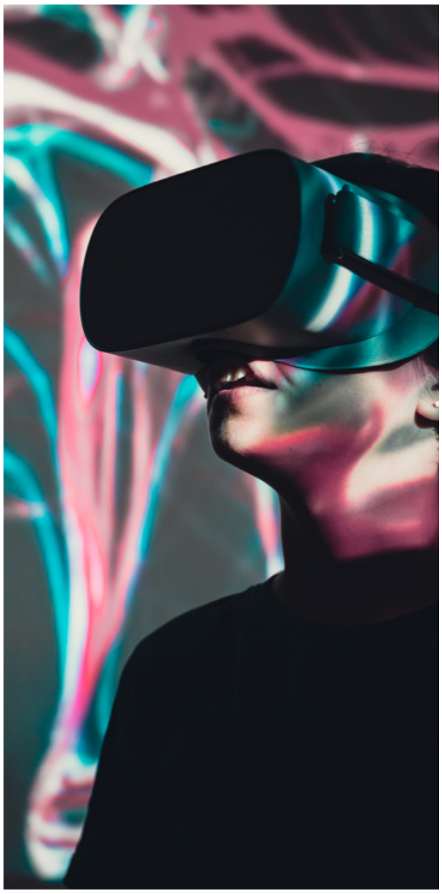
Annual insurance review

2022



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Introduction

Hello and welcome to RPC's Annual Insurance Review – a look back at the events that shaped the insurance market in 2021 and a look forward towards what to expect in 2022.

In last year's review we attempted to pick up the pieces of the devastating impact of COVID-19's emergence. If anything, this year there remains a sense of waiting to see exactly what the longer-term impact of COVID will be.

Business interruption aside, many COVID related claims remain nascent, only likely to be fully realised once the sequence of easing and then re-imposing lockdown restrictions has been broken and the true financial and economic impact of the events of the last two years starts to become clear. At the time of writing at the end of 2021, the emergence of the fast-spreading Omicron variant has led to yet further restrictions being imposed around the world. It therefore appears that the next 12 months will not be the return to business as usual that had perhaps been hoped for.

Of course, the claims environment will be heavily influenced by the overall global economic outlook. High levels of corporate insolvencies continue to be predicted, but have not yet arisen. The impact of the withdrawal of unprecedented levels of government support across many jurisdictions will take some time to be revealed. A boom in insolvencies (and the rise in claims of many kinds likely to follow) seems ever more probable, especially as further lockdown measures persist whilst business subsidies fall away. But then again, similar was predicted following the credit crunch but did not ever quite come to pass.

As ever with our Annual Review, you can jump straight to your own business class/ global geographical sector for expert insights in your chosen field. Alternatively, reading the Review in full will provide you with a complete overview of what has impacted the insurance market globally in the last 12 months.

This year, as well as COVID, key themes include:

- the impact, across a range of sectors, of big increases in cyber-attacks, especially the use of ransomware (reported to be up 25% in Asia and to have doubled according to the UK's GCHQ)
- continued, and the risk of growing, civil and political unrest across the world, driven in part by rebellion again COVID lockdown measures
- global supply chain and labour issues, impacted by COVID, other one-off events and (in the UK) Brexit.

But of course the biggest growing issue, as foreshadowed in last year's Review, was the increasing importance of ESG around the world and across all sectors. This year, for example, you can read more about insurers acting as agents for imposing affirmative ESG change on policyholders and vendors; ESG claims risks arising from investors, employees and others; and regulatory and governmental intervention in many jurisdictions.

It's been another extraordinary year. From all at RPC we look forward to working with you to help you make the best of whatever challenges and opportunities await and wish you all a prosperous and healthy New Year.

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Key developments in 2021

In a continuing hard market, insurance premium rates in Asia have increased through 2021, although at levels below the global average (and with increases across certain lines moderating). While rate rises have remained robust in the financial lines space, we have seen property rates moderate and, for casualty, achieving increases has proved more challenging.

