reducing the impact of inflation on underwriting results. Higher inflation is expected to remain a factor across Asia during 2024.

Extreme weather events

Asia lived up to its reputation as one of the world's most vulnerable regions for natural catastrophes. Among various extreme weather events hitting the region, Typhoon Doksuri swept through Beijing in July, leading to the heaviest rainfall since records began 150 years ago, as well as significant flooding. The resulting damage, combined with additional monsoon rainfall, led to economic losses in excess of USD15bn, with insurers reportedly paying out more than USD1bn. Japan also experienced heavy rains from Typhoon Mawar, as did Hong Kong from Super Typhoon Saola. These and other extreme weather events have continued to contribute to property catastrophe treaty reinsurance rates remaining hard in the region and beyond.

What to look out for in 2024

Artificial intelligence

Although there is significant variation in "AI maturity" across the Asia insurance market, we anticipate increased interest from insurers in how AI can help to improve underwriting, in particular risk assessment and pricing models, the goal being to improve loss ratios. AI is already being used to improve interactions with customers (think, personal recommendations, chatbots, quicker purchasing times) to customise products better and more quickly, and to analyse patterns within large data sets in order to detect fraud, all of which looks set to continue. AI is also expected to play an increasing part for insurers in analysing changing regulatory requirements, as well as in respect of claims processing. Insurers may also increasingly look to partner with external data providers, and to make more use of the data which they themselves generate.

FinTech insurance

Following on from the increased adoption in AI, and associated advances in the FinTech industry, we anticipate increased demand for and provision of FinTech insurance products across Asia, especially in the financial centres of Singapore and Hong Kong.

Construction

We expect that the demand for new infrastructure across Asia will continue into 2024 as governments continue to invest. This may prompt more insurers to increase capacity in the Construction (All Risks) space and ultimately may lead to some softening of rates (which have remained

stable through 2023). Insurers are, however, likely to remain cautious over the short term: projects may continue to be hampered by ongoing materials and labour shortages and, with construction costs remaining high, claims inflation currently remains a concern.

Reinsurance

In the reinsurance sector we anticipate further premium increases, against a backdrop of continued elevated extreme weather events as well as instability driven by geopolitical events such as the war in Ukraine. Conversely, catastrophe bond activity is likely to increase as (re)insurers seek to transfer their catastrophe risk to the capital markets.

Political risk insurance

The demand for political risk insurance may increase with national elections due to take place across the region in India, Indonesia, South Korea and Taiwan. In the light of election results during 2023 that were unexpected by many, organisations may look to protect themselves against potential instability and uncertainty arising from forthcoming elections in the region.

Warranty & indemnity insurance

Following a decline in M&A deal volumes globally during 2023 there has been a consequent decline in take-up of W&I insurance in Asia. This has coincided with an increase in market underwriting capacity in the region, with a number of MGAs coming online. As a result, with more players chasing fewer deals, premiums for the product have decreased significantly and coverage has widened to make a very buyer-friendly market. Most underwriting activity has been on deals in India during the period and Japan has been increasingly busy. Some smaller markets, including Thailand and Vietnam, experienced increased M&A deal activity such that overall South East Asia saw a 4% year-on-year increase during 2023. There is a general market expectation that deal volumes in China will recover somewhat during 2024. Hong Kong and Singapore in particular are expected to experience increased deal flow, making up for the bottlenecks in recent years. If so, a similar recovery in the take-up of W&I products should follow, particularly as the product is becoming more widely understood and utilised in the region.

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AUSTRALIA

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Key developments in 2023

In Australia, 2023 was the first 'normal' year since 2019. Public health concerns, however, were replaced by economic pessimism, and accompanied by supply chain issues, continued cyber risks, global conflict, and more discussion and activism around climate change and the journey to net zero.

ESG continued to be a hot topic for Australian companies. But the desire to gain competitive advantage through demonstration of good corporate citizenry has been met with an increased focus from those keen to ensure they stand up to scrutiny.

In February 2023, corporate regulator ASIC commenced its first civil proceedings over allegations of greenwashing against Mercer Superannuation (Australia) Limited for alleged misleading statements about its investment options. ASIC specifically criticised Mercer's 'Sustainable Plus' product that contained holdings of companies involved in the extraction or sale of carbon intensive fossil fuels, the production of alcohol and involvement in gambling. ASIC quickly followed this with proceedings against Active Super and Vanguard Investments Australia and continues this focus (so far successfully too, having secured an $11.3m penalty in its prosecution of Mercer).

It is not just the regulators on the attack. In August 2023, climate advocacy group Australian Parents for Climate Action commenced Federal Court proceedings against Energy Australia over allegations that its 'Go Neutral' product misled consumers due to the company's reliance on fossil fuel production. This will be the first test on claims of carbon neutrality under consumer law in an Australian court.

2023 saw a 23% increase in the number of cybercrimes being reported which, on average, is one every six minutes. On the tail of major breaches of Optus and Medibank Private in 2022 impacting millions of Australians, a cyber breach of one of the largest national law firms in Australia left major corporates and government feeling exposed.

In part of the Australian Government's going efforts to combat cybercrime it unveiled its '6 Shields' to protect Australia which will be rolled out from 2023 to 2030. The shields work towards a cyber resilient region on a global scale, including building stronger businesses and citizens by education and support, promoting safe technology, the creation of a threat intelligence network, a focus on protecting critical infrastructure, build the workforce and research on cyber protection.

In the courts, the decision of *Robertson v Singtel Optus Pty Ltd* [2023] FCA 1392 has called into question whether forensic IT reports prepared in the wake of a cyber event are subject to legal privilege. The decision held that Optus' public statements about the investigation and how the appointment of the forensic team came about meant that the report was not privileged. The decision is on appeal.

Investment by both government and private enterprises on the development of new properties and infrastructure continues across all states and territories. But increased labour and material costs continue to exert significant commercial pressure on the construction industry, threatening the viability of projects and increasing the risk of disputes and insolvencies. Although cost pressures are now causing government to question the viability of large scale infrastructure projects, demand for construction services in those projects is still resulting in a reduced capacity in residential construction needed to meet the needs of an expanding population.

Additional pressure in this area is coming from the efforts to remediate the damage from catastrophic events. The NSW floods were Australia's most expensive natural disaster ever. And with these extreme weather events here to stay, insurance industry groups are continuing to engage with State and Federal governments to consider short and long term issues raised by catastrophic weather events.

Regulatory improvements to building standards continue, including adoption of the 2022 National Construction Code. In NSW, improved standards for training and accreditation introduced by the Building and Development Certifiers Act and Regulations have come into effect. In Victoria, compliance authorities such as the VBA have continued to show an increased willingness to bring disciplinary action against practitioners for failure to comply with relevant standards of conduct.

The institutional liability claims grew in 2023 as parliaments around the country continue to implement law reform arising out of the Royal Commission into Institutional Response to Child Sexual Abuse and several important decisions in the later part of the year.

The High Court considered for the first time the use of permanent stays in historic abuse cases and overturned a decision of the NSW Court of Appeal in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*. The first civil jury trial decision against an institution in Victoria (Kneale v Footscray Football Club) resulted in staggering verdict for $5.9m plus costs in a case involving abuse by a football club volunteer. An appeal of that

decision is expected in 2024. Another jury decision in *TJ v Catholic Diocese of Wagga Wagga* the following week saw an award of approximately $3.3m plus costs. These widely reported decisions have already started impacting claimant expectations in settlement negotiations.

Class action funding and contingency fee commission rates reduced even further, already of historic lows. In September 2023, the Victorian Supreme Court made an order that the shareholder class action against Star Entertainment would run with a 14% commission. This is the lowest rate of any common fund or contingency fee ordered in Australia.

Following the decision, there has been a range of debates about whether increasingly lower rates are sustainable and/or will lead to better or worse outcomes, particularly in circumstances where defendants are fully aware of the sharp economics that are likely to be involved in running a very costly (and usually long and slow) piece of litigation like a class action.

Common fund orders, however, are back. Overturning the High Court's 2019 determination that the Federal Court did not have the power to make these orders under the *Federal Court Act*, the Full Federal Court determined that this was not the case. This is a significant decision for funders. It offers more certainty for funding return models and allows class actions to be commenced without large book building exercises that were commonplace before 2016.

The next frontier for plaintiffs will be the 'solicitor common fund order' currently sought in the Blue Sky class action. Such an order would allow plaintiff lawyers to receive a commission from any resolution sum, similar to the contingency fees available in Victoria.

Watch this space.

What to look out for in 2024

Economic challenges that Australia is facing are not going away, and some experts are forecasting further deterioration. Commercial pressures will continue to be significant, noting wage and material cost inflation and ongoing high fuel prices.

Insolvencies are expected to rise. Following three years of low levels of insolvency, the past 12 months has seen a number of construction, development and increasingly retail businesses go into administration, with October 2023's figures increased by nearly 50% year on year, according to data from ASIC. As a result, financial fallout disputes and litigation is likely to increase substantially over the next 12 months, with potential impacts across a range of lines of business.

One of the most interesting growing risks is cases being brought by social justice and climate change activists to rectify previous social injustices and introduce novel duties of care. This includes the growing use of not-for-profit and social funding models or funders, with the express aim of establishing legal precedent to encourage commercial funders to invest in future cases.

The Commonwealth Government is currently facing one such action, having been challenged over its duty of care in no less than three separate proceedings. The largest of those cases – the Pabai Pabai class action concerning climate change impacts in the Torres Strait – being heard in the Federal Court, seeking to recognise a duty of care to protect the Torres Strait and its communities.

In institutional liability, 2024 will see the landmark case of *DP v Bird* heard before the High Court testing the scope of vicarious liability and non-delegable duties arising from abuse perpetrated by clergy and it will also consider, for the second time, the use of permanent stays in abuse cases in *Willmot v The State of Queensland*. A judgment is also expected in the first case testing section 7D of the *Civil Liability Act* (NSW) attempting to set aside a prior deed which has the potential to impact all prior deeds in child abuse cases settled before recent amendments to the law (abolishing the limitation period and assisting identification of proper defendants).

There will continue to be vigorous testing of the limits of discovery in various jurisdictions as plaintiffs and defendants seek to obtain records. The High Court's recent permanent stay decision has already led to lobbying for the implementation of legislation enabling prior revisitation of claims where a permanent stay was argued. The Federal Government has also proposed legislative reforms enabling survivors to access the superannuation funds to obtain contribution from offenders. A new category of claims is also growing – secondary victims – which is anticipated to be tested as parents and family members of abuse survivors seek compensation for nervous shock.

If adopted in 2024, Privacy Act Review Report's 116 amendments to the *Privacy Act* will change the reporting obligations for small businesses who experience a cyber breach, removing an exemption that covers employee records and change what is considered to be 'personal information'.

AUSTRALIA (continued)

Generative AI remains an intriguing development – not least how it will help us work smarter. It is expected to result in more sophisticated cyber-attacks and also form the cornerstone of cyber resilience and the ability to defend against attacks.

A series of comments by ASIC has put boards on notice to prioritise cyber resilience, including preparing a cyber pulse survey. It is likely that there will be an increase in the number of prosecutions where this is not taken on board, and there are repeated or flagrant breaches.

For construction insurers, legislative and regulatory changes coming in 2024 will be positive. The Victorian government has foreshadowed the introduction of new offences for builders that receive money under a Major Domestic Building Contract without taking out domestic building insurance. The State's combustible cladding rectification authority will take first steps to join proceedings against builders and building professionals to recover cladding remediation costs.

In NSW, the effect of legislative changes aimed at enhancing consumer protection has increasingly been felt. While this has slowed down approvals, it is likely to lead to better long term results and lower clams.

Expensive and complex worker to worker claims are expected to trend upwards, particularly in Brisbane where a large number of major projects underway for the 2032 Olympic games, due to an increasingly agile workforce, is resulting in more labour hire arrangements to get projects completed. There is a definite upward trend in plaintiff costs and claims of damages, especially in Victoria.

Extreme weather continues to be a concern. 2024 is predicted to see increased risk of severe bushfires due to El Nino conditions, forecasts of lower than average rainfall and higher than average temperatures. Some parts of Australia are already experiencing this.

Between this and the catastrophic flooding of 2023, that is likely to remain one of the most expensive natural disasters to remediate. Damage caused by other extreme weather events (such as wind) can also be expected to continue. Through collaborative efforts of government and insurers, new arrangements will need to be reached to protect residents in high risk zones.

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CANADA

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Key developments in 2023

As we entered a "post-pandemic" environment, we continued to grapple with the impact of the global pandemic on economic and social sectors. 2023 has been marked with financial challenges and geopolitical strife that have directly impacted the global supply chain. In this chapter we recap some of the major changes impacting the insurance industry moving into 2024.

Continued impacts of the pandemic, inflation, and labour shortages on the construction industry

There are a number of issues which are currently impacting the construction industry which could result in increased numbers of claims against design professionals. The most immediate risks are those arising from interruption in supply chains dating back to the start of the COVID-19 pandemic in 2020 and from lack of adequate skilled labour.

Historically, (circa 1989/1990) these conditions resulted in a wave of claims against design professionals based on three types of errors: failure to detect substitutions of specified materials during site review, acceptance of substituted materials which were not fit for purpose and acceptance of deficient construction during improperly conducted inspections/ site review.

Since the onset of the COVID-19 pandemic, everyone involved in the construction industry has faced unprecedented disruption due to delays in delivery, increasing material prices and a shortage of skilled labour. While some people believe that delivery times should improve in the short run and that inflation has reached its peak, it is highly likely that the problems related to rising material and equipment prices, labour shortages and overheating in the construction sector will continue to impact customers, contractors, suppliers of materials and professionals in the years ahead.

Appeal ruling on the interpretation of material change in risk

In *Wynward Insurance Group v Smith Building and Development Ltd*, 2023 SKCA 57, the Saskatchewan Court of Appeal found that the discovery that an insured's subtenant may be affiliated with a biker gang did not amount to a material change in risk.

The insured, Smith Building and Development Ltd (Smith Ltd) owned a commercial building insured at the date of loss by Wynward Insurance Group. Smith Ltd. rented units to two subtenants, one being a motorcycle club called the Reapers Riders, which at some point, changed its name to the Heretics Motorcycle Club.

On 13 April 2016, the building was destroyed by fire. An investigation concluded the fire had been caused by an unknown arsonist. Nothing in the fire investigation implicated either Smith Ltd or the Heretics. Smith Ltd submitted a claim to Wynward pursuant to its policy seeking indemnity for its losses.

Wynward assigned a senior claims examiner to investigate and adjust the loss. He conducted certain post-loss internet and local media searches where he learned of alleged links between the Heretics and the Hell's Angels Motorcycle Club. He concluded the Heretics were affiliated with the Hells Angels, which he described at trial as a notorious motorcycle club with suspected links to criminal activities In a 30 May 2016 letter based on his investigation, without consulting the underwriter, the examiner denied coverage. The letter asserted Smith Ltd (1) failed disclose a material change in risk due to the tenancy of "a motorcycle club related to the outlaw biker club 'Hells Angels'", and (2) failed to provide details of the subleases it entered into with the Heretics and another subtenant.

Smith Ltd commenced an action against Wynward in contract and negligence for (a) the value of the insured property, (b) business interruption losses, and (c) various costs and expenses.

The issue at trial was whether a material change in risk was shown by the act of Smith Ltd allowing the Heretics to be a subtenant. The trial evidence showed Wynward's underwriters prepared an inspection report in 2012. The underwriter expressed no concern with the presence of a motorcycle club on the premises and concluded "Renew normally".

The trial judge found that Wynward had not led admissible evidence required to meet its onus to show if and when the Heretics were involved in the illegal activity which supported its coverage denial.

On appeal, the Court of Appeal cited the well-known legal principle established by the Supreme Court of Canada that a fact material to the risk is shown where "if the facts had been truly represented they would have caused a reasonable insurer to decline the risk or required a higher premium."

The Court upheld the trial judge in finding that Wynward had not demonstrated through admissible evidence that the presence of the Heretics in the insured premises was a fact material to the risk.

The risk environment, increasing interests rates and climate-related risks

The Canadian Office of the Superintendent for Financial Institutions (OSFI) published its Annual Risk Outlook for Fiscal Year

2023-2024. OSFI highlights risks associated with the higher interest rate environment, unregulated non-bank financial intermediation, climate-related risk, and geopolitical risks.

With respect to housing market downturn risk, OSFI noted that following record increases during the pandemic, house prices declined significantly in 2022. The steep increase in interest rates has eroded debt affordability. This is a growing concern from a prudential perspective. Mortgage holders may not be able to afford continued increases on monthly payments or might see a significant payment shock at the time of their mortgage renewal, leading to higher default probabilities.

Financial institutions face climate-related physical risks (ie weather events) and transition risks as Canada and their trading partners move toward a "low carbon" economy. These climate-related risks could exacerbate more traditional risks, including credit, market, insurance, and operational risks. As corporations strive to meet climate-related target commitments and disclosure obligations, they could become increasingly exposed to climate-related legal and reputational risks.

New insurance rules for Ontario drivers coming in 2024

As of January 2024, motorists in Ontario will have the option not to buy into direct compensation property damage (DCPD) coverage, which protects car owners from costs related to vehicle damage from a collision if they are not at fault. This coverage also covers the loss of the vehicle or its contents.

While opting out will reduce the driver's bill, this will mean that they will not be reimbursed for vehicle repairs, loss of a vehicle or its contents, or a replacement vehicle, among other items.

Employment Practices Liability Insurance growing in popularity

Employment Practices Liability Insurance (EPL) was traditionally not a large part of the Canadian Insurance Market offering. This type of insurance covers employers' defence costs and losses from employment-related claims, including wage and hour disputes and allegations of discrimination, harassment, retaliation and unlawful termination.

EPL claims are on the rise as the frequency of lawsuits that trigger EPL cover have significantly increased in the past two decades. Employers are becoming more vigilant when it comes to protecting themselves against these claims and considering EPL insurance.

MGA regulation

Calls for the regulation of Managing General Agencies (MGAs) are prompting consideration of changes in Ontario laws to allow for regulation by the self-governing Registered Insurance Brokers of Ontario (RIBO). RIBO, which already registered MGAs on a voluntary basis, would look to establish licensing for MGAs along with codes of conduct so as to enhance competency and best practices in the industry. MGAs compose a significant part of the wholesale offering of insurance products in Canada, and other Canadian provinces already regulate MGAs, making Ontario, with the nation's largest broking community, a logical candidate for regulation.

What to look out for in Canada in 2024

We expect to see the continued economic fallout in Canada's housing market and risks associated with higher interest rates.

We anticipate that the construction industry in Canada will continue to face pressures from supply chain disruptions, labour shortages and price increases due to inflation. While the root of the problem was supply chain disruptions due to the COVID-19 pandemic, new challenges – including geopolitical risks – continue to put pressures on pricing.

A developing economic risk involves the increase in construction costs due to inflation along with an decrease in the ability of consumers to complete purchases of residential properties (in particular condominiums). The lack of funds has imperiled some developers, projects are beginning to stall and buyers are starting to default on deposits.

Some contractors and developers are facing increased challenges to secure funding for projects amidst questions about the bankability of projects. In a high inflationary environment, funders will generally be more cautious when offering funding to projects that are high in value, complex, or have long build times.

Should this trend continue there will likely be failures of developers and their projects; historically, this has resulted in claims against the designers which were responsible to certify payments should the financiers determine after the fact that the value in the construction is less than was certified.

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Key developments in 2023

We mentioned in last year's review the issue of coverage of operating losses when there is no physical damage, in the context of the COVID-19 pandemic, and the fact that litigation before various courts of first instance and of appeal in France left an impression of chaos.

Cour de cassation (French Supreme Court) rendered in 2023 other decisions in order to provide guidelines. It is not a surprise that decisions are still rendered: litigation involves various insurance contracts, with different wordings and different exclusion clauses. Besides, Cour de cassation also had to remind more general rules.

A decision rendered on 12 October 2023 concerns validity of an exclusion regarding operating losses in the context of a pandemic. But the issue raised before *Cour de cassation* is broader than the wording of the clause: it is about the legal basis of analysis. The lower court decided that the exclusion at stake was valid in contemplation of provisions of article L. 113 1 of French Insurance Code (setting specific conditions of validity for an exclusion regarding the drafting of the scope) but declared it invalid with regard to provisions of article 1131 of French Civil Code (regarding illicit cause of a contractual obligation). The decision is quashed because validity of an exclusion must be appreciated with regard to specific provisions of French Insurance Code.