Numerous large business interruption, event cancellation and trade credit claims arising out of the COVID-19 pandemic have been resolved during 2021. However, the road to recovery from COVID-19 has been far from smooth and the broader economic challenges are continuing to impact insurers. In September 2021, Evergrande, China's second largest property developer, which has been on the brink of collapse for several months, missed an US$83.5m interest payment due on a dollar-denominated bond. Evergrande's debt problems pose a systemic risk to China's financial system and its default is having a domino effect, with other Chinese property developers now starting to follow suit. Insurers heavily invested in the Asian real estate market, particularly Chinese property bonds, risk significant losses from the crisis. China's insurance watchdog has since issued a draft guideline to enhance regulation over insurance companies, which is likely to mean added scrutiny and amplified reporting requirements for insurers operating in China.

Many construction projects delayed by COVID-19 are now back underway, although the outlook for the construction insurance market remains mixed. While many jurisdictions across Asia continuing to see high levels of investment in large scale projects, certain carriers have scaled back their appetite for construction risks, having experienced significant losses in recent years.

The cyber market has been volatile, with 25% of global cyber-attacks in 2021 occurring in Asia, but with capacity challenges and many insurers narrowing the terms of key cover, particularly in light of worsening claims experiences arising from ransomware attacks.

As always, however, it is not doom and gloom across the board. Despite trade credit insurers still working through some significant COVID-19 related losses, the anticipated rise in insolvencies moving into 2022, as governments are expected to turn off the support taps, has served to further drive up demand for trade credit insurance in Asia.

The same fear is also supporting the sustained growth of the D&O insurance market in the region. Increased demand for D&O products has also been driven by the marked increase in US securities class actions being brought against foreign issuers. Chinese companies have been the prime target, accounting for 55% of filings against non-US issuers in the third quarter of 2021 alone.

Insurance-linked securities (ILS) in the form of catastrophe bonds also enjoyed a record first half in 2021 and the market is showing no signs of losing momentum. The liquidity of ILS and scope for diversification are appealing factors. In Singapore, the ILS grant scheme, developed by the Monetary Authority of Singapore to fund upfront costs in ILS bond issuances, has been extended to December 2022 and tax neutrality is being offered for ILS vehicles until December 2023.

What to expect in 2022

Continuing COVID-19 restrictions in most Asian jurisdictions, potential challenges in the property market (whether related to Evergrande or otherwise) in combination with global supply chain issues, rising energy prices, increasing inflation and the withdrawal in temporary pandemic relief measures suggest that 2022 will be a bumpy ride for the Asian insurance market, even without further resurgent COVID-19 outbreaks (which are, of course, inevitable).

The continued growth in cyber claims is expected to continue into 2022 as cyber criminals continue to become more sophisticated. Asia remains an attractive target, particularly given as it is set to overtake the US as the largest market for data centres by 2024.

The longer-term effects of COVID-19 are likely to continue in the form of insolvencies in 2022, potentially leading to a further increase in D&O and trade credit claims. On the back of the current hard market in both sectors, we should expect further rate increases for these high-demand products, in conjunction with increased focus by insurers on policy terms and pre-inception enquiries. In contrast, other lines of insurance business can expect to see diminishing rate increases as premiums stabilise.

Political violence (re)insurers are expected to remain cautious amid growing concerns as to the potential for international sanctions, the political uncertainty in Myanmar and broader potential for social and political unrest in various countries around the region as countries wrestle with the economic challenges of transiting to a post-COVID-19 era.

Further growth in renewables can be expected, particularly in the solar and onshore/offshore wind spheres. Consumer awareness is also feeding mounting consumer and regulatory pressure on insurers to perform in accordance with ESG principles, including being selective of the types of businesses they choose to insure, particularly within the oil and gas sector. Growing interest in the ESG agenda is also expected to further propel the ILS market's long-term growth into 2022 and beyond.

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A look back at 2021

COVID-19 continued to cause disruption in Australia during 2021. While not subject to the lockdowns that Europe and other jurisdictions faced in the first half of the year, the level of normality that had been achieved in the early months came to an end in the middle of the year following significant outbreaks in New South Wales, Victoria and the ACT (and smaller outbreaks in other states and territories) leading to the closure of internal boarders, limitations on international arrivals and lockdowns.

COVID-19 continued to place the business interruption (BI) policies of many insurers under the microscope as test cases proceeded through the Courts both locally and around the globe. A key Australian decision in *Star Entertainment Group Limited & Ors v Chubb Insurance Australia Ltd & Ors* [2021] FCA 907 addresses two pivotal questions concerning: what constitutes 'loss resulting from or caused by any lawfully constituted authority' and whether COVID-19 constitutes a 'catastrophe'. In this instance, the Federal Court ruled that insurance companies were not required to indemnify Star Entertainment for losses incurred as a result of government imposed restrictions.

The class action space in Australia is experiencing high levels of volatility associated with a series of targeted regulatory changes by the Federal Government to regulate litigation funders, increase settlement return thresholds and reduce funder commissions. Coordinated changes have also been made to the Corporations Act that will make it more difficult for class action plaintiffs to succeed against companies for breaches of Australia's continuous disclosure rules.

The new and foreshadowed regulatory changes have seen a reduction in the overall number of class actions being commenced but a noticeably sharp increase in class actions commenced without a litigation funder, including in the Supreme Court of Victoria where contingency fees were introduced in 2020.

The fall out of the combustible cladding crisis continued to impact the construction sector and its insurers. In April, the Court of Appeal of the Supreme Court of Victoria gave judgment in various appeals brought from the orders relating to the Lacrosse Apartments - the first cladding matter to go through the Australia Courts - endorsing the trial judgement that found the building surveyor, architect and fire engineer liable 97% of the damages of the owners losses. The outcome of this appeal, which will likely be subject to an appeal to the High Court, has provided guidance for insurers as they continue to manage claims and notifications.

Cyber-attacks have continued to make news headlines in 2021, with long lockdowns playing into the hands of threat actors who take advantage of the rapid digital transformation which has been accelerated by the events of the last two years. The Australian Cyber Security Centre (ACSC) observed that to 30 June 2021, there was an increase of nearly 13% from the previous year in reported cyber-attacks resulting in losses of more than $33bn with the insurers reporting a corresponding increase in notifications and claims.

Australia is not alone in tackling cyber-attacks comprising ransomware, business email compromise, phishing, and data breaches and in 2021 there have been some notable cyber events involving manufacturers, health care providers, entertainment brands, technology providers and government organisations impacting ability to carry out core operations.

In the regulatory space, 2021 saw the insurance recommendations of the Financial Services Royal Commission implemented by the Australian Government.

Insurers started the year preparing for the introduction of the new unfair contract terms regime. Long established in other financial areas (and in particular consumer credit), there were a number of instances where insurers struggled conceptually to apply some of the thinking behind unfair contracts as it has developed in consumer finance, and we await any test cases or announcements of enforcement action.

In addition, there were new design and distribution obligations, the end of the exemption of claims handling and settlement from the regulated financial services regime, and a new duty to take reasonable care to replace the former duty of disclosure for consumer insurance only.

The courts also found some teeth in the previously underutilised parts of the Insurance Contracts Act which codify the duty of good faith - and have issued some interesting declarations at the suit of the Australian Securities and Investment Commission to the effect that insurers had engaged in inappropriate conduct.

Looking forward to 2022

The shadow thrown by COVID is likely to remain despite the opening of internal and external borders and the national vaccination rates hitting 90%. A number of major BI claims remain on foot and even as we head into December, there are reports of others being initiated as plaintiff firms gather class action members.

There has also been much talk of a public inquiry or Royal Commission into the handling of COVID by Federal, State and Territory Governments, which will be watched closely by insurers in anticipation of claims or class actions that could potentially result.

Following the slew of regulatory changes implemented in 2021, 2022 will be the year in which insurers learns how to work with the new regulatory regime, and for ASIC to initiate some high profile licence condition or enforcement actions to test the new regime.

There is expected to be continuing levels of uncertainty for the future of the Australian class action market until the next Federal election in the first half of 2022. Should the existing government be returned than the regulatory environment is expected to further intensify. If there is a change in government then it is likely the new regulatory environment will be substantially weakened with a likely return to previous class action and litigation funder activity levels.

Cyber-attacks will continue to be one of the top risks for organsiations and cyber insurance demand will continue to increase. 2022 will see the introduction of a regulatory framework by the Australian Government around this.

The *Security Legislation Amendment (Critical Infrastructure) Bill 2020*, which has been passed, will be split into two so that government intervention into cyber security incident responses can be progressed urgently. The bill seeks to enhance the regulatory framework to address serious cyber security incidents to infrastructure which include gas pipe lines, banking institutions, electricity assets, and enabling an emergency hatch for government intervention into cyber security incident responses.