A decision rendered on 9 November 2023 is more tightly bound to the wording of the policy. The lower court ruled that the contract covers operating losses which are not consequential to physical damage sustained by the insured's property, subject to the contractual limit. The final appeal before *Cour de cassation* is dismissed because the lower court sovereignly construed the terms of the policy without distorting them.

We mentioned last year that ACPR (*Autorité de Contrôle Prudentiel et de Résolution*: French authority supervising insurance) pursued in 2022 its surveillance of remote sale of insurance contracts, especially through telephone.

In 2023, ACPR also pursued its surveillance of protection of data and enforcement by Insurers of measures against money laundering and terrorism financing, which was presented as one of its priorities for the year 2023.

ACPR rendered on 12 October 2023 and 13 November 2023 two decisions sentencing two insurance companies for breach of the duties regarding money laundering and terrorism financing. These decisions are not isolated: since 2011, more than half of decisions of sanctions are rendered by ACPR in this area (mainly against credit establishments, but insurers are also concerned).

The decision dated 13 November 2023 is rendered in the field of sanctions: the insurance company has infringed regulation regarding freezing of assets (especially detection of persons subject to such measure).

What to look out for in 2024

Prices and emerging risks

Following a general trend of inflation, prices of Insurance increase in 2024, mainly due to the aggravated burden of losses. This has been echoed in media (not only those specialised in insurance) at the end of 2023.

The increase of losses arising from climatic events has of course been pointed out. In north of France some insured have been affected by floods successively in the autumn 2023 and at the beginning of 2024. We may expect in summer 2024 damages caused by drought (in agriculture as well as damage to buildings due to move of the desiccated soil).

Costs of repairs are also a factor in the increase of premiums. Even when frequency of losses and the extent of damage do not really aggravate, repercussion of prices of raw materials and of energy increase the costs (eg construction or motor insurance)

This leads to the notion of emerging risks, which is discussed by certain persons in France.

It is indeed questionable that climatic risks or war risks are "emerging". Though the events are unmistakably developing, they are not really new and sometimes they are not insurable risks. For instance, climatic risk is in itself not insurable, not only because it is beyond capacity of insurance, but also because the climatic change has become certain if it has not occurred yet. The climatic factor remains however the cause of aggravation of insurable risks (events like tempests, floods or drying of soils).

One could consider the only emerging risks are new technological risks. A well-accepted example is cyber risk. Other risks, currently undermined, are those related to nanotechnology and to biotechnology.

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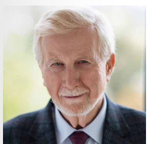

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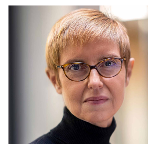

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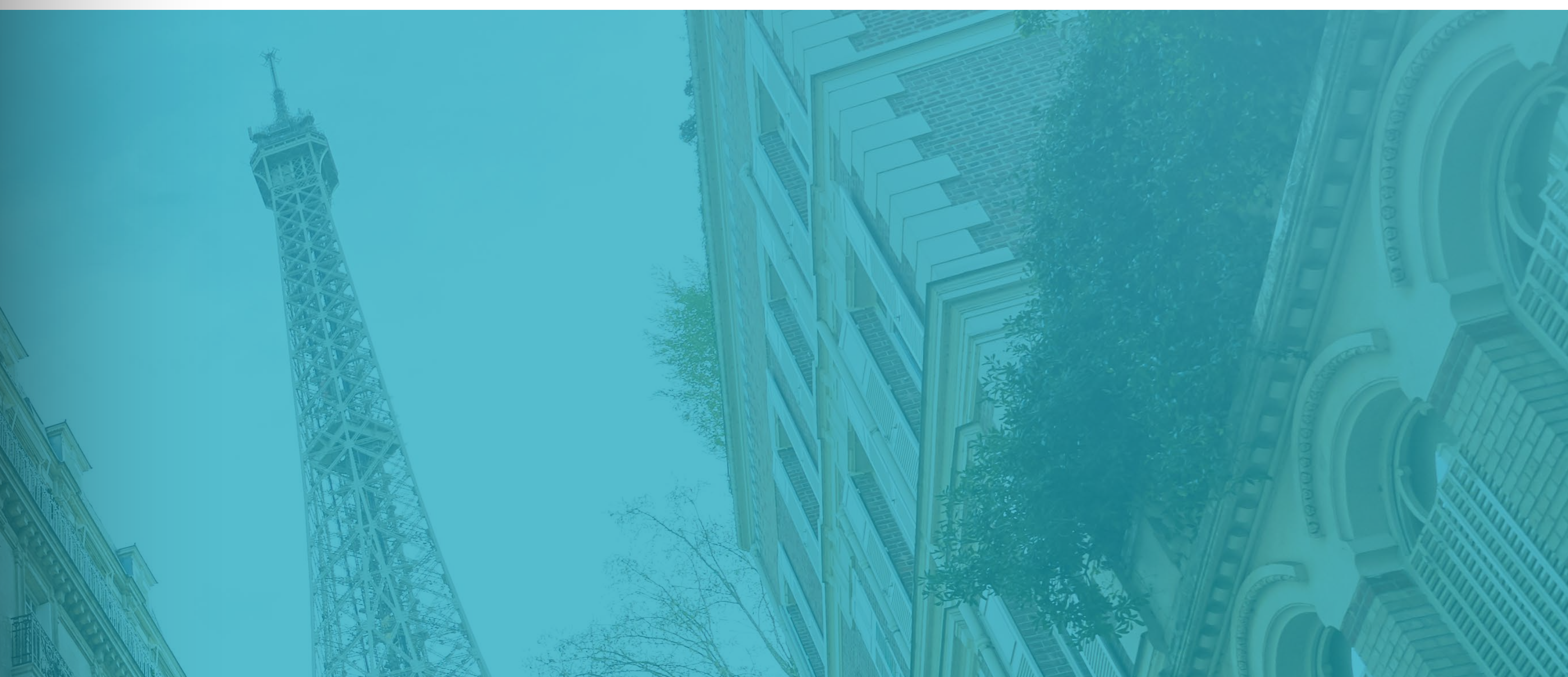

NETHERLANDS

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Key developments in 2023

Bankruptcies

During and after the COVID-19 pandemic, a significant wave of bankruptcies was expected. However, this did not materialise as the number of bankruptcies has been historically low in recent years due to government compensation schemes and the option to defer tax obligations. Now that these compensation schemes have ended, overdue taxes need to be paid, and inflation, costs, and interest rates have skyrocketed, the rise in bankruptcies has now set in. We are witnessing these bankruptcies, and inherent directors' and officers' liability claims, primarily in the trade and construction sectors.

ESG, climate change litigation and forever chemicals

After a group residents filed criminal charges against Tata Steel in 2021, the environmental concerns surrounding Tata Steel once again gained a lot of traction this year. In February 2023, the District Court of Amsterdam imposed two fines totalling €110,000 on Tata Steel for acting in violation with its environmental permits and the local environmental authority imposed several penalty payments and filed criminal charges against the company after it turned out that the equipment used to monitor the nitrogen emissions of its coke oven gas plants were not calibrated correctly.

Another 'hot topic' is PFAS. In September 2023, the District Court of Rotterdam has ruled that chemical concern Chemours (formerly DuPont) complied with its permit in the period up until July 1984, but is liable for the damage to the environment in the municipality of Dordrecht and its surroundings due to its PFAS emission between July 1984 and March 1998 as it withheld important information about the potentially hazardous emissions from the authorities. The damages are still to be determined.

Class actions

In its fourth year, the new regime for class actions (the so-called WAMCA) – which is based on an opt-out system and allows for claiming damages – has led to around 80 cases, varying from actions against the State, 'idealistic' claims and damages claims. The first of this last type of cases have reached the final formal stages of the proceedings, with the *Airbus* decision addressing three major issues of admissibility. The courts of The Hague have (i) defined a minimum threshold for the number of class members, (ii) ruled that activities of the claim vehicles (ie Foundation) cannot be outsourced, and (iii) confirmed that a Foundation must be able to act independently from the litigation funder.

In another major development, the courts of Amsterdam have decided in the *TikTok* case that the reasonable remuneration of a litigation funder is limited to five times the amount actually invested. At the same time, this court ruled that claims for non-material damages related to a breach of data privacy cannot be brought collectively, thus dismissing the bulk of the claims against TikTok.

Cyber and IT

In the Netherlands significant cyber incidents remain to occur relatively frequently, including a high profile case involving the Royal Netherlands Football Association. That case re-ignited public debate around ransom payment. A trend in 2023 is that cyber-attacks, such as ransomware attacks, became more sophisticated and criminals more frequently threatened publication of the stolen and encrypted data in what is called 'double extortion'.

We also see an increase in cases regarding liability following a cyber incident. In this emerging field of litigation the victim of a cyber incident brings an action against their IT-provider for damages related to the incident. The proceedings generally concern the interpretation of IT agreements and the IT-provider's duty of care. The most important case in 2023 related to a cyber incident in the IT systems of a municipality. In this case, the court was reluctant to accept liability on the IT provider's part, both in light of the contractual arrangements and the inadequate safety measures taken by the municipality itself.

What to look out for in 2024

ESG, climate change litigation and forever chemicals

In April 2024, hearings will take place in the appeal that Shell lodged against the 2021-ruling of the District Court of The Hague that Shell is obliged to reduce the CO_2 emission of the group's activities by 45% net at the end of 2030. Meanwhile, more than 1,400 residents living near Tata Steel have announced a mass claim against the company citing problems of pollution, noise, poor air quality and smell. Greenpeace has announced that they will start proceedings against the State of the Netherlands in cooperation with (representatives of) the residents of Bonaire, if the Dutch government does not take measures to adequately protect Bonaire against the consequences of climate change.

As mentioned above, litigation regarding forever chemicals such as PFAS is also increasingly gaining attention. A mass

complaint on behalf of roughly 3,000 residents has been filed with the State Prosecutor asking them to start criminal proceedings against the management of Chemours and the Dutch government has announced that it will bring a civil liability claim against the American company 3M for PFAS-pollution caused in the Dutch part of the Western Scheldt River by the nearby 3M factory in Belgium.

Class actions

In 2024, the first cases regarding the retroactive effect of the new regime will be heard in appeal. This will shed light on whether the strict approach taken by the courts of Amsterdam (ie making the application of the WAMCA dependent on when the first event occurred) will be confirmed as opposed to a dual, parallel application of the regimes for the relevant periods. The courts will also continue to grapple with data privacy cases in the admissibility phase as more have been brought in the second half of 2023 against major tech companies (such as Amazon, Google, Twitter and Meta). In addition, the first major class actions will enter the merits phase. Finally, it remains to be seen whether litigation funders may be less likely to fund cases given the limitations imposed in a few major decisions in the second half of 2023 (ie the *Airbus* and *TikTok* decisions).

Cyber and IT

The European Union is working on a number of legislative instruments that relate to cyber security and IT. One such piece of legislation, the NIS2 directive, must be adopted by EU member states by 17 October 2024. It imposes stricter security, notification, and enforcement rules on essential and important entities. Such entities include various digital infrastructure and ICT services. The NIS2 Directive also extends liability to 'management bodies' for the infringement of the obligation to take cybersecurity measures. We also expect a continuation of the trends we noted in the key developments section in terms of cyber liability cases and cyber incidents.

Revised product liability directive

In 2022 the European Commission adopted a proposal to modernise the existing Product Liability Directive. The changes are expected to provide further protection for consumers. In this proposal, the definition of the term 'product' is updated to better reflect technological developments. In addition, more parties can be held liable for damages caused by a defective product. Due to the broader scope, insurers may be confronted with more and higher claims in the future. In October 2023 the European Parliament has determined its position. In 2024 the legislative process will continue.

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LATIN AMERICA

RPC

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Key developments in 2023

The year 2023 has seen a significant rise in production costs and inflation. This increase has directly impacted insurance claims as the costs of repairing, reconstructing, or replacing insured risks have not been adequately covered. Additionally, inflation has impacted the valuations of insured properties, resulting in a situation where policy limits are insufficient to cover costs. This has led to a significant problem of underinsured properties.

Moreover, this year has seen an increase in catastrophic events in the region. For example, there have been devastating hurricanes in Mexico, droughts in Uruguay caused by the lack of rainfall and rising temperatures, landslides, and earthquakes in Ecuador, and the "El Niño y la Niña" phenomenon affecting Peru and Brazil. Additionally, forest fires in Chile have occurred as a result of high temperatures and strong winds, and there have been significant floods in Paraguay and Argentina.

Extreme weather events have become increasingly common in recent years, which may be seen as the result of climate change. As a result, insurance companies are becoming more aware of the potential losses that may arise from these catastrophic events. To reduce these risks, insurance premiums have increased considerably, and we expect to see new insurance products to be developed in the region.

Furthermore, the ongoing invasion of Ukraine by Russia has had a significant impact on the energy sector in Latin America, resulting in disruptions in the supply chain and putting additional pressure on an already tight global energy market.

The conflict has led to increased inflation rates, not only due to the rise in energy prices but also in the prices of agricultural products and the cost of living. However, some Latin American oil exporters, such as Brazil, Ecuador, and Colombia, have benefited from the situation, as it has led to an increase in their oil production. It remains unclear how this may impact the insurance industry, but we have seen an increase in losses in the energy sector as a result of the increase in production. This scenario could lead to a rise in premiums.

Several Latin American countries have experienced an increase in social conflicts and political violence-related losses during 2023. These losses are related to the change in presidential administrations in countries such as Brazil, Colombia, Costa Rica, and Paraguay, which occurred at the beginning of 2023 and the previous year. The new administrations have implemented social, economic, and security policies, leading to an increase in social inequality and political violence-related losses.

What to look out for in 2024

Latin America has emerged as one of the most rapid growth markets in the world. This regional insurance market is evolving rapidly both in terms of premiums and product sophistication.

Several developments are expected to be the focus of attention for the region

in the coming year. These include the growing awareness of climate change and the need to comply with ESG standards, the increasing use of technology in the sector, particularly Artificial Intelligence, the economic instability in some countries that may be affected by the upcoming presidential administrations, and the possible impact of international conflicts on the energy sector.

It is evident that climate change, ESG standards, and the energy transition will be crucial subjects as numerous investors are moving into Latin America to invest in renewable projects.

The demand for sustainable solutions is increasing in the insurance market worldwide, and Latin America is no exception. We have observed a rise in awareness among (re)insurers as they strive to align their business activities with international ESG standards and mitigate risks associated with natural catastrophe events.

Parametric insurance, also known as index-based insurance, is increasingly popular in the region as a way to help minimise financial losses from frequent natural catastrophes. This type of insurance covers the insured person based on the probability and intensity of a covered natural event rather than providing compensation for actual losses incurred. If the pre-agreed parameter is reached, the insurance policy will pay out a predetermined amount to the insured person.

Also, it is likely that losses from Nat Cat events will continue in 2024. Thus, it is important to determine whether the insured values are up to date. Often, the insured values can be inaccurate due to the costly nature of updating them. This can result in the premium paid by the insured not reflecting the true value of the property insured and, therefore, being impacted by underinsurance.

Inflation will continue to have an impact during 2024 in industries like property, construction, and energy due to increased material and labour costs. This will result in a significant increase in insurance rates and repair costs.

In addition, the use of technology in the insurance industry has been increasing, and this trend is also visible in the region. It is expected that rules and regulations related to the use of artificial intelligence will impact the insurance sector, especially on how premiums are calculated based on risk analysis. This is likely to be an issue in many jurisdictions as it could affect how (re)insurers carry out their business in the region.

Finally, the economic instability in certain countries, as well as the lack of response from governments during natural catastrophes, may result in protests and political violence. Additionally, the election of new presidential administrations in countries like Argentina and Guatemala and the upcoming elections in El Salvador, Panama, Mexico, the Dominican Republic, Uruguay, and Venezuela could also lead to similar events.

As the region has undergone widespread political changes, we anticipate an increase in losses related to political violence in 2024.

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Key developments 2023

Insurers continue to confront social inflation, economic inflation, ESG/sustainability, and artificial intelligence as well as the systemic challenges associated with artificial intelligence and cyberattacks. COVID-19 business interruption, cyber and privacy, PFAS and opioids, construction defect, weather-related claims, D&O/securities, and traditional asbestos and environmental claims dominated claims and litigation activities and court decisions.

Social inflation

Although economic inflation has dropped from a 40-year-high of 9.1% in 2022 to approximately 3.5%, it remains almost three times the rate of 2020. Social inflation remains unabated in the US, where a world leading 40 million lawsuits a year are filed. The tort system costs per household range from US$2,000 to $5,500 depending upon the state.

Combating social inflation is difficult in an environment fraught with improvident legal and evidentiary rulings by judges giving rise to large liabilities, coupled with nuclear and thermonuclear verdicts rendered by juries. Traditional rules of evidence and jury instructions have been ineffective in tapering proclivities of younger jurors and addressing the challenges presented in this instant information age. The plaintiffs' bar is rolling in cash, armed with litigation funding, employing reptilian tactics, and spending nearly US$1.5bn annually in advertising to recruit plaintiffs and pre-condition future jurors to render large verdicts. Meanwhile, defendants and insurers have relinquished their traditional leverage and financial advantages in favor of what at times seems to be a myopic focus on containing their litigation spend.

Except for Florida, little meaningful tort reform has been enacted across the US in recent years. The short-term impact of the Florida reform has been the infusion of 280,000 new cases filed in advance of the effective date of the legislation. By contrast, state legislators have contributed to social inflation by passing privacy statutes such as the Illinois Biometric Information Privacy Act (BIPA) (which allows for recoveries in the absence of plaintiffs sustaining any actual damages), eliminating statutes of limitation for sexual abuse cases, expanding causes of action permitting an award of punitive damages. Public nuisance tort theory has gained traction in some states.

ESG/sustainability

The Biden administration and many states continue to advance environmental, social, and governance (ESG) criteria on a "whole of government" basis with ESG dominating most decisions and actions of agencies and departments. The Securities and Exchange Commission has proposed an onerous climate-related disclosure rule and is stepping up enforcement activity with respect to ESG.

The momentum remains on the side of ESG, but the pace and depth of ESG have resulted in backlash. The anti-ESG movement has gained momentum on the heels of last year's US Supreme Court decision in the *West Virginia v EPA* case, which struck down a rule promulgated by the EPA to address carbon dioxide emissions from existing coal and natural gas-fired power plants, ruling the agency exceeded its authority under the Clean Air Act. The Court's 2023 decision in *Sackett v EPA* narrowed the federal government's authority to regulate bodies of water and upending a Biden administration rule. Finally, the Court's decision in *Students for Fair Admissions, Inc v President and Fellows of Harvard College* took a bite out of diversity, inclusion, and equity initiatives in terms of college admissions. The Court struck down affirmative action admissions policies used by both Harvard and UNC, effectively barring the consideration of race as an independent factor in university admissions. Harvard and UNC receive federal funding and are subject to the Equal Protection Clause of the Fourteenth Amendment to the US Constitution and Title VI of the Civil Rights Act of 1964, which bar discrimination based on race. Private companies generally are not subject to the Equal Protection Clause but are subject to Title VII of the Civil Rights Act of 1964, which has language very similar to Title VI. Many companies are at least reevaluating their DEI initiatives. The ultimate impact on private employer diversity initiatives will play out over time.

As the ESG debate roils, some state legislative bodies have enacted or proposed anti-ESG legislation, much of which is directed to investment issues. This past legislative season saw roughly 99 bills nationwide aimed at restricting the use of ESG factors, a marked increase from the 39 bills in 2022.

Artificial intelligence

Insurers are using artificial intelligence (AI) in a variety of ways with respect to underwriting, pricing, fraud investigation, claims evaluation and handling, and other activities. There are no insurance industry-wide AI standards or regulations, but state insurance regulators, the National Association of Insurance Commissioners, and various organisations are formulating regulations, guidelines, and best practices for the use of AI and algorithms by insurers, and artificial intelligence may be subject to otherwise applicable existing regulatory requirements. In November, the US Cybersecurity and Infrastructure Security

Agency and the UK National Cyber Security Centre released their Guidelines for Secure AI System Development. The use of AI and algorithms by insurers is drawing increased scrutiny from regulators and policyholders alike.

Effective use of AI will be an important determinant of insurer success going forward. AI already has produced claims and it is expected to produce and amplify a large volume of claims activity into the future.

COVID-19 business interruption litigation

Almost 2,400 COVID-19 have been filed in state and federal courts across the US since the pandemic. Approximately 476 cases have been filed as putative class actions and 856 cases include allegations of bad faith. At the trial court level, insurers have prevailed in approximately 69% of the 236 rulings on motions to dismiss in state courts across the country and in more than 86% of the 740 rulings in federal courts. These victories have been predominately obtained on the grounds that the claims do not involve "direct physical loss or damage" to property as required by the language contained in most US first-party policies or based upon the application of virus or other exclusions. Insurers have prevailed in most summary judgment rulings in and six of the first seven trials. Policyholders scored their only jury win to date with a US$48.5m verdict in favor of Baylor College of Medicine against Lloyd's in Texas.

Insurers have prevailed before every US Courts of Appeals circuit, except for the D.C. Circuit which has yet to rule. Insurers also have prevailed in appeals before State Supreme Courts in Connecticut, Delaware, Iowa, Louisiana, Massachusetts, Nevada, New Hampshire, Ohio, Oklahoma, South Carolina, Washington, and Wisconsin. Policyholders were handed a victory in the Vermont Supreme Court allowing a lawsuit to go forward. Insurers have prevailed in most state intermediate appellate court decisions to date as well.

Cyber

For the past 13 years, the US has had the highest average costs in the world for data breaches at US$9.48m. Since 2020, the costs of healthcare data breaches have increased by 53.3%. Phishing accounts for 16% of data breaches followed by stolen or lost credentials at 15%. Breaches resulting from the use of stolen or lost credentials had the longest lifecycle at nearly 11 months to detect and contain the breach. Organisations with high levels of incident response planning and testing reduce average data breach costs by US$1.49m, and extensive security, artificial intelligence, and automation on average lowers data breach costs by US$1.76m.

Most reported coverage decisions involving cyber issues have been so-called cyber decisions – decisions under traditional general liability, first-party, and crime/fraud policies.

The intermediate New Jersey appeals court affirmed the trial court decision in *Merck & Co. v Ace Am. Ins. Co.*, holding the 2017 cyberattack from malware known as NotPetya carried out by hackers acting on Russia's behalf was not barred by the hostile/warlike action exclusion. The New Jersey Supreme Court agreed to review the decision. The decision will be important for legacy cyber insurance contracts, but insurers in the US are moving forward with a new generation of war exclusions. Reportedly, the US Department of Treasury has reached a tentative conclusion that a federal cyber insurance backstop is required for catastrophic cyber risk. At this point, however, no such backstop exists.

On 26 July 2023, the US Securities and Exchange Commission adopted rules requiring registrants to disclose material cybersecurity incidents they experience. Additionally, they must disclose annually material information regarding their cybersecurity risk management, strategy, and governance.

Privacy

The US lacks an encompassing federal law comparable to the European Union's General Data Protection Regulations. Data breach notification laws, however, are in place in all 50 states. There are now nine different comprehensive state privacy laws along with at least 25 different state data security laws in the US. At least 16 states introduced privacy bills in the 2022-2023 legislative cycle.

Privacy acts in Connecticut and Colorado became effective in 2023 and the comprehensive California Privacy Rights Act of 2020 (CPRA) became fully effective. Numerous rulings have been rendered under the Illinois Biometric Privacy Act demonstrating the broad scope of the act. Most of the coverage decisions to date have favored policyholders and hold that various exclusions do not preclude coverage.

PFAS/forever chemicals

Per- and polyfluoroalkyl substances (PFAS), often referred to as "forever chemicals," have been around since at least the 1940s and have been used in so many products they are said to be ubiquitous. Only recently has PFAS became one of the most fervent areas for civil litigation. There are now thousands of cases pending across the US, with numerous eye-opening settlements reached. Governmental regulators arrived late to the scene but are now locked and loaded on regulating PFAS chemicals.

USA (continued)

Numerous states are suing manufacturers and others for contaminating drinking water and damaging natural resources and are seeking to bar the use of these chemicals. The United States Court of Appeals for the Sixth Circuit vacated a district court order certifying a class of 11 million Ohio residents in a case involving ten defendants.

On 11 October 2023, the EPA issued its final rule under the Toxic Substances Control Act, requiring companies that manufactured or imported PFAS for a commercial purpose since 2011 to report PFAS data to the EPA by the first half of 2025.

PFAS claims present numerous coverage issues. Several decisions have ruled on the applicability of various forms of pollution exclusions with mixed results. Various specific PFAS exclusions may be included in policies of more recent vintage. Many claims potentially implicate legacy policies.

Climate and weather-related claims

The greatest impact that climate change has had on insurance claims to date has been as a phenomenon impacting the frequency and severity of weather events. Despite all the activity surrounding climate change, only one actual climate change coverage decision has been reported. This is the Virginia Court of Appeals decision in *AES Corp. v Steadfast Ins. Co.* in which the court affirmed the grant of summary judgment in favor of the insurer on the basis that the underlying complaint did not allege an "occurrence" covered by the policies. The court did not address the pollution exclusion or trigger issues.

In the wake of several insurer insolvencies, Florida enacted two statutes interposing litigation reform impacting first-party claims, particularly with respect to claims involving roof damage and creating a US$2bn reinsurance program. This year, at least three major insurers announced they would stop or limit writing homeowner's policies in California due to weather-related claims and the inability to charge adequate premiums.

Traditional environmental and asbestos claims

Notwithstanding the various emerging claim types, traditional asbestos and environmental claims continue to dominate with over 1,300 Superfund cleanup sites and 22% of US population residing within three miles of them. Approximately US$1bn from the Infrastructure Investment and Jobs Act was allocated to the cleanup of 49 Superfund sites. Claims-made policies and issues are more dominant in environmental claims today than decades ago. There have been several coverage decisions rendered, but none changing the course of coverage litigation.

Opioids

Opioid epidemic reportedly costs the US approximately US$1tn annually. Approximately, 3,000 state and local governmental entities have been seeking to recover costs of public services associated with opioids from drug manufacturers and distributors. Policyholders have not fared well seeking coverage under general liability policies over the past couple of years. However, there was a policyholder victory under a D&O policy in North Carolina federal court in 2023.

Lead paint

Coverage issues relating to the US$400m plus lead paint abatement fund resulting from a long-pending case in California against three lead paint manufacturers have been subject to three separate coverage actions, with the insurers prevailing in California, the policyholder prevailing in New York. In the *Sherwin-Williams* case, the Ohio Supreme Court heard oral argument in October.

Construction defect

There has been no slow-down in activity in construction defect coverage litigation. Recently, the Illinois Supreme Court ruled that water damage to the interior of the completed townhome units, if proven, could satisfy the definition of "property damage" and "occurrence" requirement, but remanded the case to the trial court to consider whether the business risk exclusions bar coverage. Earlier in the year, the Wisconsin Supreme Court changed the way it analysed whether there has been "property damage" caused by an "occurrence" under the policies.

Representations and warranties/ transactions insurance

Representation and warranties and other forms of transactions insurance have taken root in many transactions, but the claims volume has been manageable and only a few coverage decisions have been reported.

D&O and securities law

There has been an uptick in litigation involving greenwashing claims, including shareholder derivative actions against officers and directors for breach of fiduciary duty and violation of securities law. Consumer litigation around alleged ESG misstatements about products and practices continue to be asserted with mixed outcomes. To minimise exposure for greenwashing, some companies have turned to "green hushing," where companies seek to hide their climate strategies from wider scrutiny.

Although companies with cogent ESG practices may reduce some exposures, corporate activism on ESG issues can have an adverse impact on stock prices and

create litigation exposures. Disney found itself in this position, but it prevailed in a records demand action brought by a shareholder. The Delaware Supreme Court ruled that a professional services exclusion in a management liability insurance policy's professional services exclusion did not preclude coverage for the underlying investigation and claim.

The US Supreme Court granted review in *Macquarie Infrastructure Corp. v Moab Partners, L.P.*, to determine whether the failure to make the disclosure required by Item 303 of Reg. S-K (requiring disclosure of known trends or uncertainties that have or will have a materially favorable or unfavorable impact on the company) constitutes an actionable omission under Section 10(b) and Rule 10b-5. The Second Circuit has held that Item 303 creates an actionable duty of disclosure, while the Third, Ninth, and Eleventh Circuits have held that it does not.

Wasting limits policies and reimbursement of defense costs

Effective 1 October 2023, Nevada became the first state in the country to preclude issuance or renewal of insurance policies that pay defense costs on a wasting limits basis. The enactment of this legislation generated considerable concern that the abolition of wasting limits policies would result in insurers leaving the Nevada market or liability insurance becoming prohibitively expensive. In response to these concerns, the Nevada Commissioner of Insurance adopted a regulation limiting the application of the law.

Courts across the US are split over the issue of whether insurers may obtain reimbursement for defense costs incurred on non-covered claims by asserting the right to reimbursement in a reservation of rights letter in the absence of a policy provision expressly providing for reimbursement. Policyholders recently prevailed on this issue before the Hawaii Supreme Court and the Eleventh Circuit (under Georgia law). These decisions will not have broad application in view of the number of existing decisions on the issue and the inclusion of provisions expressly allowing for recoupment in policies of recent vintage.

Reinsurance

Several decisions addressed arbitration and panel related issues, but few substantive reinsurance decisions in 2023. The Second Circuit considered allocation under English law in *The Ins. Co. of the State of PA. v Equitas Ins. Ltd*. There, the cedent settled environmental claims with its insured applying an "all sums" allocation pursuant to California law. The reinsurer challenged the cession, contending that an "all sums" allocation was improper under English law, which governed the facultative certificate. The Second Circuit determined the issue was not whether English law would have allocated the cedent's liability based on an "all sums" allocation. The issue was, once the cedant's liability was property allocated as the parties agreed it was, whether English law would interpret the reinsurance policy as providing co-extensive coverage. The Second Circuit concluded English law would interpret the reinsurance policy as providing co-extensive coverage. The Second Circuit also rejected the reinsurer's late notice defense.

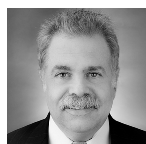
What to look out for in 2024

The various claim types discussed above are expected to be subject to additional decisions in 2024. Social inflation, ESG, and artificial intelligence will continue to impact insurers. Few new COVID-19 business interruption cases are expected to be filed but pending cases will continue to be litigated and generate decisions for the next couple of years before tapering off. Although unlikely to change the trajectory of the COVID-19 coverage litigation, important appeals are pending before the high courts of California and New York. Coverage decisions will be rendered under cyber-specific policies with greater frequency.

PFAS losses will present major losses to insurers and their policyholders with the potential to rival asbestos-related losses. This is a rare time where two cases directly impacting insurers are pending before the U.S. Supreme Court. The Supreme Court will render decisions in *Great Lakes Ins SE v Raiders Retreat Realty Co LLC*, which involves the issue of choice of law under a marine insurance policy and *Truck Ins Exchange v Kaiser Gypsum Co Inc*, which raises the issue of whether an insurer who will be paying on asbestos claims has standing to object to a plan of reorganization. In addition, the Supreme Court is expected to issue its decision in *Harrington v Purdue Pharma LP* concerning the power of courts to issue nonconsensual third-party releases in bankruptcy. Finally, the Supreme Court set oral argument in February in cases raising issues as to whether the U.S. EPA can implement a plan to reduce cross-state pollution over objections its "Good Neighbor Plan" usurps the authority of states to develop their own plans for controlling emissions.

Pending before the California Supreme Court is a case involving equitable contribution claims. The court has limited review to the issue of whether a primary insurer may seek equitable contribution from an excess insurer after the primary policy underlying the excess policy has been exhausted (vertical exhaustion) or only after all primary policies have been exhausted (horizontal exhaustion).

CONTACTS



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MIDDLE EAST AND AFRICA

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Key Developments in 2023

Middle East

Last year's Annual Insurance Review predicted that investments in green technology and sustainable projects would continue to grow in the Middle East in line with the region's ambitious renewables energy targets.

The legal and regulatory landscape in the Middle East is evolving to support these advancements. The Dubai World Insurance Congress continues to highlight the insurance market's commitment to renewables. Last year, it was noted that insurers and brokers who undercut ESG standards will "face catastrophic consequences". This year, the Congress stated that regulatory "force" will be necessary to spark industry climate action.

The introduction of the Saudi Civil Transactions Law (KSA Civil Code) is a further example of the developing legal landscape in the region, integrating Islamic principles into a more formalized legal framework, in an effort to promote business-friendly legal mechanisms and streamline transactions including the resolution of insurance claims.

Africa

Last year we predicted continued market sophistication in Africa, driven by a growing focus on innovative and technology driven solutions.

We have witnessed the beginnings of a shift towards the implementation of risk-based capital (RBC) regimes across the world's second-fastest-growing region for insurance. South Africa is the forerunner, transitioning to an RBC regime similar to Europe's Solvency II, setting a benchmark for regulatory reform. We anticipate other nations to follow suit. Adopting RBC regimes should bolster resilience in the insurance market, safeguard consumers, and promote financial discipline.

Further signs of growth in Africa's insurance market are evidenced by the strategic expansions of major insurers into the region and Africa Speciality Risks' recent approval for a Lloyd's syndicate launch.

The entry of new international insurers, the sustained investment by existing international insurers, and the developing regulatory environment in the region underscore the growing attractiveness of the African market.

What to look out for in 2024

Middle East

With a forecasted annual growth of 13.43% in the renewable energy market from 2023 to 2028, we expect continued success in the Middle East's transition to sustainable energy sources.

The UAE continues to be a leader in this sphere, with ambitions for clean energy to constitute 50% of its total energy supply and generating over 70 GW of power by 2050, in alignment with its Net Zero by 2050 strategy.

We anticipate further leveraging of the region's substantial solar potential. Solar and wind energy alone are set to double the region's renewable power generation capacity by 2030, while existing projects already underway are expected to increase the region's renewable energy production capacity fivefold by 2030.

According to the International Renewable Energy Agency's Pan Arab Clean Energy initiative, 92% of the renewable energy generation targets set for Middle Eastern countries are expected to be met by 2030.

The drive towards renewable energy in the region continues to necessitate extensive construction projects and the operation of vast energy infrastructure, all of which require investment and insurance solutions.

Africa

We anticipate that innovative and technology driven solutions will continue to drive the expansion of the African insurance sphere.

The African Insurance Organisation's (AIO) focus on digitization, particularly through mobile technology, should continue to enable the delivery of tailored micro-insurance products and expansion of services into rural areas. In Kenya, for instance, one notable product is M-PESA's mobile-based health insurance service called M-TIBA which allows users to save, send, and receive funds specifically for medical treatment, linking them directly to healthcare providers. This service has significantly increased access to health insurance and care in the region, and we expect similar products to continue facilitating the market's expansion.

Further, it is possible that other countries on the continent may follow South Africa's lead with their own implementation of risk-based capital (RBC) regimes. As the continent continues to evolve and adapt, it is expected that the insurance sector will not only expand but also become more robust and integrated into the global financial system.

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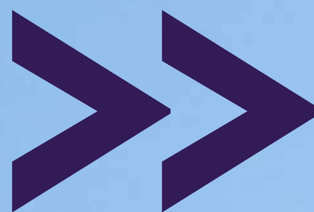
Business line updates



Accountants

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Key developments in 2023

In our last annual review, we reported on the anticipated progress that 2023 was likely to bring in terms of UK audit reform regulation. Following delays to the timetable, a draft bill had been expected late in the year, with the reforms to come into force in spring 2024. However, the exclusion of audit reform from the King's Speech in November 2023 means that the proposed reforms will most likely be delayed until at least after the next General Election (likely to be in 2024 and before late January 2025), disappointing many.

The reforms were intended to restore public trust in the way the UK's largest firms are run, following several high-profile corporate collapses in the last few years. Central to this was the proposed transformation of the Financial Reporting Council (FRC) into the Audit, Reporting and Governance Authority (ARGA), a new regulator with an expanded remit and increased enforcement powers. The reforms proposed were to improve the quality of audit reporting, set minimum standards for audit committees, and widen the definition of Public Interest Entities (PIE), bringing around 600 more companies under ARGA's remit. They had also been aimed at increasing competition in PIE audits, an area currently dominated by the 'big four'.

The FRC is, however, in the process of implementing several of the reforms that do not require primary legislation. These include amendments to the UK corporate governance code, although in its published statement of 7 November 2023, the FRC confirmed it will now only take forward a small number of the original proposals in this area.

The FRC also launched its regulatory 'scalebox', a means for existing smaller PIE audit firms to obtain additional support from the regulator to expand the scope of their PIE audit work. The FRC has also created a new 'tier' for current non-PIE audit firms looking to join the PIE audit market.

The FRC has doubled in size over the last four years, in preparation for the ARGA transition, and has imposed record fines on accounting firms for poor quality audit work. In December 2023 it also indicated an intention to crack down on audit quality at smaller 'tier 2' and tier 3' PIE audit firms. Even in the absence of wider reforms and primary legislation it is therefore clear that audit firms will continue to be closely scrutinised.

What to look out for in 2024

Reform will continue to be a key factor in the accountancy field in 2024. The ICAEW, the largest UK accountancy member organisation, has been consulting on proposed changes to its professional indemnity insurance (PII) regime for its members.

The ICAEW identified several factors necessitating this review, including: the changing nature of the structure of firms (and their insurance arrangements); the financial capacity of its members; increased pressure to manage the costs of insurance; and an increase in firms unable to obtain qualifying insurance. The consultation took place between October and December 2023.

The reforms are likely to see changes to the current minimum insurance levels in place for all sizes of firm, with the minimum level of cover for many firms (excluding the largest and smallest categories) to increase significantly from £1.5m to £2m in the aggregate, with defence costs in addition. Other proposed amendments for certain categories of firm include allowing for the excess to be applied to defence costs, and providing for a significantly extended period of run-off cover. The ICAEW will also provide further guidance to clarify how 'compound firms', ie multiple entities within a group, are to be treated for the purposes of its insurance requirements.

The focus of the proposed amendments appears to be increased consumer protection, and the ICAEW's self-expressed role as an improvement regulator, acting to "strengthen trust in ICAEW Chartered Accountants and firms" is to be welcomed. That said, many in the industry have expressed concerns about the potential increases to premiums payable by firms as a result of the amendments. Insurers may also be concerned about some of the proposed amendments, including the significantly extended mandatory run-off cover period, and a suggestion that Insurers should pay the firm's excess should the firm become insolvent.

More will be known soon, as the ICAEW has confirmed it will report on the outcome of the consultation in early 2024.

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Art and specie

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Key developments in 2023

In a year that has seen the British Museum reporting around 2,000 artefacts missing, stolen or damaged, there have been renewed calls for accountability for the failure to take care of cultural property of other countries, and for items to be returned to the countries of origin. In China there have been calls for the British Museum to return Chinese artefacts. The Greek government has renewed calls for the return of the Parthenon Sculptures, also known as the Elgin Marbles, and Nigerian officials have also called on the museum to return the Benin Bronzes.

The lack of a full record of artefacts held by the museum has been criticised, but this is certainly not unique to the British Museum. Glasgow Museums have been unable to locate a sculpture by world famous sculptor Auguste Rodin, said to be worth £3m, and this is said to be just one of almost 1,750 items currently listed as missing or stolen. The Imperial War Museum, National History Museum and Museum Wales have all also reported large numbers of missing items.

The recovery of artefacts will be hampered by a lack of evidence of provenance, and the length of time over which it is thought these artefacts have been stolen. The British Museum has said that it will now digitise its entire collection.

No doubt insurers will be giving renewed scrutiny to whether their policyholders have in place a comprehensive inventory of all artworks and adequate security as well as the risks of policyholders inadvertently dealing in something which turns out to be stolen.

What to look out for in 2024

2024 will continue to see technological advances to manage and monitor the risk of damage.

Whilst shipping works of art by sea has in the past been unpopular due to its higher risks and resulting higher insurance costs, that has changed as part of the transition to net zero carbon and the introduction by the Gallery Climate Coalition (GCC) and Lloyds Market Associate Joint Specie Committee's best-practice guidelines for the insurance of artworks travelling using sea freight. Technology can assist in managing the risks involved and generating data which will assist underwriters in making decisions.