Under the *Ransomware Payments Bill 2021*, entities intending to make a ransom payment (excluding those with an annual turnover less than AU$3m) will be required to notify the ACSC of key details giving the ACSC clearer oversight into attacker trends and the impact on the economy.

The sector as a whole continues to face the challenges of a hardening market and the financial impacts of COVID, erratic climate events and fierce competition keeping downward pressure on pricing. There are rumours of M&A activity in the sector within 2022 which could see some consolidation in the market. Insurers will continue to look at innovative business models and investment in InsurTech to control costs, drive efficiency, and maintain market share.

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Key developments from 2021

2021 brought with it the continuation of the COVID-19 pandemic, impacting insurance companies and the regulation of insurance more broadly. In this chapter we recap of some of the major changes impacting the insurance industry moving into the new year.

Business loss coverage

The COVID-19 pandemic brought with it the rise of business interruption claims and pandemic insurance. In *MDS Inc. v Factory Mutual Insurance Company*, the Ontario Court of Appeal considered whether the insurer appellant was required to provide insurance coverage for losses arising from an unplanned shutdown. The Court providing broadly awaited clarity on the scope of the term "physical damage" in the context of exceptions to exclusion clauses. The Court held that the "physical damage" exception to the exclusion clause did not apply to economic losses caused by the inability to use equipment during a shutdown. While the case did not arise from a COVID based shutdown, this may be relevant to COVID-19 related insurance litigation claiming business interruption losses moving forward.

Promissory estoppel and insurance

In *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, the Supreme Court of Canada considered the application of the doctrine of promissory estoppel in the context of a personal injury claim. Specifically, the Court found that an insurer was not estopped from denying coverage by its conduct before it had actual knowledge of material facts constituting the insured's breach of the policy.

"Core Policy Decisions" and government immunity

As well, in 2021, the Supreme Court of Canada heard *Nelson (City) v Marchi*. The Court clarified the law with respect to what constitutes a "core policy decision" rendering a government of public authority immune from liability. The Court specifically defined a core policy decision as "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith." The Court went on to outline four factors to be used to identify core policy decisions including: the level and responsibilities of the decision-maker; the process by which the decision was made; the nature and extent of budgetary considerations; and the extent to which the decision is based on objective criteria. As well, the Court noted that financial implications and/or using the word "policy" are not determinative of whether a decision is a core policy decision immune from liability.

Duty to defend claims alleging intentional acts

The Supreme Court of British Columbia in *Henderson v Northbridge General Insurance Corporation* considered whether an insurer had a duty to defend a claim against its insured arising from negligence and assault allegations in the alternative. The insured operated a daycare and had been accused of shaking an infant baby in her care. The insurer provided general liability coverage but denied coverage on the basis of an exclusion for bodily injury despite the negligence claim being the primary cause of action. The court held that the claims in negligence and the intentional tort of assault were not sufficiently disparate to render the two claims unrelated as they arose from the same actions and had caused the same harm. The court therefore held that the negligence claim was derivative and the insurer was not obligated to defend the insured.

Indivisible injuries

The British Columbia Court of Appeal in *Neufeldt v Insurance Corporation of British Columbia* commented on whether injuries sustained in two accidents were indivisible in nature. If injuries are indivisible, the damages which flowed from each injury cannot be assessed separately and distinctly, leading to liability concerns. The Court found that, in order to determine if injuries are indivisible, causation needs to be determined and, if only some injuries are indivisible, damages must be approached through the *Long v Thiessen* approach.

Dispute resolution provisions

The Superior Court of Quebec in *9369-1426 Quebec inc. (Restaurant Bâton Rouge)* declined jurisdiction over a class action suit against an insurer in favour of dispute resolution provisions in the insurance policy, namely, mediation and arbitration provisions.

Material change

In *Dubroy v Canadian Northern Shield Insurance Co*, the British Columbia Superior Court considered whether an individual moving out of a home constituted a material change in risk such that its non-disclosure warranted no coverage. The Court found that the policy was not void because there was no change in risk – the house was still occupied by family members of the exclusive owner and the insurer continued to insure the same risk.

Climate change

On 12 October 2021, OSFI published a summary of stakeholder feedback in respect of a discussion paper entitled "Navigating Uncertainty in Climate Change: Promoting Preparedness and Resilience to Climate-Related Risks" released on 11 January 2021. This discussion paper invited federally regulated financial institutions, federally regulated pension plans and interested stakeholders to respond to specific questions developed by OSFI regarding climate change-related risks and the development of guidance to address such risks.

Foreign insurers

On 29 March 2021, OSFI released a letter indicating that it will be revising the vested asset regime for foreign insurance companies operating as branches in Canada. The *Insurance Companies Act* (Canada) requires foreign insurance companies to maintain in Canada an adequate margin of assets in respect of their insurance business in Canada. The Canadian branch of the Company must vest these assets in trust pursuant to OSFI Standard Form Trust Agreement (Form 541) in a Canadian financial institution selected by the Branch.

On 28 June 2021, OSFI issued its final version of Guideline E-4: *Foreign Entities Operating in Canada on a Branch Basis* (Guideline E-4). Previous guidance in respect of foreign insurance branches and bank branches (Branches) was contained in Guideline E-4A: *Role of the Chief Agent & Record Keeping Requirements* and Guideline E-4B: *Role of the Principal Officer and Record Keeping Requirements*, respectively. OSFI has now consolidated its guidance in respect of foreign insurers and banks.

What to look out for in 2022

Business loss coverage

We see that more COVID-19 litigation will be addressed by Canadian Courts as damages crystallise and the Courts begin to review these cases in earnest. We expect a number of decisions will be summary in nature and that a great deal of guidance will be taken from the initial cases on how courts in general will deal with these issues.

Promissory estoppel and insurance

Looking forward to 2022, we envision that insurers may be more ready to issue reservations in cases where they might not have done so previously, particularly in cases that have potential for prior notice and disclosure issues.

"Core Policy Decisions" and government immunity

In 2022 we expect that there will be more discussion and potential litigation on Municipal Liability matters and whether infrastructural decisions were policy or operational, particular as climate change is said to cause weather-related flooding.

Duty to defend claims alleging intentional acts

Looking to 2022, we see this case as making it clear that deliberate conduct exclusionary language will have to be made more distinct if Underwriters wish to avoid liability.

Indivisible injuries

We see more potential in the "invisible injury" category particularly with regard to brain damage as more is understood about the nature of brain trauma. The topic is fast becoming one of interest amongst the personal injury bar.

Dispute resolution provisions

We expect to see a renewed emphasis on insurance providers inserting well-drafted dispute resolution provisions in their policies especially in light of the rise in class actions against insurance providers amid COVID-19.

Material change

For 2022 we note that the problem of unoccupied dwellings continues to be significant for insurers and we suspect the move may be to require warranties from insureds as to occupancy so as to emphasise the need to not leave dwellings unprotected for prolonged periods of time.

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Key developments in 2021

Last year, we mentioned a decision rendered on 24 September 2020 by *Cour de cassation* (French Supreme Court) regarding aggregation of claims in PI insurance, in case of breach of the duty to inform and advise committed by an insured toward many clients. *Cour de cassation* decided that "provisions of article L.124-1-1 of French Insurance Code confirming claims aggregation are not applicable to liability incurred by a professional in case of breach of the duties to inform and to advise, these duties being individualised by nature and excluding that there is a technical cause, under article L.124-1-1, allowing to deem them a unique damaging event".

This position is open to criticism but *Cour de cassation* nevertheless reaffirmed it on 26 November 2020 and then on 27 May 2021. The ten identical decisions rendered on 27 May 2021 are all the more noticeable that in order to quash the decision of the lower court, *Cour de cassation* raised of its own motion the issue of aggregation which was not in the grounds of the final appeal.

We also mentioned last year that the issue of coverage of operating losses when there is no physical damage, which was already an issue the year before, has been renewed and rendered more accurate than ever by the COVID-19 pandemic.

The question of coverage of operating losses sustained by professionals following the lockdown received various answers and the decisions rendered by various courts (of first instance and of appeal) in France leave an impression of chaos.

Considering this, some insurers, among which a prominent French insurer, initiated last summer a process of amicable settlement which met quite a success (the offer has been accepted in 80% of the matters).

Still, the issue of capacity on the insurance market for this kind of risk remains, which poses the question of sharing the risk between insurers and the State. Some consider the solution could be a mix including compulsory insurance and an "exceptional disaster" guarantee fund, similar to the "natural disaster" fund.

What to look out for in 2022

In France too, climate change has become a major concern regarding insurance.