Advances in risk mitigation technology such as the ability to detect early signs of deterioration, and the ability to monitor and control the temperature, humidity, illuminance exposure and visibility can mitigate risks and keep insurance costs down. Real time environmental monitoring data and virtual tracking systems, including the ability to track shock and tip of a shipping container for instance, can also be used by underwriters to assess risks and determine future pricing.

More generally, technological advances also assist in supporting decisions as to authenticity and condition (including pinpointing when any damage took place, and the extent of that damage). The ability to obtain a digital fingerprint of painting surfaces will assist in combating art fraud and support insurance of high value artworks. Such technologies are set to be of increasing assistance in claim disputes.

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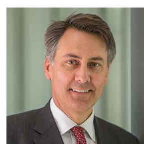

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Brokers

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Key developments in 2023

Claims inflation has been a key theme throughout 2023. Inflationary pressure has required brokers to pay close attention to the adequacy of sums insured and led to an increased number of claims as well as a rise in the costs of insurance claims. One notable example of this relates to the dramatic rise in the cost of building materials, labour shortages and supply issues, which has led to increased rebuild costs for buildings as well as an increased risk of underinsurance.

There has also been a rise in the number of claims against brokers relating to underinsurance for business interruption losses. One such example is the recent judgment in *Infinity Reliance v Heath Crawford*, which serves as a useful reminder of brokers' duties to policyholders. These include the need for brokers to make sure they have a clear understanding of a policyholder's business and are asking the right questions in order to identify the main risks and advise on appropriate cover. This applies as much on renewal as when placing a client's insurance for the first time.

Environmental, social, and governance (ESG) has remained a key theme throughout 2023, with brokers adapting to placing ESG risks in an evolving market. In addition, an increased focus on ESG topics amongst a wide range of professionals has led to increased risks for brokers. Examples include failing to advise policyholders sufficiently as to what they need to disclose in relation to ESG and not recommending cover that fits with the policyholder's requirements in relation to ESG.

What to look out for in 2024

Inflation and the cost-of-living crisis are issues that look to remain, and brokers will continue to need to ensure they are obtaining adequate insurance that reflects their client's needs in light of these challenges. Clients will rely on brokers to navigate obtaining appropriate insurance during these volatile times, particularly if the budget for it decreases. Brokers should be mindful of their duties and ensure to carefully explain cover and the options for cover to their clients, and also to understand what is essential for a client's business.

AI continues to grow, and the incorporation of it into businesses and professional services, with some large law firms even developing their own AI. Brokers will need to ensure that their clients who are exploring AI are adequately covered in respect of it, including from a regulatory and privacy perspective.

ESG will remain central in respect of its impact on insurance and potential claims against brokers. Brokers will need to be across Insurers' expectations in respect of an Insured's ESG obligations or commitments in order to properly present the risk, and also the impact ESG can have on producing or placing terms on behalf of clients, particularly in areas such as construction.

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Class actions and collective redress

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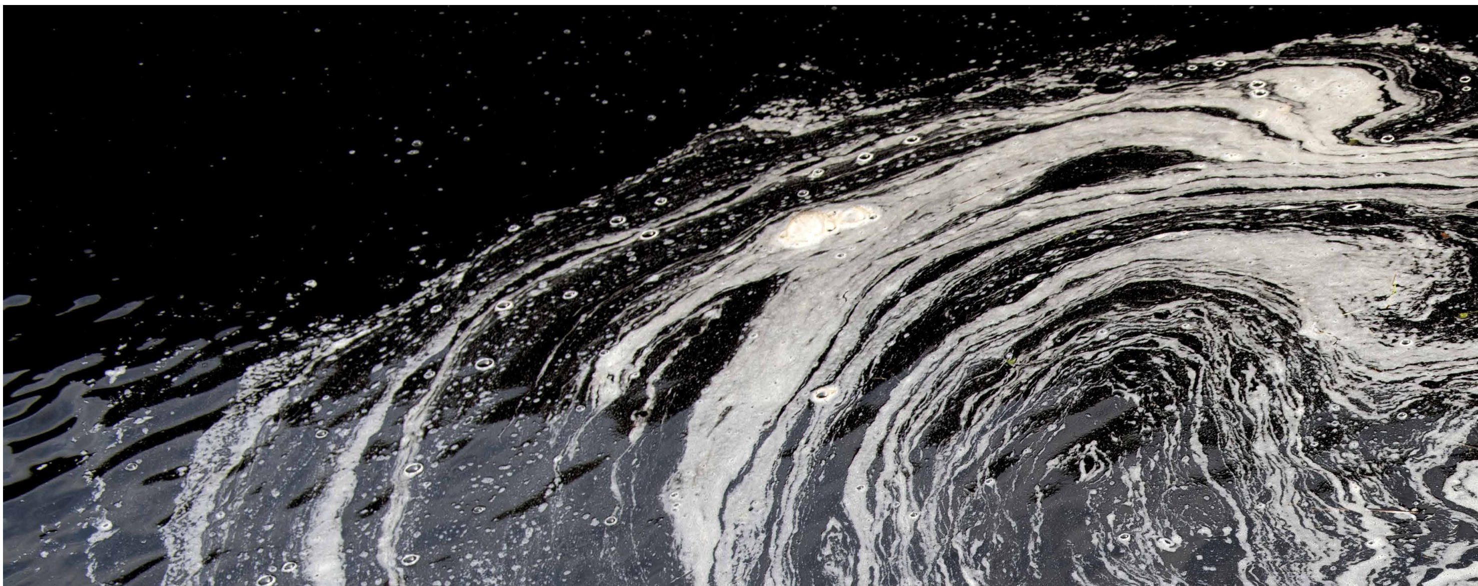
Key developments in 2023

2023 saw further developments in cross-border environmental/ESG group litigation brought against multinational companies and the impact of litigation funding. A highlight has been the progress of the *Municipio de Mariana v BHP* case, concerning the Fundao dam collapse in Brazil in 2015. This continues the trend for carbon majors to be targeted by group litigation in the English courts in relation to alleged torts in other jurisdictions, subsequent to the *Vedanta* [2019] and *Okpabi* [2021] cases involving pollution in Zambia and Nigeria.

Following the Court of Appeal's 2022 judgment[1], group litigation brought by Brazilian litigants has been allowed to proceed against BHP and others in the English Courts. The BHP case is a ground-breaking piece of litigation in both the environmental/ESG sphere and for the English courts. Its scale is unprecedented, and it concerns one of the largest environmental disasters in Brazil's history, with over 700,000 claimants and damages now projected up to GBP£36bn. Despite parallel litigation and a compensation scheme already established in Brazil, the English Courts permitted the case to proceed amidst concerns regarding access to justice and adequate compensation for the myriad types of damages claimed. Although trial is scheduled for October 2024, it is speculated that BHP will negotiate a final, encompassing settlement.

We are still very far from a US "opt-out" class action for civil claims in the English courts (this mechanism is only available in a competition context) and "opt-in" group litigation orders remain the main mechanism. Representative actions can still only be brought in relatively limited circumstances. Most recently, the claimants in *Lloyd v Google*[2] and in *Jalla v Shell*[3] concerning data protection and pollution claims, respectively, failed to satisfy the "same interest" test, in order to bring a representative action on behalf of a class of claimants. However, the BHP case has undoubtedly demonstrated the shift in the approach of the English courts to mass litigation, particularly in an environmental/ESG context. 2023 also saw an 'opt-out' competition class action brought against six water companies on behalf of homeowners, on the basis that they have abused their position and under-reported sewage emissions to regulators, in order to avoid penalties and continue overcharging customers.

Litigation funding continues to drive the expansion of group litigation globally. A long running class action brought by Indonesian farmers against PTTEP Australasia, in relation to 2009 oil spillages in the Timor Sea, was settled in 2022 for AUS$192.5m. Harbour Litigation Funding had invested in the litigation and reportedly received two-fifths of the settlement. In 2023, Gramercy announced a £450m litigation funding investment in Pogust Goodhead (the law firm which has led the litigation against BHP in the English courts and Braskem in the Dutch courts). The competition class action



brought against six UK water companies is reportedly being funded by Bench Walk, a US based litigation funder.

However, the Supreme Court's 2023 decision in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others*[4], has cast some doubt on the enforceability of litigation funding agreements (LFAs) which were held to fall within the statutory definition of damage-based agreements (DBAs)[5]. The definition of DBAs includes "claims management services" which are defined as including "the provision of financial services or assistance"[6]. Consequently, the court held that LFAs fall within the definition of DBAs and are not enforceable, unless they comply with the Damages-Based Agreements Regulations 2013. This raises questions regarding the enforceability of both existing and future DBAs. The court also clarified that DBAs are prohibited in opt-out collective actions, pursuant to section 47C(8) of the Competition Act 1996.

What to look out for in 2024

Although the BHP case may be resolved without a substantive trial on liability during 2024, the way has been paved for similar large-scale environmental litigation. We will likely see more historic pollution cases and it is possible that the representative action mechanism could be explored further where claimants seek injunctive relief (and therefore have a more obvious common interest). We are still yet to see a "historic GHG emissions" case brought in the English courts, such as those issued in the Swiss and German courts. The use of the "opt out" competition class action in an environmental context will be tested against the water companies and it remains to be seen whether such claims will gain traction more widely. Litigation funders will also have to grapple with the structure of their arrangements and compliance with the regulations on DBAs. It will be interesting to see to what extent this affects the pipeline of large-scale group claims in the English courts.

Notes

1. [2022] EWCA Civ 951
2. [2021] UKSC 50
3. [2021] EWCA 63
4. [2023] UKSC 28
5. Section 58AA(3)(a) of the Courts and Legal Services Act 1990
6. Section 419A of the Financial Services and Markets Act 2000

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Climate and biodiversity risk

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Key developments in 2023

2023 closed with the COP28 conference and a more tangible commitment by nations worldwide to transition away from fossil fuels. Over 2,500 climate change related cases have now been filed worldwide, including in relation to plastic pollution. Biodiversity cases are also gathering pace brought on behalf of individual species and the environment.

Whilst the outcome of COP27 had been disappointing after a deal could not be negotiated in relation to phasing down or reducing fossil fuels, COP28 saw renewed pledges regarding de-carbonisation, curbing methane emissions and tripling renewable energy capacity by 2030. The conference also focused on the need to protect global ecosystems and the synergetic relationship between climate and nature. Investing more in protecting oceans through the restoration of mangroves was a hot topic and demonstrated progress, following the discussions led by the Global Mangrove Alliance and Coral Reefs Resilience Action at COP27.

In December 2023, it was announced that the EU Parliament had reached a provisional agreement on the Corporate Sustainability Due Diligence Directive. This will set out the obligations for large companies to conduct due diligence regarding actual and potentially adverse impacts on human rights and the environment. It will also address the adoption of climate transition plans and enforcement, including injunctive relief, fines and the establishment of a civil liability regime for failures to comply with the directive.

2023 also saw further developments in relation to plastic pollution, both in terms of evolving regulations and litigation. The negotiation of a global plastic treaty is ongoing and in October 2023, the UK implemented a ban on single-use plastics including plates, trays, bowls, cutlery, balloon sticks and certain types of polystyrene cups and containers. In January 2024, it was announced that the UK government is considering a ban on fruit and vegetable plastic packaging, in order to reduce waste. The proposed new rules would reportedly make compostable or recyclable bags compulsory.

The European Consumer Organisation, ClientEarth and ECOS filed a complaint with the European Commission, alleging

that Coca-Cola, Nestle and Danone have made misrepresentative statements concerning the recyclability of plastic water bottles. This follows ClientEarth's case against Danone in relation to plastic pollution and its global supply chain, and alleged failures to devise a solution. At the end of 2023, New York State filed a lawsuit against PepsiCo for allegedly causing contamination of the Buffalo River and making misleading statements/ failure to warn the public regarding the accumulation of plastic waste in the environment.

The "Carbon Majors" cases brought against the oil, gas and mining industries concerning historic greenhouse gas (GHG) emissions, continue to make progress through the US courts. Most notably, in September 2023, the State of California filed a lawsuit against BP, Shell and others, in relation to alleged false advertising over many decades, concerning the risks associated with fossil fuels, and causing billions of dollars of environmental damage. This follows similar cases filed in state courts by other cities and states, including the City of Honolulu and Rhode Island, which allege public nuisance (via the global emission of GHGs), misleading advertising and marketing, fraudulent business practices, and failure to warn (strict and negligent products liability).

In Europe, to date, we have seen two "climate impact" cases filed. *Lliuya v RWE* is a case brought in the German courts in relation to the melting of a glacier in Huarez, Peru. As we reported last year, *Lliuya* is regarded as a test case for whether a private corporation can be held liable for historic GHG emissions, by reference to its percentage contribution to global emissions (based on nuisance principles and using attribution science to calculate RWE's 0.47% share). In February 2023, a second case (*Asmania et al v Holcim*) was filed in the Swiss courts by inhabitants of an Indonesian island of Pari, against concrete manufacturer, Holcim. This is on the basis that manmade climate change has caused sea levels to rise, and the island is at extreme risk of flooding. The claimants seek damages for historic GHG emissions and a contribution to adaptation measures, and also a commitment by Holcim to reduce its CO2 emissions by 43% by 2030.

Although a historic GHG emissions case has not yet been filed in the English courts, the Supreme Court's decision in May 2023 in *Jalla v Shell*[1] provided useful guidance on environmental claims brought on private nuisance grounds and limitation issues. The case concerned a 2011 oil spill off the coast of Nigeria that allegedly caused ongoing pollution. The claimants asserted that the claims were not time barred because the spillage was a "continuing nuisance". The Supreme Court rejected this argument and held that there was no repeated activity by the defendants or an ongoing state of affairs which could be deemed a continuing nuisance. The continued presence of pollutants on the claimants' land due to inadequate clean-up was to be distinguished and originated from the 2011 spill. This is an important decision both for claims arising from standalone catastrophic events (which must be brought in time) and for claims concerning repeated, ongoing pollution (where a cause of action accrues afresh (eg GHG emissions, plastic pollution, PFAS and other types of air pollution).

2023 also saw the dismissal of ClientEarth's climate change related derivative action against Shell's Board of Directors. The case had targeted Shell's directors in relation to carbon emissions commitments, on the basis that they had failed to implement an adequate transition plan. The court held that ClientEarth had fail to establish a *prima facie* case that the directors were in breach of their duties under the Companies Act 2006. It remains to be seen whether other shareholders will overcome the hurdles to bringing similar types of claim in an ESG context.

What to look out for in 2024

In 2024, the focus on human rights in the context of climate change litigation will continue to gain traction. We can expect more historic GHG emissions cases to be filed across the world. Given the recent uptick in cross-border environmental litigation, it remains to be seen whether we will see a climate impact or "Carbon Majors" case brought in the English courts.

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Notes

1. *Jalla and another v Shell International Trading and Shipping Company and another* [2023] UKSC 16

Construction

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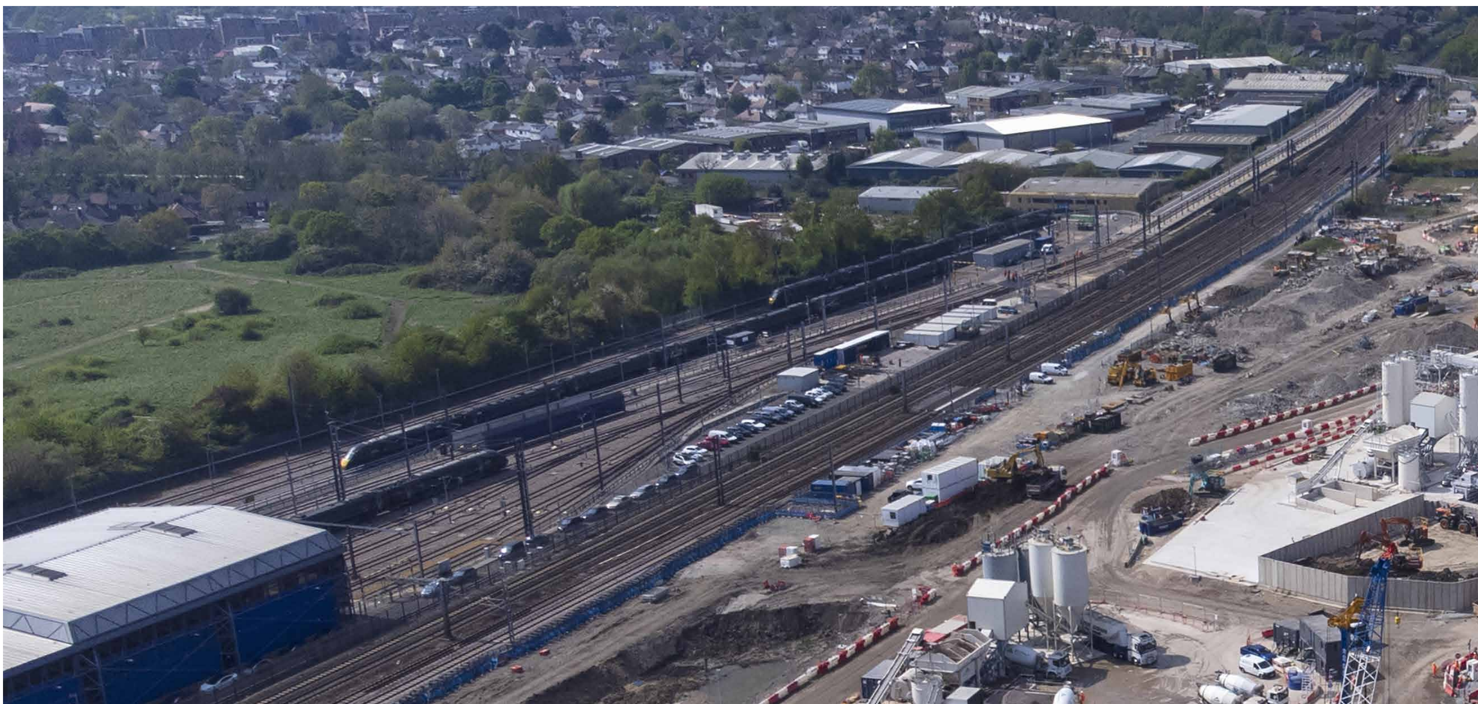
Key developments in 2023

Reinforced autoclaved aerated concrete (Raac) made headlines this year, when it was reported that over 150 schools built with the material were at risk of collapse. Raac was originally used for its lightweight and thermal properties. However, it lacks durability and is susceptible to sudden failure. Various organisations, including the Department for Education and NHS Improvement, are taking action to remove Raac building materials over the next few years – it is possible that work on this will increase as more at-risk buildings are identified. Questions will be raised when considering claim coverage as to whether Raac-related damage is construed as a sudden and unforeseen event, whether it is excluded on the basis of wear and tear, or whether a blanket exclusion will be established for Raac claims. The extent of damage to a property, and whether resulting damage is covered, will also need investigating.

Another headline-grabbing construction update was the cancellation of the northern leg of HS2, a decision blamed on project delays and escalating costs. Originally projected to cost around £37bn in 2009, this year the project was on set to cost around £100bn in total. The decision to scrap HS2's second phase was met with disappointment by the construction industry, particularly by companies set to undertake work on the project. An upgrade has been announced to the Transpennine Route, and the industry will be closely watching how the money will be reinvested in alternative infrastructure schemes, as promised by the Prime Minister.

The Building Safety Act 2022 (BSA) came into force on 28 April 2022. The Act puts more stringent safety requirements on "higher-risk" buildings (at least 18m high or seven storeys, which contain two or more residential units or are hospitals or care homes). A new dutyholder regime in the Act puts responsibility on key stakeholders in higher-risk projects to retain and provide information and to maintain. Section 156 of the BSA amends the Regulatory Reform (Fire Safety) Order 2005 (FSO) to improve fire safety in all buildings regulated by the FSO. This will be achieved by: improving cooperation and coordination between Responsible Persons, increasing requirements in relation to the recording and sharing of fire safety information, making it easier for enforcement authorities to take action against non-compliance, and ensuring residents have access to comprehensive information about fire safety in their building.



What to look out for in 2024

Whilst the number of disciplinary complaints made to the Royal Institute of Chartered Surveyors (RICS), the Royal Institute of British Architects (RIBA) and the Architect's Registration Board (ARB) has not dramatically changed since 2018, the number of ARB complaints which progressed to a professional conduct committee (PCC) (effectively a trial) has increased from four, in 2018, to 62 in 2023. With no sign of regulatory investigations slowing down, it is crucial for construction professionals – architects in particular – to ensure they have the correct procedures in place to stay on top of professional development and engage with their regulator when required. It is also important for construction professionals to check if they are insured for the cost of responding to any such investigation.

The combination of Brexit, COVID-19, the war in Ukraine, high interest and inflation rates, and a higher cost of borrowing, has resulted in a changeable and high-risk construction market in 2023. These industry challenges (which have led to increased costs of materials, reduced availability of labour, and higher fuel costs) have made it harder for contractors to estimate their future costs and project timelines. Contractors are increasing their prices to avoid the risk of cost absorption and insolvency, however project costs continue to outweigh the rate at which tender returns can increase. The difficulty in forecasting the true cost of a construction project has caused an increase in construction claim inflation. The industry has developed various methods of tackling this, including: adding a provisional sum into a construction contract, including a fluctuation provision and finding creative solutions to keep on-site costs down. Until external factors affecting the industry stabilise, claims inflation is likely to be an ongoing problem.

The industry will continue its efforts to comply with the government's Net Zero Strategy, with 2024 likely to see a focus on sustainability and decarbonisation. The most recent update from the Construction Leadership Council (CLC) shows continued progress in its 'CO2nstruct Zero programme', particularly in implementing its plan to eliminate diesel use on 78% of UK construction sites by 2035. In order to achieve this aim, the plan focuses on five areas: measuring diesel use, improving efficiency, using cleaner fuels (such as hydrogen) where possible, transitioning to electric, and working collaboratively with companies across the industry.

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Construction (all risks)

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Key developments in 2023

The construction industry has seen mixed fortunes in 2023.

On the positive side, a strong pipeline of projects has been accompanied by an easing of supply issues, shorter delays in delivery times, and (more recently) inflation beginning to ease.

Conversely however, the persistently high interest environment has impacted contractors, many of whom rely on credit and are now threatened by insolvency. Public debt has soared, endangering infrastructure projects which many governments have committed to. Many of these projects have now been delayed or in some cases cancelled in response to cost pressures (the less said about the UK Government's flagship HS2 project the better!).

Raw materials remain significantly more expensive in contrast to the pre-pandemic position and labour shortages (and labour cost inflation) have continued apace. It has been a particularly challenging year for the residential sector, with homebuilders struggling in many jurisdictions – the UK, Germany and China being notable examples. Furthermore, the construction industry has not obviously escaped the impact of natural catastrophes and extreme weather events in 2023, with floods and severe weather impacting timelines on numerous projects.

How has this translated to the insurance space? The market has remained stable, albeit we have begun to see softening of rates in certain markets with abundant local capacity as the year has progressed. The issues described above have meant higher construction costs and, by extension, claims inflation. Those seeking extensions to existing cover have typically been faced with significant additional premium as insurers repriced risks in the face of high inflation, with terms of cover sometimes restricted and higher deductibles imposed.

Notably, September 2023 saw the first court decision on the LEG3 defect wording in *South Capitol Bridgebuilders v Lexington*, heard in the District of Columbia in the US. From an (English) common law perspective, the court's finding that there had been physical damage (as opposed to the merely defective property from the moment it was completed) is highly questionable, as was the court's ultimate finding in favour of the insured. Notably, the court was less than complimentary about the drafting of LEG3 (terming it "egregiously ambiguous") and, given the widespread adoption of the LEG clauses in CAR policies, the decision will be important, notwithstanding its controversial nature.

What to look out for in 2024

Hot topics for 2024 include, first, the use of new technologies in construction. Generative AI has been the big disrupter this year. How will the construction industry further engage with AI and digitalisation? Will smarter equipment, better scheduling and project management tools, etc. bring about greater productivity and enhanced safety on projects? Will underwriters support innovative contractors when pricing the use of untested technologies?

ESG also remains important to all stakeholders. While construction has inherent challenges in this arena, being a high carbon process, improvements are being made and the nature of risks are changing as a result. A focus on the "embodied carbon" of buildings is driving a conversation around the benefits of retrofitting buildings rather than demolishing them. Governments are also legislating to mandate the sustainability of new projects and cap emissions from public works. Construction companies are investing in greener materials. However the push to improve the sustainability of projects is likely to have a significant impact on cost and ongoing support from insurers will be vital.

Extreme weather events continue to become more frequent and more severe. In addition to one-off events, climate change is physically impacting site conditions, including changes to ground conditions and design decisions. As a consequence, projects in certain parts of the world may increasingly struggle to obtain adequate cover.

However, the demand for infrastructure is not dissipating. Instead, the construction industry is forecast for strong growth in the coming decades, particularly in emerging markets, China and the US, leading to obvious opportunities for insurers.

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Cyber

Elizabeth Zang | Associate

Key developments in 2023

In 2023, we have been seeing an expansion of the regulatory and legislative landscape for cyber both nationally and globally, with the NIS 2 Directive (NIS2) and the Online Safety Act 2023 expected to be particularly impactful on the cyber market.

NIS2 came into force on 16 January 2023 and promised to "future-proof the UK NIS Regulations" – the predecessor to NIS2 which came into force in May 2018. NIS2 has increased the scope of businesses captured by the NIS Regulations to include, for example, social network platforms, data centre providers and managed service providers. The government highlighted that managed service providers in particular are being brought into the scope of NIS Regulations "due to their unique and growing importance in the UK economy and the systemic dependencies they create across multiple sectors". This demonstrates an increased focus on the importance of supply chain to managing cyber risks.

The Online Safety Act 2023 also casts a wide net, imposing requirements on any services that allow content generated by users of the services to encounter content published by other users. This most obviously applies to social media platforms, online forums, dating sites etc. But it could have far wider effect – for example, potentially capturing websites allowing comments to be posted by users. The main requirements relate to protecting users from scam ads and online fraud, with particular requirements as to the protection of children. These are laudable aims, but the potential scope is far-reaching, with the net result being an increasing regulatory and legislative web for a range of businesses to navigate.

What to look out for in 2024

In 2024, we expect to see increased scrutiny on organisations in relation to basic security protocols. Cyber security breaches continue to increase, with not just a record number of ransomware incidents being reported, but a considerable number of business email compromises taking place as well. The compromise of account credentials remains a common method of entry and, whilst no defences are fool proof, there are some relatively basic security measures that can be taken which considerably reduce the chances of this type of compromise. One such security measure could be enforcing multi-factor authentication to the login process for employee accounts, to help in protecting against the consequences of phishing, credential stuffing and brute force attacks.

Cyber insurance underwriters have been placing a greater focus on assessing the security that prospective insureds have in place before offering appropriate cover. We have seen instances of insurers insisting on specific security protocols being in place as a pre-requisite for providing cyber insurance. This is also a point that regulators are certainly aware of, with the ICO having released a statement that data security incidents can occur when organisations do not have appropriate technical and organisational measures to protect the personal data they hold and confirming that this is "a key area of action for the ICO". Given this stance taken in both the cyber insurance market and the regulatory landscape, we expect to see an increase in the base level of security across a wide range of organisations.

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Key developments in 2023

2023 continued to see ESG claims, which is not surprising when the World Business Council for Sustainable Development reported these types of claims have grown 25% in the last 30 years. Shareholders have continued to make claims against companies for failures around sustainability commitments, for financing fossil fuel projects and for exaggerating the extent of investments into ESG related projects. The perhaps more surprising target for claims has been companies/directors who have been proactive with ESG causing some shareholders to complain that the companies have ignored profit at the expense of ESG. This has led to a rise in "green-hushing" – where companies don't broadcast their ESG efforts, in an attempt to avoid scrutiny and allegations of "greenwashing"*.

The FCA has shown an increased focus on non-financial misconduct (such as harassment, bullying and sexual assault). The FCA continues to investigate individuals to see whether non-financial misconduct means that someone is no longer a "fit and proper" person to work in financial services. This focus looks to continue because in September 2023, the FCA and PRA published consultation papers setting out a number of changes to incorporate non-financial misconduct within "Fit and Proper" assessments, the Conduct Rules and the Suitability threshold.

What to look out for in 2024

There is a new law in town – the Economic Crime and Corporate Transparency Act 2023. All new and existing directors will need to verify their identities and there is a new failure to prevent fraud offence. It only applies to large companies who meet at least two of the following criteria (i) more than 250 employees, (ii) more than £36m turnover and/or (iii) more than £18m in total assets. There will be a defence if the company had "reasonable procedures" in place to prevent fraud or that is was reasonable not to have any procedures. The Act came into force on 26 October 2023 but the failure to prevent fraud offence will only come into force once the Government has published guidance on "reasonable procedures" (expected in the first half of 2024). Whilst there is no individual liability for this offence, directors should watch out for the guidance. And of course, failures by directors that lead to the company being exposed to a prosecution, still less a conviction for the offence, may rebound in terms of claims against them by the company for compensation, if they have left the board or by disgruntled shareholders derivatively, not to mention against the company itself, in the form of potential securities claims of the sort that have arisen in the context of companies being convicted for the failure to prevent offence under s. 7 of the Bribery Act 2010

In light of the SEC's new rules (in July 2023) requiring companies to disclose material cybersecurity incidents as they happen and annual disclosures on cybersecurity risk management, strategy and governance, UK directors must keep their cybersecurity procedures/risk management at the top of their priority lists. The SEC has already filed a civil enforcement action against software company SolarWinds and its Chief Information Security Officer for allegedly misleading investors by understating the company's cyber vulnerabilities. Whilst it is not new, rising interest rates coupled with economic inflation mean we are likely to see further claims against insolvent directors as we see an increase in company insolvencies. AI is a hot topic and directors should take care to ensure AI is used in a responsible manner and that they understand and manage potential risks (for example how algorithms are used and data bias).

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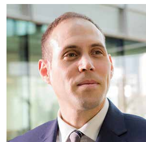

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Energy

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Key developments in 2023

In our last Annual Insurance Review, we anticipated the further progression of the energy transition and a corresponding expansion of associated insurances.

Over the past 12 months, the global trend towards sustainable and renewable energy sources has gained further momentum. The UN Climate Change Conference (COP 28), in December 2023, saw the multilateral agreement of those participating nations to *"transition away from fossil fuels in energy systems"*. The agreement was described by the UN Climate Change Executive Secretary, Simon Stiell, as the *"beginning of the end"* of *"the fossil fuel era"*.

Despite the political headway being made towards renewable energy systems, 2023 has seen a continuation in the upward trend in total global premiums for offshore energy insurances. The International Union of Marine Insurance (IUMI) has reported an increase in global premium of 7.3% since 2019, to USD4.1bn.

The increase in global offshore energy premium reflects the uptick in offshore activity in consequence of increased oil and gas prices. A material contributor to the increase in those prices is the continued geopolitical concern over energy security in view of Russia's ongoing war in Ukraine.

The war in Ukraine has exposed the fragility of global oil and gas supply to geopolitical events – which has resulted in nations, including the UK, reversing the decline in domestic production of oil and gas, in an effort to secure domestic energy supply. Accordingly, governments have been placed in the position of advocating a transition away from fossil fuels whilst simultaneously granting an increasing number of extraction licences.

With no end in sight for the war in Ukraine, and despite the apparent success of COP 28, the rise in premium income within the offshore energy market, in the short term, looks likely to continue.

What to look out for in 2024

During 2024, we expect to see further growth in the production (and insurance) of hydrogen energy.

Over the last couple of years, the US and US have both invested significantly in hydrogen as a future source of energy. Saudi Arabia has spent billions of dollars on the NEOM Green Hydrogen Project, alone, which is due to be commissioned in 2026. Globally, according to the Hydrogen Council, 680 hydrogen energy projects have been proposed worth an estimated USD240bn.

As a nascent technology, investors in hydrogen projects will look to the insurance market to provide certainty as to the nature, allocation, and extent of the risk associated with a given project. It is the insurance market that will make these projects investable – and, by extension, possible.

In last year's review, we highlighted Marsh's hydrogen project insurance facility. Marsh is also joined in this space by insurance giant, Munich Re, who offer risk transfer solutions to hydrogen producers.

Whilst hydrogen projects may be novel to the energy insurance market, the relevant coverages for production, transportation, and utilisation – and the associated hazards – will not be too dissimilar to those of the existing energy sources with which the market is familiar.

We look forward to seeing how the energy market develops, during 2024, to respond to this increasing focus on hydrogen energy.

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Financial institutions

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Key developments in 2023

As we predicted last year, the global economic downturn precipitated by the COVID-19 pandemic has continued to distress western economies throughout 2023. Whilst the UK has managed to avoid a recession this year, the Bank of England has increased the base rate of interest to a fifteen year high of 5.25% to tackle surging inflation. Similarly, interest rates in the United States are at their highest level since 2001 with consequences for many financial institutions and society more generally.

Earlier this year, three smaller US banks (Silicon Valley Bank, Signature Bank and Silvergate Bank) all failed within the space of several days, triggering various claims against the institutions and their directors as a result. Whilst Signature and Silvergate failed through overexposure to the volatile cryptocurrency market, the failure of SVB demonstrated how rising interest rates represent a risk for financial institutions with large portfolios of interest rate-linked government bonds (including UK pension funds). A short time later (although arguably unrelated), Swiss bank UBS was forced to step in to save ailing competitor Credit Suisse after clients rapidly withdrew deposits, with UBS now facing consequent claims from shareholders in relation to the controversial takeover.

These developments have left confidence in the banking system shaken, and whilst the situation appears to have stabilised following the crises earlier in the year, there is still a significant risk of a slow-burning and more widescale banking crisis developing into 2024 and beyond.

What to look out for in 2024

Concerns around a global banking crisis aside, we anticipate that ESG will continue to be a source of risk for financial institutions, with allegations of 'greenwashing' constituting a particular risk for investment managers given the increased prominence of 'environmental sustainability' as an investment criterion. Fund managers are coming under increased pressure to promote sustainable investment options, and regulators are expanding disclosure obligations for 'sustainable funds', all of which will increase the risk of greenwashing-related claims against financial institutions offering these services.

Fraud trends are continuing to rise globally, particularly those relying on social engineering, and we envisage that financial institutions such as retail banks may be at increased risk of claims brought by customers who have been victims of fraud. In the UK, certain provisions of the *Financial Services and Markets Act 2023* are set to come into force in January 2024, including a mandatory reimbursement scheme for victims of Authorised Push Payment (APP) fraud where a victim is tricked into authorising a payment to a fraudster. Whilst there are qualifying criteria to trigger reimbursement, it is anticipated that approximately 90% of all APP Fraud (which totalled around £500 million in 2022) will fall within the ambit of the scheme. Those costs will be borne by payor and payee banks, and we anticipate that FIPI and crime policies may be called upon to indemnify the loss.

Lastly, we consider that Artificial Intelligence (AI) could constitute a serious risk to certain financial institutions in 2024 and beyond. Risk management teams are increasingly using AI to help with credit risk assessment, anti-money laundering checks, fraud detection and regulatory compliance. Failure of the AI to help manage these risks could result in regulatory consequences and concurrent claims. Further, cyber criminals will undoubtedly look to make use of advanced AI software in order to bypass security measures and defraud financial institutions and their customers. This in turn increases the risk of financial institutions relying on their insurance policies to cover costs related to regulatory investigations, third-party claims brought by potential fraud victims or cyber-attacks.

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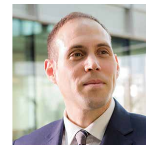

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Financial professionals

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Key developments in 2023

The biggest change for the advisory market in 2023 was the implementation of the FCA's Consumer Duty, which came into force on 31 July 2023. The Consumer Principle (new Principle 12) requires that firms act to deliver good outcomes for retail customers, and this marks a move from rules-based regulation toward outcome-based regulation.

It's too early to say specifically what difference the Duty will make to the way claims and complaints are framed and how the Courts/Financial Ombudsman Service will treat them. However, Abbi Thomas (the Chief Ombudsman) did say in June that they did not expect that the Duty would have a significant impact on how they decide complaints. Additionally, we are already seeing some evidence of how the FCA will approach this, as nine banks and building societies were asked to provide value assessments on savings products in September following the FCA's concerns that they were not passing on the benefit of interest rate rises to consumers. Also, in November the FCA confirmed this was not a 'one and done' or 'box ticking' exercise and that the Duty is intended to be part of a firm's culture and how they do business.

The FCA has assigned additional funding to undertake supervisory work in this area which, combined with a new Rule (at PRIN 2A.2.5R) requiring firms to take action to rectify foreseeable harm that it identifies from any source, creates an environment that is likely to generate an increasing number of regulatory complaints and past business reviews going forwards.

What to look out for in 2024

We have already seen some evidence of how the FCA will approach enforcement under the Consumer Duty, but the first large scale indication of its approach is expected from the retirement income advice review, the results of which are expected before the end of the year. That review will link to the FCA's findings on lifetime mortgages, published in September 2023. This noted evidence of borrowers' income and expenditure not being properly considered, inadequate discussions about alternative options and sales being incentivised at the expense of both quality of advice and good consumer outcomes. Unsurprisingly, and as we can expect from the FCA going forward, the stated expectations resulting from the review are framed through the lens of the Duty with particular emphasis on acting to deliver good outcomes for consumers.

The retirement income review itself focuses on an area that has become more complex following the pension freedoms. It will look at how consumer needs are being met, not only through the prism of the Duty, but the ongoing cost of living crisis. Given the relatively flat performance of most investment markets in recent years (and the temptation for consumers to draw heavily from pension funds to make up income shortfalls in the current climate) it's possible that the review could uncover some poor practice. If so, firms will no doubt be expected to take swift action in resolution in accordance with PRIN 2A.2.5R. Firms (and their insurers) should bear in mind that, even if regulatory breaches are identified, a legal liability will still need to be established before redress is payable under a past business review.

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General liability

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Key developments in 2023

The biggest change in General liability this year is the changes made to the Fixed recoverable costs regime. After several delays, the extension to fixed recoverable costs (FRC) was implemented on 1 October 2023 and will affect nearly all civil claims up to £100,000 in value.

The intention to streamline civil litigation may well be laudable but this one-size fits all approach has inevitably led to compromises and may result in unintended consequences and behaviours.

Unlike other civil claims, the new regime will only apply to personal injury cases where the cause of actions accrues on or after 1 October 2023 (or where the letter of claim is sent after this date for disease claims).

The Fast Track remain largely unchanged. However, the new regime introduces an Intermediate Track for claims up to £100,000 in value. The Court retains its discretion to allocate cases the Multi-Track should it consider this to be appropriate.

Another significant change to FRC is the introduction of complexity bands which cases will be assigned to following allocation. There are four different bands in both the Fast Track and Intermediate Track and the higher the complexity band, the greater the amount of FRC. The complexity bands for the Fast Track and Intermediate Track are entirely different so two similar cases with values of £15,000 and £30,000 will not be assigned to the same bands in the differing tracks even if the matters in dispute are very similar.

On the Fast Track the bands are more tailored to the type of claim, whereas on the Intermediate Track the banding is to be determined on the number of issues in dispute and complexity.

Many of the uncertainties in the rules seem destined for satellite litigation and appeal level judgments are likely to be required before there is clarity for litigators. Given that we still see such litigation over the current FRC regime, this is likely to be an issue for at least the rest of the decade.

What to look out for in 2024

The main change in 2024 will likely be the discount rate changes. The interest rate is due to be reviewed by July 2024. However, it has yet to be determined what the rate will be. Recently The Isle of Man have increased their discount rate from – 0.25% to +1.00 per annum and personal injury lawyers in England and Wales are now waiting to see whether the Lord Chancellor will follow suit.

If the interest rate looks likely to increase Defendant Lawyers should keep in mind that Claimant Solicitors may look to settle before the new interest rates are implemented. For offers currently on the table, Defendant's offers are likely to be overstated, meaning Defendant lawyers will need to be mindful of this change as they may wish to withdraw offers before the new discount rate applies.

There will also be a review on whether a dual rate would be more appropriate. Currently the set rate of -0.25% is used across all heads of loss for all future losses, regardless of the length of time of the loss. It will now be considered whether to have dual or multiple rates. Other jurisdictions offer a dual rate for long term and short-term future losses, the short-term loss varies from jurisdiction but is generally between 5-15 years. Another option is to have rates set for different heads of loss in the award, such as for the cost of future care or for future loss of earnings.

It is currently unclear whether the dual rate will be implemented in July 2024 as the current single rate means less complexity for the court, but there are arguments that a dual approach would be more appropriate and fairer for Claimants.

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Health and safety

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Key developments in 2023

The Building Safety Act 2022

The main parts of the Building Safety Act 2022 came into force this year, as well as some further fire safety legislation.

From 1 October 2023, the Building Safety Regulator (BSR), which is the HSE, became the building control body for new higher-risk buildings (those classed as being at least 7 storeys tall, and over 18m in height) which must be registered with the BSR. Existing projects would have had to have been submitted to the BSR before 1 October 2023. The BSR will oversee safety and standards, requiring applicants to submit a building control approval application before construction can start. A safety case report summarising major fire and structural hazards and risk management measures is now mandatory for each higher-risk building.

Additionally, a series of new 'duty holder' roles have been introduced. Individuals must be able to evidence they have the appropriate skills, knowledge, experience, and behaviours to perform their roles, and organisations must be able to demonstrate their organisational capabilities.

The Focus on Mental Health

In our last annual insurance review [link?], we reported that the HSE had confirmed that reducing work related ill health with a specific focus on mental health was one of its key strategic objectives in its 10-year strategy (2022-2032). The HSE said it intended to "*deliver interventions that make a real difference*", and this year we have seen the launch of a new online learning tool designed to prevent work-related stress as part of its Working Minds campaign. The new tool is comprised of six short modules and is designed for businesses to come away with an understanding of what the law requires and what actions they need to take. The tool was launched on 8 November, at HSE's online Health and Work conference. It can be found here.

What to look out for in 2024

Protect Duty Legislation

The Terrorism (Protection of Premises) Draft Bill, which was initially called Protect Duty legislation, is a direct response to the terror attack at Manchester Arena on the night of 22 May 2017, where 22 people were killed as a result. Over the past 24 months, the Government has set down the

Health and safety (continued)

groundwork for the bill and in the King's Speech on 7 November 2023, outlined its intention to lay it out before parliament in the coming months, thus confirming that the Bill will go forwards.

The legislation will impose a duty on the owners and operators of publicly accessible locations to take proportionate steps to increase their preparedness for and protection from a terrorist attack. The precise enforcement regime has yet to be confirmed, but consultations refer to site owners being encouraged to take steps to comply with substantial penalties to be considered where there is repeated noncompliance. The indications are that locations falling within the standard tier (maximum capacity of 100 people) will be subject to a maximum penalty of £10,000; whilst those within the enhanced tier (locations with a capacity over 800 people) could face a maximum penalty of up to £18 million or 5% of worldwide turnover. Businesses are encouraged to:

- consider what tier they may fall into to better understand what is expected to comply with legislation
- carefully review any current risk assessments to ensure compliance
- consider what changes could be made to current security plans.

The Food Standards Agency (FSA)'s new risk based approach

In June 2023, the FSA introduced a revised model for delivery food standards controls which was produced following a consultation in late 2022. This new model is aimed at helping local authorities take a more risk-based and intelligence driven approach to the inspection of Food Business Operators (FBOs).

A phased rollout started this summer and the deadline for local authorities to transition to the new model is the end of March 2025. The changes will only come into force in England and Northern Ireland and the Food Law Code of Practice was updated to include:

- new foods standards risk rating scheme to create a risk-based approach to inspections
- decision matrix to determine the frequency at which food standards controls should be delivered to a FBO as a result of any risk assessment.

A key aim of the new approach is to allow local authorities to focus their resources to the inspection of higher risk FBOs which should in turn encourage compliance from FBOs who will, as a result, benefit from less frequent inspections if they are found to be 'lower risk' businesses in relation to food safety and hygiene. FBOs would be wise to make themselves aware of this new approach and how it may affect their business once it is introduced by the local authority, which may occur at any time between now and March 2025.

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International arbitration

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Key developments in 2023

Reform of the Arbitration Act 1996

The Arbitration Act 1996 has served the insurance industry well over the last 25 years but a fresh look to modernise it by the Law Commission resulted in King Charles III during his inaugural speech at the State Opening of Parliament on 7 November 2023 announcing the Arbitration Bill.

The Arbitration Bill introduces six "major initiatives":

- **governing law of the arbitration agreement**: In the absence of an express governing law, the law of the seat is deemed the applicable law of the arbitration agreement
- **power of summary disposal**: Arbitrators are to have express power allowing them to issue summary awards for the dismissal of any issue
- **challenging awards for lack of substantive jurisdiction**: The existing framework for challenging awards due to a lack of substantive jurisdiction under s67 of the Act needs revision
- **strengthening court support powers: The courts' supportive powers to encompass**: (1) emergency arbitrators' peremptory orders; and (2) third parties, expanded
- **codification of arbitrator's duty of disclosure**: The common law duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to an arbitrator's impartiality following Halliburton v Chubb, codified
- **enhancing arbitrator immunity**: intended to shield arbitrators from personal liability.

It is worth mentioning that not all issues identified in the consultation papers have been addressed in the Arbitration Bill. In particular, the Commission decided not to include a general prohibition on discrimination in arbitration and a statutory duty of confidentiality.

What to look out for in 2024

Litigation funding

The Supreme Court handed down a judgement in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28* on 26 July 2023, which has far-reaching implications for third-party litigation funding agreements.

The MoJ is actively looking at remedying the problems raised by the Supreme Court's decision.

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Intellectual property (IP)

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Key developments in 2023

April 2023 saw mass media coverage of supermarket Lidl's claim against Tesco where the High Court found that Tesco's 'Clubcard' sign infringed Lidl's trademarks for the word version and wordless version of its main logo. Tesco's use of its Clubcard sign also amounted to passing off as to equivalence and infringed the copyright in Lidl's logos.

Evidence in this case was key to Lidl's success. In Lidl's claim for trademark infringement, Lidl relied on origin confusion evidence contained in research by an external research agency commissioned (not by Lidl but) by Tesco to evaluate the Clubcard prices promotion which reported that 8% of the 276 customers who saw an out of home advert thought it was for Lidl. In Lidl's copyright infringement claim, Tesco struggled to satisfy the court that the design for its Clubcard sign was an independent creation leading to the court finding that Tesco had copied the Lidl mark.

The case is unusual as it did not rely solely on customers being deceived as to origin but because customers also linked Tesco's Clubcard sign with Lidl's brand and reputation and believed that Tesco's prices were being said to be comparable to Lidl's low prices and/or that they were price matched to Lidl. It wasn't a reputation associated with luxury but its value proposition that Lidl was protecting in this case. With value being on the agenda for many businesses, similar claims may follow in a cost driven marketplace.

What to look out for in 2024

Way back in our 2021 Review, we covered *Sky v Skykick* which, on its return to the High Court from the Court of Justice, found that Sky had registered trademarks in bad faith. That court had limited the scope of Sky's registration to goods and services that Sky actually used (or intended to use).

In 2021, in a more evenly balanced judgment, the Court of Appeal partly reversed the High Court's ruling, finding that applying to register a trademark without an intention to use it in every 'species of goods or services falling within a general description' did not alone constitute bad faith. This was on the basis that the applicant may have a strategy of seeking broad protection to cover further, as yet unformulated, goods within the same category. The Court of Appeal's decision has provided a quandary for defendants to infringement proceedings (and their insurers) when it comes to running a counterclaim based on bad faith. To succeed, they are currently required to evidence that an application was made with the intent to be broad enough to stymie competition, rather than being part of a genuine strategy that is not yet completely formulated.

The Supreme Court heard the appeal in June 2023 focussing on two main issues: what the legal test is for bad faith under UK law and in the event bad faith is found, how to determine the specification that the trademark owner should be allowed to retain. The judgment is expected towards the end of this year, or early next year and divergence from EU law is a real possibility. If the Court of Appeal's ruling is reversed this may lead to a stream of bad faith claims and the need for changes to litigation strategy when drafting pleadings in bad faith actions.

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Legal practices

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Key developments in 2023

In *RSA v Tughans* [2023] EWCA Civ 999, the Court of Appeal held that solicitors were entitled to cover for liability in respect of fees which they are contractually entitled to, upholding the High Court's decision.

The decision will not be welcomed by insurers. The Court of Appeal suggested that cover provided under solicitors' compulsory indemnity insurance may even extend to restitutionary claims, which were traditionally thought to fall outside the scope of cover. It may well be that firms and their brokers will now rely on this decision to test the boundaries of the cover available.

We continued to see buyer-funded development claims throughout 2023 and the SRA remains active in this area. The decision of the Solicitors Disciplinary Tribunal in *SRA v Hon-Ying Amie Tsang* is worth mentioning. The Tribunal dismissed the SRA's allegations on the basis that Ms Tsang had acted reasonably within the terms of her retainer to set out the risks of the investment to her clients despite being under no duty to do so. Unusually, the Tribunal ordered the SRA to pay ~£75,000 in costs based on the SRA's inordinate delay in bringing the case which had harmed Ms Tsang's reputation and practice and the fact that there had been no basis in law for the SRA's allegations.

Finally, October 2023 saw the biggest SRA intervention ever in England and Wales with the collapse of Axiom Ince following the alleged misappropriation of over £60m from the firm's client account by its former managing partner. We mentioned the SRA's decision to reduce the profession's contributions to the SRA Compensation Fund in our Annual Insurance Review in 2022. However, the SRA is considering an increase in the levy to law firms to fill any gap in the compensation fund as a result of Axiom Ince's collapse.

What to look out for in 2024

2023 saw an explosion in the development and use of generative AI models such as ChatGPT. This has raised questions over the appropriate use of AI in the legal profession as we move into 2024 and how solicitors can manage the risks involved when using such tools.

The SRA is also alive to the opportunities and risks posed by the rapid development of AI tools available to firms. It has identified a variety of opportunities for firms arising from AI, including the potential to substantially increase productivity, save costs and increase transparency where it is possible to show how an AI algorithm reaches its decisions. The SRA predicts that AI may also help firms to structure their businesses in new ways that better serve their clients' needs, for example through use of AI chatbots to provide services to clients when staff would not otherwise be available.

However, AI will also present risks and challenges for the legal industry as its use develops through 2024 and beyond. Generative AI has no concept of 'reality' and can therefore be prone to highly plausible but incorrect results. The speed at which AI operates may also make it more difficult to supervise its use effectively whilst there are also questions around the protection of client confidentiality when using generative AI tools. Firms will need to develop their AI policies on an ongoing and dynamic basis to ensure client data is protected and compliance with their regulatory obligations. They might also consider updating their standard terms of engagement to ensure that clients are suitably informed about how AI might be used by the firm in a given case.

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Life sciences

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Key developments in 2023

Artificial Intelligence (AI) has gained increasing prominence in our everyday language and has become a hot topic this year in healthcare. The complex question of how to regulate such rapidly evolving technology to mitigate its associated risks continued to dominate in 2023.

In March, the UK Government outlined its position in its white paper: *"A pro-innovation approach to AI regulation"*. The Government's vision focuses on the context in which AI is used and proposes a principles-based approach, with sector specific regulators, for example the Medicines and Healthcare products Regulatory Agency (MHRA), taking a lead role in interpretation and implementation.

The MHRA has already started work on wider reforms to the regulatory regime for medical devices and last year published a roadmap setting out details of plans to reform the regulatory framework for software, including AI, as a medical device. Work to support regulatory changes across the product lifecycle will include consideration of challenges specific to 'AI as a Medical Device' (AIaMD), such as interpretability (by humans) and bias. The MHRA has indicated that much of the reform programme will build upon existing laws through the issue of clear and detailed guidance, along with the development of tools and designated standards to help manufacturers demonstrate compliance. In the meantime, following collaboration between the MHRA and other domestic agencies (including NICE, NHS England, the CQC and the HRA), an online tool, the *AI and Digital Regulations Service*, has been launched to provide advice and guidance on the regulatory system for those who develop or adopt this technology.

The regulatory landscape for AIaMD in the UK will continue to evolve; however, developers, manufacturers and their insurers may take some comfort that guidance to clarify regulatory requirements is on its way and should increase the understanding of what is needed to meet pre- and post-market compliance obligations, smoothing the way for getting innovative AIaMD products onto the market.

For those with international reach, the impact of regulatory divergence is likely to be a significant concern. While the compatibility of a new UK framework with those of other countries is not yet clear, the MHRA intends to work with other international regulators, including via contributions to the International Medical Devices Regulators Forum (IMDRF), with the aim to promote international alignment.

What to look out for in 2024

The COVID-19 pandemic has already had a significant impact on the insurance sector and, with the UK COVID-19 Inquiry well underway and producing some significant revelations, there may be further ramifications in 2024.

The Inquiry was formally established on 28 June 2022 and is currently split into six modules, which examine: the resilience and preparedness of the UK (Module 1), political decision-making (Module 2), impact on the health care system (Module 3), vaccines and therapeutics (Module 4), procurement (Module 5) and the care sector (Module 6). Further modules are due to be announced in the coming months; the areas expected to be covered are testing and tracing, the Government's business and financial responses, health inequalities, education and young persons, and other public services including frontline delivery.

The scope of the Inquiry cannot, of course, extend to making findings of liability; however, there will be findings of fact, which could give rise to civil claims and/or inquest proceedings. Vaccine damage, vaccine refusal, and allegedly inadequate clinical trials are the key areas in which we predict litigation may arise.

The first COVID vaccine claim has already found its way into the Courts, and we shall watch with interest the issues which arise.

The Inquiry will examine vaccine development and deployment, as well as issues around safety and the UK Vaccine Damage Payment Scheme, which may inform potential claims. It will be interesting to see whether any of the legislative changes made by the Government to support the national vaccine roll-out, for example provisions which extended immunity from civil liability, and/or any contractual indemnities in the supply chain, impact any future litigation.

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Marine and shipping

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Key developments in 2023

2023 was another year of marine war risk focus – in Ukraine and beyond.

For vessels and cargoes stranded in Ukraine, the Black Sea Grain Initiative (or Istanbul Agreement) provided safe passage to new cargoes out of Ukraine, but many of the vessels and cargoes trapped since the beginning of hostilities were often far down the queue. Land transportation routes (routes out form Danube ports) were workable but often limited. The one-year anniversary of the invasion on 24 February 2023 triggered the balance of war risk vessel CTLs costing war risks underwriters up to USD700m.

Unfortunately, in July Russia withdrew from the Istanbul Agreement. The Ukrainian government set up a 'humanitarian corridor' in the Black Sea for vessels bound for African and Asian markets carrying foodstuffs. However, it has had limited success and appetite to insure shipments' war risks has been low, meaning vessels travelled uninsured or with high premiums. The war risks premiums for voyages fluctuated in late 2023 with some reports noting premiums as high as 5% (in Aug 2023), and 3% (in Nov 2023), of the value of the vessel. Notably, the premiums saw a spike following the 8 November Russian missile strike on a Liberian flagged ship entering an Odesa port, killing the pilot and injuring four others.

In early November, Lloyd's and Marsh backed a scheme that aims to cut the cost of claims for damage to ships and crew transporting grain through the Black Sea corridor. Lloyd's insurers provide USD50m of hull war risk cover and USD50m of war P&I insurance for every voyage. The scheme is supported by the UK and Ukrainian governments. Not all details are public, but the scheme should make war risks cover for grain cargoes much more affordable, with the Ukrainian government bearing the first potion of any claims up to an undisclosed level. The programme will cover shipments through Ukraine's Danube ports as well as Odesa, Chornomorsk, and Pivdennyi. But for vessels and cargoes in Ukrainian ports further east – and closer to the front line – discharge and land transit to other "open" ports remains the only option.

The war between Israel and Hamas which began on 7 October, and the subsequent Houthi attacks on commercial vessels in the Red Sea, have added further disruption to maritime trade and supply lines. On 18 December, London's marine insurance market widened the area in the Red Sea deemed high risk, causing war premiums (paid by ships and their charterers) to rise further. As a result of the Houthi attacks, one of the world's largest shipping companies – Maersk – suspended transits through the Red Sea and the Gulf of Aden – a route which typically handles about 15% of world shipping traffic.

What to look out for in 2024

It is hoped that the Ukrainian insurance schemes developed in 2023 will help to keep war risks premiums at more sustainable levels. We should expect an increase in premiums for war and cargo risks policies for vessels in the Red Sea as a result of the war between Israel and Hamas. Longer voyages (round the Cape of Good Hope) and higher war premiums will be passed on in higher shipping costs and will add to consumer price inflation.

Vessel fires remain one of the largest safety issues for the maritime industry (and for marine insurers). 2023 has been no exception with notable fires on board an (electric) car carrying vessel and a tanker (caused by a lithium-ion battery for a hand-held radio device). Sadly, continued growth in the lithium-ion battery sector plus increasing containership size (and greater scope to mis-declare cargoes) equals increased risk of vessel fire and explosions.

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Key developments in 2023

The Economic Crime and Corporate Transparency Act (ECCTA) received Royal Assent in October this year. The ECCTA, which is primarily aimed at fighting fraud and corruption, also contains the first Anti-SLAPP legislative provisions to be enacted in any jurisdiction across the UK or Europe. SLAPPs (strategic lawsuits against public participation) have stayed relatively prominent on the legal agenda since Russia's invasion of Ukraine in early 2022, which highlighted the need to dispose of baseless legal claims threatened by oligarchs and Russian-controlled entities connected to Putin's regime.

The ECCTA contains two provisions that are critical for the fight against SLAPPs – a definition of a SLAPP claim (although it is focused only on economic crime), and an early dismissal mechanism for those claims deemed to be SLAPPs. Pursuant to section 195, a SLAPP claim is, amongst other factors, defined as a claim in which the claimant's behaviour has or is intended to have the effect of restraining the defendant's exercise of the right to freedom of speech, is brought in relation to information that is disclosed for a purpose related to the public interest in combating economic crime, and the claimant's behaviour is intended to cause the defendant harassment, alarm, distress, expense, harm or inconvenience beyond that ordinarily encountered in the course of properly conducted litigation. Section 194 requires the Civil Procedure Rules (CPRs) to be amended so as to provide that a claim that falls within the definition of a SLAPP claim may be struck out before trial where the claimant has failed to show that it is more likely than not that the claim would succeed at trial. That provision also contains a subsection that requires the Civil Procedure Rules to be amended in the case of a SLAPP claim to prevent a court from ordering a defendant to pay the claimant's costs, except where, in the court's view, misconduct of the defendant in relation to the claim justifies such an order.

What to look out for in 2024

The Online Safety Act (OSA), which recently received Royal Assent, introduces a new regulatory regime for online platforms and search engines which target the UK, imposing wide-ranging obligations on in-scope services with serious consequences for non-compliance. The OSA will impose new duties on 'user-to-user' services and search services to tackle (1) illegal content, which includes content relating to terrorism and child sexual exploitation and abuse, and (2) content that is harmful to children on their platforms. New offences have also been created, including the offences of epilepsy trolling, cyber-flashing, and sharing intimate images online, including "deepfake" pornography.

However, a major feature of the OSA is the role of Ofcom in publishing Codes of Conduct that, if followed, will allow in-scope digital platforms and search engines to be compliant with the requirements of the OSA. Given the complexity and reach of the OSA, the fact that compliance can be achieved by adherence to ready-made Codes of Conduct is significant.

Now that the OSA has received Royal Assent, the onus is on Ofcom to draft Codes of Conduct that will not only be capable of implementation but that will actually result in the online safety outcomes sought by the OSA.

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Medical malpractice

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Key developments in 2023

Changes to the delivery of healthcare in a post-pandemic world invited new risks in primary care in 2023.

The use of tele-triage and telemedicine for remote consultations has become an established fixture of healthcare organisations following the pandemic, especially in GP practices and urgent care centres. The rise of telemedicine has continued into 2023 with guidance on tele-triage and remote consultations being drip-fed by the NHS throughout the year, as these care delivery methods develop.

In May 2023, the Department of Health and Social Care and NHS England published a joint 'delivery plan for recovering access to primary care'. This plan enforces stricter timeframes, of two weeks, for appointments to be secured for GP patients where an in-person appointment is needed. This thereby expands the role of a GP receptionist in determining the appropriate care pathway for patients, namely whether they need to be seen remotely or in person. They are often assisted by AI generative systems which link clinician questions and care advice to clinical endpoints.

The dispositions and care plans reached are vulnerable to the completeness of the data input into the systems by non-clinically trained staff. Further, there has been an increased reliance on nurse practitioners taking consultations over senior clinicians.

We have seen an emergence of cases where diagnoses are missed when critical information falls between the gaps in tele-triage and telemedicine appointments, and when remote encounters result in a failure to spot tell-tale signs of wider clinical problems. Insurers should therefore pay close attention to the systems used by their primary care Insureds, as the reliance on nurse practitioners, non-clinical staff and the use of AI will continue to develop.

What to look out for in 2024

We predict major developments for medical malpractice in the sports arena in 2024.

In recent years head injuries, and more specifically concussions in sport, have become an issue of significant concern and controversy both legally and scientifically. This is especially true in sports which involve contact, such as rugby union, rugby league, boxing, and American football.

In the UK, the Rugby Union litigation is now swiftly progressing, as the High Court is set to decide which of the claims should proceed as test cases. The group litigation has been brought by nearly 300 former rugby union players, who allege the governing bodies of the sport (RFU, WRU and World Rugby) failed in their duty of care thereby exposing them to concussion injuries, with the Claimants suffering from permanent neurological injuries including early onset dementia, Parkinson's disease, and the neurodegenerative condition 'CTE'.

There is the potential for a landmark judicial decision that could change the whole way head injuries are treated in sports, potentially spilling over to other contact and even non-contact sports such as horse racing, cycling and Formula 1. The outcome is likely to trickle down and result in an increase in the number of concussion claims brought against professional sports clubs and team doctors. We are already seeing these trends.

Ultimately, continuous developments in the understanding of concussion, and the litigation of head injuries in sports, will inevitably bring about changes in what is required of sports physicians and organisations to mitigate the risks of brain injuries. Insurers for governing bodies, sports clubs and team doctors must remain alert to this rapidly developing area of sports litigation.

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Pensions

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Key developments in 2023

The High Court's judgment in *Virgin Media v NTL Pension Trustees II Limited*, subject to the outcome of any appeal or statutory override is a wide-ranging decision likely to impact many final salary pension schemes. The case considered whether amendments to a final salary scheme that had contracted out, are automatically void if an actuarial confirmation (section 37 confirmation) was not first obtained. The decision has been appealed, but if it stands, any amendments made to schemes that had contracted out between April 1997 and April 2016 are void in the absence of a section 37 confirmation (often referred to as a section 37 certificate). Advisors (whether lawyers, benefit consultants or administrators) may already have been asked to enter standstill agreements if they were involved with deeds pre 2008 (given the 15 year long stop) and dependent on the outcome of the appeal we may see litigation on whether advisers should have ensured that section 37 confirmations were in place before executing scheme amendments impacting contracted out rights.

ESG issues have started to emerge. In *McGaughey v Universities Superannuation Scheme Ltd* the Court of Appeal dismissed a derivative action brought by two members of the Universities Superannuation Scheme against the directors of a pension trustee company alleging (amongst other things) a failure to plan for adequately divesting from fossil fuels. The claim was dismissed fundamentally on the basis that the members did not have an appropriate legal standing to bring a derivative action, but when considering the fossil fuel issue, the judgment commented on the ESG issue and the fact that making out a loss was difficult. The decision is an early indicator that bringing ESG related claims is likely to be difficult at least whilst pension scheme investments continue to perform. However, the position on legal proceedings is different to the regulatory position where we saw ExxonMobil Pension Plan became the first pension scheme to be fined by the Pensions Regulator (TPR) for failing to publish a report on the trustees' management and governance of climate related risks and opportunities in time.

What to look out for in 2024

The Pension Regulator has confirmed that the long-awaited Defined Benefit Funding Code will come into force on 1 April 2024. The new funding code will represent one of the biggest changes in funding and investment strategies to final salary pension schemes in decades. The code will require action from both trustees and sponsoring employers and will cover all aspects including the actuarial valuation process, employer covenants and investments. Part of the code will see an emphasis on trustees establishing a long-term funding objective and for a diminished reliance on the sponsoring employer. It is anticipated that the Code will impact the calculation of pension scheme liabilities.

Another project under consideration by TPR, is the development of a Value for Money Framework. The aim of the framework will be to allow schemes to shift their focus from purely costs to a more holistic assessment of value for money. A consultation on the framework is set for Spring 2024.

The regulation of pension administrators, who currently fall outside of TPR's remit, has come under enhanced scrutiny since the liability driven investment crisis of 2022, with the potential for greater regulatory oversight of the benefit consultancy market likely.

In our review last year, we mentioned that pension dashboards would be introduced in 2023. The introduction has been further delayed and it is now expected to be rolled out in late 2026. However, dealing with the risks of the dashboard when it comes to accurate data and cyber risks (with Capita (a large pension scheme administrator) having been hit this year with a cyber breach) will remain high on final salary schemes agendas in the run up to the launch of the pension dashboard.

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Political risk and trade credit

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Key developments in 2023

It was apparent in last year's Political Risk and Trade Credit review that we could not predict how long the war in Ukraine would last. Sadly, this remains true. The Ukrainian counter offensive did not result in the desired territorial gain and, despite rhetoric from military leaders, positions appear entrenched. This will not be helped by wavering support from the West and continued Russian supply chain issues. For insurers this has provided another year without clarity as to the condition of assets, any prospects of retrieval, and developments in the sanctions regime,

As the Russia-Ukraine War continues, there have been further conflicts spiking across the globe which have applied pressure to War Risks books. The war in Sudan continues with widespread governmental and business shutdowns that makes advising or obtaining information from the country very difficult. More recently, the shocking events of 7 October 2023 have ignited the Israel-Hamas conflict and will likely make underwriting in the Middle East (more widely) less attractive due to instability.

The impact of these conflicts is felt not only in the war zone but also in the wider geopolitical landscape. Governments lend their support via the implementation of sanctions which has led to an increased degree of segregation across the Trade Credit market as more areas of the global economy become unviable. Eastern focused economic communities, such as BRICs, are rising to compete with the traditionally Western G7 bloc and thus further the economic divide. This exemplifies supply chain issues in global trade and makes previously widespread commodities more precious – not to mention the impact which climate change has on certain products. Olive oil and coffee, to name of a couple of common household examples, are both starting to experience price pressures. All of this in turn results in higher premiums.

A final note to add on household pressures arising from 2023 is the high level of inflation experienced in many economies. This has forced interest rates even higher and, accordingly, debt repayment by institutions and governments became a serious challenge. The Trade Credit market will have had to and will likely continue to, where possible, accommodate restructuring and potentially even defaults.

Looking forward to 2024

The conflicts across the globe will continue to be inflammatory. Tensions in the Middle East are growing and Western relations with the multiple interested parties in the region may cause further sanctions implementation – and potentially additional conflict. An example of this would be Iran who continue to provide varied support to Hamas and Houthi militants. Not only does this heighten the violence in the region but also applies pressure to global trade where, recently, Red Sea shipping has been disrupted.

Western and European countries will need to adapt to these growing tensions to ensure impacts are not felt too harshly in their economies. However, to do so, they need to ensure a cohesive approach. Fractures are showing as the support for Ukraine is experiencing a degree of 'fatigue' and Hungary, as part of the European Union, is vetoing further support measures. This is not to mention that US foreign policy will be determined by the outcome of the upcoming presidential election next year. This degree of polarity is conducive to protests both abroad and at home as interested parties try to influence policy decisions.

Foreign policy is not the only aggravating factor, we predict next year will see further growth in political violence arising from environmental protests. For example, groups such as Just Stop Oil (who have hit the headlines during various major events this year) will continue in their campaigns and potentially inspire others. This will be exemplified as mineral rich regions across the globe feel the strain of demand for crucial resources such as nickel which is increasingly relied upon to support the growth in electric cars.

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GLORY TO UKRAINE!
GLORY TO HEROES!
PRAY FOR UKRAINE!
STAND WITH
PEACE
UKRAINE
NO WAR

2024

Procedure, damages and costs

Aimee Talbot | Knowledge Lawyer

Key developments in 2023

2023 will be remembered by litigators as the year that the Government implemented the final Jackson reform: the extension of fixed recoverable costs (FRC) to most civil cases where £100,000 or less is claimed. These reforms require a sea change to litigation tactics akin to the 2013 Jackson reforms introducing costs budgeting. Budgeting is now out for simpler claims for £100,000 or less. Where these would be allocated to the fast or newly-created intermediate tracks, a schedule of fixed costs (increased to reflect inflation following Jackson LJ's 2017 report and due to be increased again in April 2024) will apply.

The new rules apply to personal injury claims where the cause of action accrued on or after 1 October 2023, to disease claims where the letter of claim was sent on or after 1 October 2023 and to all other claims that were issued on or after 1 October 2023. In practice, the FRC rules are likely to capture claims where the trial will last three days or less, there are no more than three parties and between £25,000 (£10,000 for personal injury claims) and £100,000 is claimed. Within the fast and intermediate tracks, there will be four complexity bands, with higher fixed costs the higher the band. The new intermediate track will be a simpler version of the multi-track with page limits for witness statements and expert reports.

There is no guidance beyond the rules themselves, which give sparse explanation of assignment of a complexity band within the intermediate track, for example. As such, the reforms are likely to generate substantial satellite litigation, at least at first, but are likely to reduce litigation costs in the long term. On the topics of costs and budgeting, parties can also expect a pilot scheme of "Costs Budgeting Lite" in 2024, for cases where between £100,000 to £1m is claimed, which aims to reduce the cost of the budgeting process.

What to look out for in 2024

Compulsory ADR likely to be the hot topic for 2024. The Court of Appeal in the recent case of *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416 concluded that it was lawful for the Court to order the parties to engage in ADR, provided it does not interfere with the claimant's access to a judicial determination.

The *Churchill* case is the latest iteration in the debate over whether forcing parties to engage in ADR interferes with their Article 6 rights to access to justice. The case was widely expected to lay down principles governing the Court's powers to order parties to engage in ADR and to overrule the seminal case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, in which the Court of Appeal said *"to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."* Whilst the Court of Appeal in *Churchill* declined to lay down any definitive guidelines for use of the Court's power to order parties to engage in ADR, it concluded that the principle from *Halsey* was not binding, paving the way for judges to order ADR in other cases.

The decision reflects the changing judicial attitudes towards ADR and the pressures on the justice system. The MOJ announced compulsory mediation in all County Court matters in 2022 and a pilot scheme is due to be implemented in April 2024. The pilot scheme is likely to require parties in all new defended small claims (ie up to £10,000) to attend a one-hour telephone mediation before a hearing is listed. Whilst parties are likely to be obliged to attend the telephone mediation, they will not be forced to settle the case.

Together, these reforms mean that insurers are likely to see cases where the Court is ordering ADR in 2024. Generally, this is likely to lead to more settlements; but there will always be cases where one or both parties are unwilling to settle, either at that early stage or at all.

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Product liability and recall

Andrew Martin | Associate

Key developments in 2023

There were two key developments in Europe related to products in 2023.

Firstly, as identified as something to watch out for in last year's review, there was the continued progress of the European Commission's directive for the liability of defective products. On 9 October 2023, the European Parliament's Internal Market and Consumer Protection Committee (IMCO) and the Committee on Legal Affairs (JURI) agreed a revised wording for the proposed PLD. The changes, including the replacement of "producer" with the term "manufacturer" to include providers of software, digital services and online marketplaces, when introduced will modernise a system of product liability that has been in place for the last 40 years.

Secondly, on 25 April 2023, the Council of the EU adopted the General Product Safety Regulations (GPSR) which aim to reinforce product safety and consumer protection laws for products sold both online and offline.

The GPSR states that only "safe products (whether new, used, repaired or reconditioned) should be made available on the market. Where a product is found to be dangerous, businesses must immediately apply corrective measures and communicate the issue to consumers and the relevant authorities. In the event of a product recall, consumers are entitled to at least two options from the following: a repair, replacement or refund. The GPSR will apply in full on 13 December 2024, after a brief transition period to allow businesses to prepare for the new regulations.

In an unexpected U-turn from its post-Brexit regulatory reform the Government announced that British businesses will be able to use the CE mark on their products indefinitely. The UKCA mark was intended

Product liability and recall (continued)

to replace the CE mark on goods being sold in the UK but businesses can now use both marks, either separately or alongside each other.

The decision was allegedly made to ease the burden on businesses whilst helping the economy to grow but there may be some backlash from businesses who have incurred significant costs on seeking advice on and implementing the UKCA marking.

What to look out for in 2024

Following a call for evidence in March 2021, it has been clear that significant changes were needed to update the UK's product safety framework to deal with AI, online marketplaces and the ESG agenda.

On 2 August 2023, the Smarter Regulation: UK Product Safety Review, was opened as part of the Government's programme of regulatory reform.

The new regime proposed by the Office for Product Safety and Standards (OPSS) seeks to:

- ensure business obligations are proportionate to the hazard presented by their products, exploring how to reduce compliance costs for lower risk products and make the conformity assessment process easier where possible
- shift the balance between regulations and industry-led standards to enable a more agile and responsive regulatory framework, allowing business greater scope to innovate when producing safe products
- use of digital solutions, such as voluntary e-labelling, to reduce business costs and explore how digital options can be utilised to reduce burdens
- address concerns regarding the ease with which unsafe products can be sold online, creating a fairer playing field so that shopping online is as safe as on the high street
- enhance the leadership and coordination role of the Office for Product Safety and Standards alongside addressing identified enforcement gaps.

Whilst product safety falls under the criminal regime and product liability falls under the civil regime, this Consultation also proposed a review of the current civil product liability regime in light of technological developments. The proposals which refer to the definitions of "product" and "defect" as being inadequate could mirror Europe's proposals which seek to widen definitions to consider technology, AI and online marketplaces.

The Consultation closed on 24 October 2023 and the feedback received will help shape both the product safety and product liability regimes in the UK over the next 12 to 24 months. Given the accelerated reforms in Europe, and the close relationship between the UK and Europe, the Government would be wise to act fast to ensure they do not fall behind.

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Property and business interruption

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Key developments in 2023

Causation

Questions of causation continued to prove fertile ground for litigation in 2023, both in cases involving damage to property and in a COVID-19 business interruption (BI) context.

In *Brian Leighton (Garages) Ltd v Allianz Insurance Plc*, the Court of Appeal considered an insured's claim for property damage and BI losses arising from leakage of fuel from a ruptured underground pipe at a petrol station. The policy excluded damage caused by pollution or contamination under an exclusion with a write-back provision. In his dissenting judgment, Lord Justice Males reasoned that "caused by" in the write-back part of the clause should not be interpreted narrowly as "proximate cause", and that "caused by" in the exclusion part of the clause should be construed in the same way. The majority did not agree, holding that the applicable test for causation was that of "proximate cause" and that the leak, and not pollution or contamination, was the proximate cause of the damage to the garage.

In *Allianz Insurance plc v The University of Exeter*, causation of damage following a deliberate detonation of a World War II bomb discovered during building works in 2021 was considered. The policy excluded damage "occasioned by war" (which, it was accepted, meant proximately caused by war). The High Court held that the exclusion applied and there was no cover for the claim under the policy. The primary basis for this conclusion was that the Judge's finding that the damage was proximately caused by the war and not the detonation. On appeal, the Court of Appeal favoured the Judge's alternative view that the war and the detonation were concurrent proximate causes. However, this made no difference to the outcome: as one of the two concurrent proximate causes was expressly excluded, the claim was not covered under the policy.

2023 also saw significant further litigation arising from insurance claims for BI losses in connection with the COVID-19 pandemic. As regards causation, the judgment in *London International Exhibition Centre Plc v RSA* decided that the multiple concurrent proximate cause approach to causation applied by the Supreme Court in the FCA COVID-19 BI Test Case to clauses requiring disease within radiuses of one to 25 miles should also apply to clauses requiring disease at a specific premises. The effect of this is that one case at a premises potentially gives cover for the consequences of all cases of COVID-19 throughout the world at the relevant time, not just the consequences of the case at the premises. Considered unsatisfactory by many, this judgment will be tested in the Court of Appeal in 2024.

As readers may recall, the Supreme Court's approach to causation displaced the previous orthodoxy of the "but for" test applied in *Orient Express Hotels Ltd v Assicurazioni Generali SpA*, leading to the conclusion that damage to a hotel did not constitute the proximate cause because the hotel closure would have occurred even without the damage, because of the evacuation of New Orleans due to hurricanes Katrina and Rita.

With increased high energy weather events due to factors such as climate change, it may not be long before the courts are called upon once again to consider these kinds of causation questions in a wide area damage context. As the abovementioned cases illustrate, difficulties often arise with the identification and satisfaction of the causation requirements of a given policy term in a variety of contexts. Further case law developments in this area can therefore be expected.

What to look out for in 2024

Misnaming of insureds

In *(1) George on High Limited & (2) George on Rye Limited ("GOR") v (1) Alan Boswell Insurance Brokers Limited (2) New India Assurance Company Limited*, the named insured was *"George on High Limited t/a The George in Rye"*. The Court held that Insurers had incorrectly rejected a claim by GOR in connection with a fire at its hotel premises (The George in Rye) on the basis that it was not named as an insured. Either the named insured should be construed as *"George on High Limited and the business operated by GOR t/a The George in Rye"* or the policy could be rectified and/or insurers estopped from denying liability.

Aggregation

In November 2023, the Court of Appeal heard an appeal in *Various Eateries Trading Ltd v Allianz Insurance Plc*. At first instance, *Various Eateries* was part of a triumvirate of cases (including *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd*, *Greggs v Zurich Insurance Plc*) dealt with together by the High Court. All three concerned questions of aggregation of COVID-19 BI losses under the Marsh Resilience form of wording. The wording allows aggregation by reference to a "single occurrence", which the High Court considered could be particular Government measures, but not the initial events surrounding the emergence of the pandemic in China.

Whilst the Court of Appeal's judgment in *Various Eateries* is awaited, a significant number of disputes on issues of aggregation of COVID-19 losses

Property and business interruption (continued)

remain ongoing across the market. One prominent example is *The Arsenal Football Club plc & others v Allianz*, a case on the same Marsh Resilience wording as *Stonegate et al* and also involving issues of aggregation. A trial is expected sometime in 2024. Cases such as this pose interesting tests of the application of the High Court's judgment in *Stonegate et al*. and, it is to be expected, the Court of Appeal's judgment in *Various Eateries*. Even with the benefit of guidance from such judgments, it is likely to be some time before all disputes as to aggregation of COVID-19 BI claims are resolved.

Economic factors impacting property claims

Many of the major challenges related to property insurance claims seen in 2023, and likely to continue into 2024, arise from the currently prevailing economic circumstances.

Long before inflation spread widely across the economy, supply chain disruptions led to price inflation of building materials, rising 23.5% August 2020-21 and a further 17.8% 2021-22. Inflation in building materials dropped to 2.3% in August 2022-23 and is dropping further still, but the spread of inflation across the economy means that total build costs have continued to rise in 2023.

This has had a major impact on claims for property damage. It gives rise to a greater possibility of underinsurance, poses difficulties in reserving for claims and adds to the risks associated with disputing coverage.

Inflation and the increased costs of borrowing have put pressure on individuals and businesses. As inflation gives way to diminished economic output, the pressures on those individuals and businesses will continue. Such conditions inevitably lead to a surge in fraudulently made and/or inflated claims. Increased vigilance in the investigation of claims is therefore likely to be required over the course of at least the next 12 months.

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Regulatory

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Key developments in 2023

Consumer Duty over the past year

On 31 July 2023, new Consumer Duty rules came into force for new and existing products and services. The rules, aimed at creating a higher standard of consumer protection in the retail markets, have resulted in a significant shift of the FCA's expectations on insurance firms to provide good outcomes for retail clients (ie for insurance, this is broadly consumers and small businesses). There are four new consumer outcomes covering products and services, price and value, consumer understanding and consumer support.

In particular, the new Consumer Understanding and Consumer Support outcomes are likely to result in a significant shift for the insurance market. The Products and Services and Price and Value outcomes are largely dealt with by existing product governance and pricing regulation.

The new Consumer Support outcome requires firms to provide a level of support to meet the needs of customers throughout the lifecycle of an insurance product or service. Firms are required to "*make it at least as easy to make a claim and obtain support on an insurance product as it is to take out the insurance product in the first place*". The FCA wants firms to crack down on processes and practices which obstruct customers from taking certain actions (these are often referred to as "sludge" practices as outlined in our previous article on the Consumer Duty) and to proactively ensure compliance by, for example, seeking new forms of management information (MI) on claims and utilising existing data and MI sets.

What to look out for in 2024

ESG future year ahead – Consumer Duty and Culture

Insurance firms will need to be ready for Consumer Duty rules coming into force for closed insurance products and services from 31 July 2024. Beyond this point, the FCA has also made it clear in a recent Dear CEO letter "Insurance Market Priorities 2023 – 2025" that its focus in the coming years will continue to be on Consumer Duty implementation and that it will consider using a range of regulatory tools to assess the effectiveness of firms implementation plans, which could include mystery shopping exercises across different insurance sectors, carrying out thematic reviews and monitoring trends at the Financial Ombudsman Service.

This coincides with both the PRA and the FCA currently consulting on proposals to introduce a new regulatory framework to improve diversity and inclusion in the UK's financial sector. The consultation sets out proposed requirements on financial services firms, including insurers, aiming to reduce groupthink, foster psychological safety and improve how firms understand and provide for diverse customer needs. Insurance firms could, depending on the outcome of the consultation, be required to report publicly on diversity and inclusion measures, fix targets and firm-wide strategies setting out their plans towards a more equitable sector. The days when diversity and inclusion could be regarded as a facet of HR are gone. In common with various other regulators, it is clear that the PRA and FCA regard firms' processes and controls relating to governance and culture as being a key part of providing good outcomes for their customers. In other words, a core business priority.

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Restructuring and insolvency

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Key developments in 2023

Important insolvency changes are afoot.

On 26 January 2023, HM Treasury published a consultation document in which it set out its intention to introduce a dedicated insurer resolution regime in the UK. The timing of these changes is, at present, uncertain. The Government has indicated that it plans to legislate when parliamentary time allows. A large majority of the respondents to the consultation suggested that the industry would require a minimum 12-month lead-in time.

Certain tools, including modified insolvency procedures, are already available to manage insurer failure. However, HM Treasury was concerned that such arrangements may be insufficient to manage failures involving: (1) one of the largest firms, especially a rapid failure; (2) multiple insurers concurrently; or (3) insurers offering 'niche' business lines where replacement or substitute cover cannot easily be obtained.

The new regime seeks to provide the UK authorities with new powers and tools to address such scenarios and to mitigate against the risk of an insurer failure threatening the stability of the wider economy. It is proposed that the new regime will be based on the special resolution regime already in place for banks and building societies, which was most recently used in relation to the rescue of UK entities of Silicon Valley Bank.

In the meantime, it appears that the PRA will increasingly focus its attention on exit planning. Only the largest and systemically most important insurers are likely to be subject to pre-resolution planning requirements under the new insurer resolution scheme. However, the PRA indicated in their Dear CEO letter of 10 January 2023 that, separate from those reforms, they may require all insurers to prepare exit plans (to a level of detail commensurate with the size and impact of the insurer). Consultation is ongoing in this regard. All insurers should continue to keep a close eye on developments and to seek legal advice as necessary to assist them in complying with these future requirements.

What to look out for in 2024

The last two quarters of 2023 have seen the highest number of corporate insolvencies in over a decade in the UK. This trend unfortunately looks likely to continue in 2024. According to the latest Red Flag Report produced by Begbies Traynor, nearly 480,000 businesses in the UK reported that they are 'in significant' financial distress. The report notes that the pressures of higher interest rates, inflation and weaker consumer confidence are being felt beyond just the consumer facing sectors (such as hospitality and retail) and are becoming widespread, particularly within the construction and property sectors.

This economic backdrop is all likely to have a significant impact upon the insurance market. With increased numbers of insolvencies, there is a greater risk of insurance policies (such as D&O and business interruption cover) being called upon and premiums increasing as a result. Businesses and directors may also look to address any gaps in their existing insurance coverage to mitigate against the increased insolvency risk. For example, businesses with highly integrated supply and customer chains and which therefore may be most at risk of counterparty insolvency, could increasingly look to obtain trade credit insurance. Trade credit insurers however may consider that they need to adopt a cautious approach when underwriting any such new business, in light of the uncertain economic outlook and increased levels of risk and pay-outs already being made under existing policies.

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Surveyors

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Key developments in 2023

Last year was a busy year for regulators, with the introduction of various building safety regulations including the Fire Safety (England) Regulations 2022 (FSER) following the Fire Safety Act 2021 (FSA), and the Fire Safety Act Commencement Prioritisation guidance (Prioritisation Guidance), which is intended to assist responsible persons with complying with their duties under the Regulatory Reform (Fire Safety) Order 2005 (FSO). Managing agents and their insurers should continue to be mindful of their ongoing obligations under the FSA, FSO and FSER and should refer to the voluntary guidance provided in the Prioritisation Guidance to assist them in meeting their duties.

The Building Safety Act (BSA) also came into force last year on 1 April 2023, which required all existing higher-risk buildings to be registered with the Building Safety Register (BSR) by 1 October 2023. The BSA defines higher risk buildings as buildings of at least 18m in height or with at least seven storeys and containing two or more residential units. From 1 October 2023, all new higher-risk buildings must also be registered with the BSR and must receive a completion certificate before they can be occupied.

Registrations must be carried out by the Principal Accountable Person, or someone authorised by them, such as a managing agent or lawyer. Failure to register a higher-risk building is a criminal offence under the BSA. For further information regarding registrations please refer to the Government's guidance here.

What to look out for in 2024

Following the Social Housing (Regulation) Act 2023 which gained Royal Assent recently, the Department for Levelling Up, Housing and Communities plans to launch a consultation on minimum energy efficiency standards in the social housing sector by early 2024. The Government has also announced a second wave of the Social Housing Decarbonisation Fund, which will allocate an additional £80m to improving the energy performance of social housing in England to a minimum of EPC B and C.

The UK's commitment to reducing carbon emissions by 68% by 2030 and to achieve net zero by 2050, the introduction of minimum energy efficiency standards and the increasing energy prices have created a demand for retrofit services in the residential sector. An RICS residential survey has shown that energy efficient homes are more desirable and achieve a higher market value. RICS is currently reviewing feedback on a draft Retrofit standard which is due to be published in the first quarter of 2024 and there will then be a six-month lead-in until the standard comes into force.

Additionally, in line with growing international climate concerns, Scotland intends to introduce a New Build Heat Standard aimed at prohibiting the use of direct emissions heating systems in new buildings applying for a building warrant from 1 April 2024 onwards. Where there is a heating system contained within a new building, it will be required to be one that produces negligible direct greenhouse gas emissions (a zero direct emissions heating system). It will be interesting to see whether the English Government follows suit.

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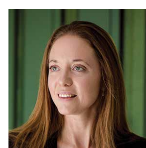

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Technology

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Key developments in 2023

In 2023, the European Commission proposed the first-ever regulation of Artificial Intelligence (AI): the Artificial Intelligence Act (AI Act). The AI Act aims to balance the protection of human rights and the promotion of innovation and growth in AI.

The AI Act classifies AI systems into four risk levels: unacceptable, high, limited, and minimal. It bans AI systems that harm human dignity, such as those that manipulate human behaviour. It imposes strict rules on high-risk AI systems, requiring accountability, governance, and human oversight; and finally, it mandates transparency and user information for limited and minimal risk AI systems, such as chatbots or video games.

The AI Act also tackles the issue of generative AI, such as ChatGPT, which can produce realistic content that mimics human-made. It obliges that such content is marked as artificial and that users are informed about its origin and purpose.

The legislation is expected to come into force in 2026, after the approval by the Parliament and the Council and a two-year transition period. As an EU Regulation, it will apply directly in all EU Member States, ensuring a harmonised approach. However, some critics have argued that the AI Act is too inflexible and may leave regulatory gaps as technology advances.

Nevertheless, the act is a ground-breaking initiative that will shape the future of AI in Europe and the world. It remains to be seen how the UK will react.

What to look out for in 2024

On 8 March 2023, the UK government unveiled a new bill, aiming to save the UK economy more than £4bn over the next 10 years by updating and clarifying the UK's data protection laws. The Data Protection and Digital Information (No 2) Bill (The DPDI bill) replaces the previous DPDI Bill (No 1), which was introduced in July 2022.

The new Bill does not replace the existing UK Data Protection legislation, but instead makes some important changes and clarifications to the current rules.

One potentially significant change is the broadening of the definition of scientific research. Under the current law, there is some ambiguity and confusion about how personal data can be processed for research purposes, which creates various legal hurdles and costs for researchers and innovators. The new Bill defines scientific research as 'processing for the purposes of any research that can reasonably be described as scientific, whether publicly or privately funded and whether carried out as a commercial or non-commercial activity.'

This change is expected to be welcomed by the technological industry, as it will reduce the administration and legal costs involved in conducting research which involves the processing of personal data. It will also enable more innovation and collaboration in the fields of artificial intelligence, biotechnology, health, and social sciences. However, the exact scope and application of this definition is still unclear, and it remains to be seen how it might work in practice.

The new Bill is currently under consideration by Parliament, and it is hoped that it will be passed into law soon. The UK government claims that the Bill will 'support the UK's data economy, enhance public trust in data use, and promote the UK as a world leader in data-driven innovation and research.'

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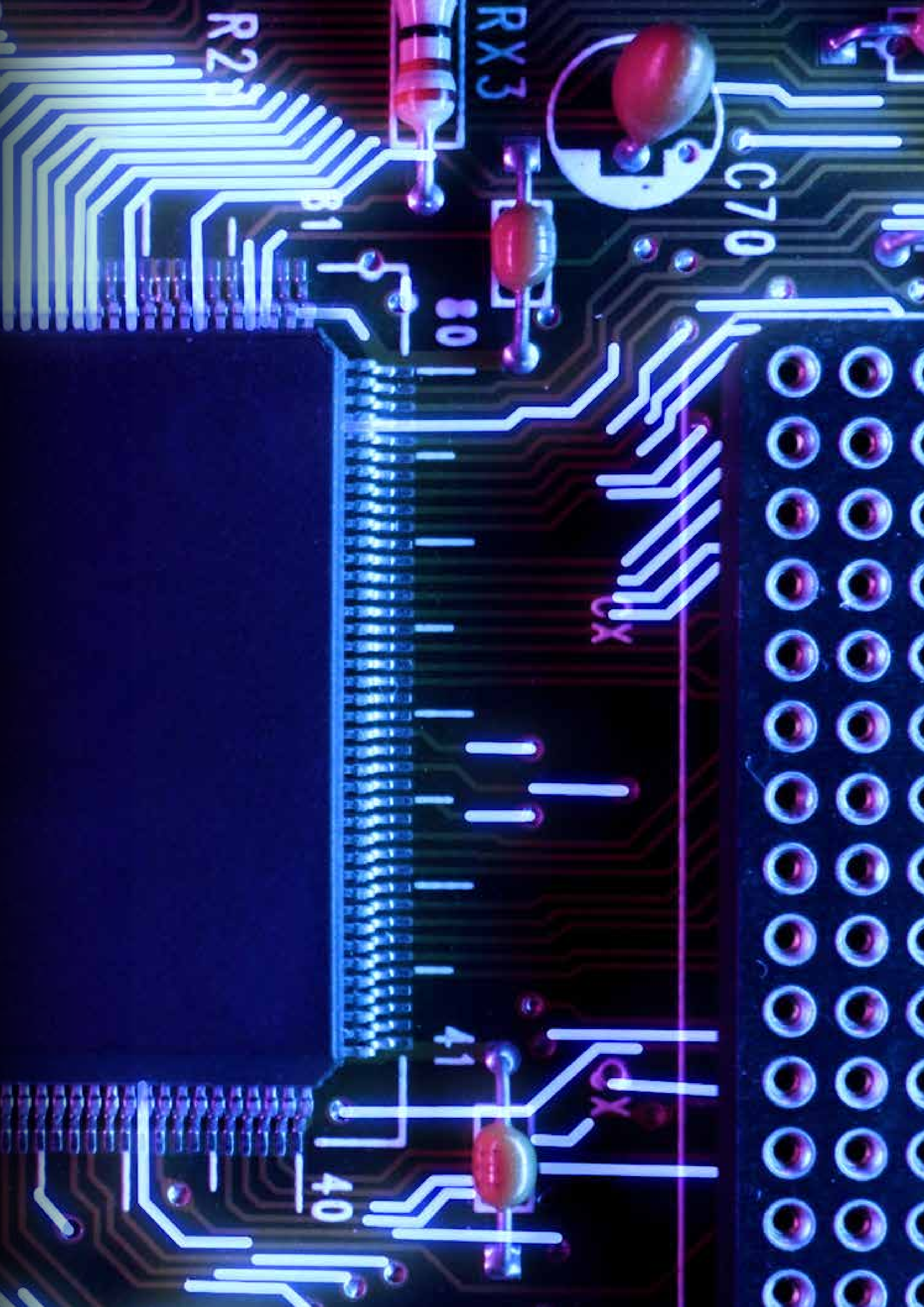

Toxic tort and legacy exposures

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Key developments in 2023

Per and polyfluoroalkyl substances (PFAS) or "forever chemicals" dominated the legacy exposure stage during 2023. PFAS litigation is rapidly gaining traction outside of the US courts and expanding beyond the main manufacturers of the chemicals, to target downstream manufacturers who incorporate PFAS into their products.

Awareness of the persistent and ubiquitous nature of these chemicals and their potentially deleterious effects on human health and the environment, has increased significantly, and there is a marked uptick in PFAS-related claims in Europe and elsewhere in the world. The longer chain PFAS (PFOA and PFOS) and their presence in the environment are more widely known. Understanding of the shorter chain PFAS (including GenX) is still evolving, however. It is thought that there are over 15,000 of chemicals which belong to the PFAS group. The increasing public consciousness of PFAS bears a striking resemblance to asbestos and how it emerged as a toxic substance, spawning decades of litigation which is still running.

PFAS litigation in the USA has been running for the past three decades and has mainly targeted manufacturers of PFAS, including DuPont and 3M, and industries which used PFAS in the manufacture of their products (such as the plastics and carpet industries). Cases concerning alleged groundwater/ water course contamination due to PFAS emissions/releases from manufacturing plants and the use of aqueous fire-fighting foam (AFFF) at airports and military bases, have largely dominated the litigation to date.

2023 saw the announcement of several multi-billion-dollar settlements concerning water course remediation and ongoing monitoring of PFAS levels. In June 2023, it was announced that 3M had negotiated an "in principle" settlement with public water suppliers for USD10.3bn (subject to judicial approval). DuPont, Chemours and Corteva reportedly negotiated a similar settlement for USD1.19bn.

In Europe, there is a rising tide of cases concerning contaminated water courses. Following the 2022 settlement between 3M and the Flemish government for €571m, in relation to remediation of alleged PFAS contamination of the Scheldt river by one of its plants, the Dutch government is reportedly bringing litigation in relation to contamination of the same river. In addition, 13 municipalities in France are bringing litigation in relation to alleged PFAS contamination of the Rhone river. In a significant development for European claimants, in December 2023, the Swedish Supreme Court ruled that residents in Kallinge and Ronneby were entitled to compensation for being exposed to PFAS-contaminated drinking water. Elsewhere in the world, in May 2023, the Australian government settled a PFAS class action concerning AFFF used on air force bases, for AUD132m.

Claims against manufacturers who have used PFAS in their products and/or packaging continue to gather pace. We have already seen various claims against the food industry and manufacturers of food packaging, with false advertising allegations against McDonalds, Burger King and Coca Cola. For example, it is alleged that Coca Cola marketed an orange juice product as "organic" and "safe", which actually contained harmful levels of PFAS. There are various ongoing claims in relation to cosmetics (eg waterproof makeup) and textiles (menstrual underwear, school uniform).

However, there has been some cause for optimism concerning the evidential hurdles plaintiffs will have to overcome, in order to bring mass injury claims. In November 2023, the District Court in *Hardwick*, overturned an order certifying a class action on behalf of over 11 million residents in the state of Ohio with a certain level of PFAS in their blood. The plaintiff sought relief in the form of ongoing medical monitoring of individuals within the class. The court held that the plaintiff had failed to establish that any of the ten defendant companies named in the lawsuit had exposed him to five different types of PFAS detected in his blood. This is a welcome decision for defendants, given *Hardwick* had originally been seeking a nationwide class certification.

What can we expect in 2024

In 2024, we can expect more PFAS litigation being brought in Europe concerning historic contamination adjacent to manufacturing plants and sites where AFFF was used (there are a large number of sites in Europe with high PFAS levels). PFAS litigation is following the same pattern as the cases brought in the USA, against a global uptick in group litigation and litigation funding. We can also expect more litigation against companies which use PFAS in their products, in particular the textiles and packaging sectors. This is an uncertain time for corporates given the regulations on PFAS are still being deliberated in Europe (a widespread ban on their use is not expected until

2025, at the earliest). The regulatory landscape is still evolving, given the vast class of chemicals and the difficulty with implementing a more extensive ban due to our reliance on the chemicals in daily life.

Outside of the PFAS arena, cases involving ethylene oxide (widely used by the medical industry), lithium batteries and agrochemicals will also continue to gather pace. It remains to be seen whether ethylene oxide cases will expand beyond alleged pollution from plants to more of a workplace context (eg exposure to the gas in hospitals).

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Warranty and indemnity (W&I)

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Key developments in 2023

From mid-2022 into the first half of 2023 we have seen global M&A activity continue to decline from post-pandemic boom levels, with a reduction in both global deal value and deal volume. Many investors and sellers particularly in respect of large transactions (GPB 750m +) adopted a "wait and see" approach hoping for more favourable market conditions in the face of fears of global recession, rising interest rates and inflation, and a hostile geopolitical context. However, global M&A activity has fared better than most expected in 2023, particularly as small to mid-level transactions have remained relatively resilient. Further, expectations have adapted to the market conditions and the market has shown signs of improvement as the year has evolved.

In 2023, the W&I market has continued to be resilient as cautious buyers and sellers have sought cover in economically and geopolitically volatile times. The W&I market has continued to expand globally, particularly in markets in Asia and Latin America. We have also seen unprecedented claims lodged under W&I policies in 2023 in the wake of the aftermath of the record policy placements in 2021 and early 2022.

We have also seen increased W&I litigation in the UK, and authoritative case law emerge from it. The High Court handed down its judgment in *Finsbury Foods v Axis* relating to an acquisition of a gluten-free bakery business that it was alleged a price and recipe change was not disclosed. This was the first case that every aspect of a W&I claim has been fought and considered by a Court in the UK – Insurers succeeded on every basis. We have also seen the High Court dismiss *Project Angel Bidco Ltd v Axis*, as it held that the policy did not cover corruption-related losses linked to the buyout of a construction firm that collapsed amid bribery allegations. There is also another ongoing proceeding of *CIEP v Liberty*, which may add to evolving authorities.

What to look out for in 2024

Global M&A is expected to continue to improve in the face of stabilising market conditions. There is a substantial backlog of transactions that are now becoming active, and this will likely continue into 2024. M&A activity has the potential to increase with continued focus on digital transformation, AI adoption, and also trends of pharmaceutical companies and biotech firms pairing up. However, such activity bouncing back to the heights of post-pandemic boom seems unlikely.

Given the restricted access to debt financing and depressed market valuations we expect the growth of secondaries transactions (especially GP-led secondaries) to continue. These transactions can raise particular concerns in relation to the scope of due diligence and disclosure, especially where there is an element seller rollover, which insurers should be alive to.

Synthetic W&I structures, which involves the Insured and Insurer agreeing on various warranties in the policy directly between themselves, are being increasingly considered in the face of a precarious economic environment, particularly in respect of insolvency sales. Synthetic W&I policies are being increasingly considered in various types of transactions, particularly with its benefits of efficiency and this may be a potential structure for W&I insurers to explore further.

ESG continues to be an increased focus of warranties, and the importance of ESG due diligence is intensifying. We also expect to see the increase in renewables M&A activity in certain European jurisdictions such as Spain translate into connected claims arising around availability of tariffs, planning and consents.

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