Regarding first party insurance, multiplication of natural disasters and increase of the amount of losses question sustainability of the current system of insurance and State guarantee fund. An Act is currently discussed before French Parliament, but it is not as ambitious as one may have expected.

Regarding third party insurance, presently the risk appears quite difficult to apprehend through civil liability. Insurers are still trying to figure out how climate change may give rise to a civil liability involving insurance, insofar as classical conditions are usually not met. But rules might be bent as they have been in order to compensate environmental harm. It is also possible that climate change litigation is based upon classical grounds of liability that are not strictly related to climate change, like tort liability, liability arising from environmental damage, D&O...

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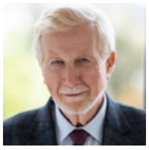

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A look back at 2021

Property & BI

The new model for bourse conditions for Property & BI policies is released this year. These VMZB 2021-conditions (and matching schedule and clarifying document), that are intended to replace the commonly used NBZB and/or NBUG (both dating from 2006), can already be found on the VNAB website in Dutch here. One of the key changes is that the VMZB 2021 are of a modular design/structure, with separate modules for physical loss and BI, in line with current market practice and needs (also re automation). Further, the language has been adapted to normal language use anno 2021. Sentences are shorter and the layout is clearer, making the conditions easier to read. And, of course, the conditions have been adapted in terms of content to comply with current legislation and regulations, and also to get in line with current business practices.

Class actions

We have a new regime that is currently being applied/tested in practice with some 20-odd cases (and growing). Various diesel gate cases (VW, FiatChrylser, Mercedes), Oracle & SalesForce (data privacy), actions against the Dutch State (anti-conception pill, environment, ethnic profiling, fundamental rights, etc), IP infringements, bankruptcy proceedings, Stop Online Shaming, etc.

After the UK, the Netherlands has become the battle-ground for follow-on litigations regarding EU competition law cases (ie damages in civil courts). We have several big cartel cases pending in the courts and are involved in one of them (Deutsche Bahn pre-stressed steel case). This flurry of cases has led to an expansion of certain courts with dedicated chambers.

We also have a very active interest group for shareholders that keep on pursuing claims against companies. Not only for lost shareholder value, but also in relation to big bankruptcy proceedings. The most interesting one is the IMTECH case, one of the biggest in the Netherlands.

A crucial part of some of these new types of litigation is litigation funding. In addition to two local funders (incl Redbreast), other funders have flocked to the Netherlands and even started their own law firms (eg Hausfeld). We also see US firms moving into the market.

Environmental litigation is obviously one of the most interesting changes, as recently witnessed by the Shell case. This movement got kick-started by the Urgenda case against the State from a few years ago and has now developed into a 'movement' of sorts where various other actors will be attacked. Also note that this seems to coincide with activist shareholders that push for greener companies from within (again, Shell is a good example). Note that the majority of these cases do not involve damages, but court orders to ensure compliance with climate targets.

D&O

As (major) insolvencies caused by the COVID-19 pandemic did not emerge in the scope we expected in the Netherlands, D&O insurers did not receive COVID related claims in the magnitude they feared. This fear, however, did cause a further hardening of the D&O market. Prices (again) rose drastically, not just because of COVID, but also because of scarcity in capacity and new risks such as cyber and climate change related claims.

Looking forward to 2022

D&O

Now that we know that there is no quick way out of the pandemic, specific sectors still face greater insolvency risks and inherent risks of D&O claims. We also see an increasing social pressure on corporations to take their responsibility in ESG issues. A group of legal professors opted to include this corporate responsibility in the Dutch Civil Code. In the current system, D&Os are obliged by law to act in the interest of the company. The interest of the company is however, in the end, aimed at maximalisation of profit. The group of legal professors argue that this focus on profit is damaging to society and therefore opt to include an obligation for directors to act not only in the interest of the company, but to also make sure the company acts as a responsible citizen. Whether ESG responsibilities will in fact be included in the Dutch Civil Code is yet to be seen, but we do already see that civil courts take such responsibilities into account in their assessment of claims. The Shell Climate case is an example of this. Insurers fear that this trend of activistic litigation will lead to D&O claims in the (near) future.

Insurability of climate change damages

The Authority for the Financial Markets (AFM), the Dutch conduct supervisor for Dutch financial enterprises and financial service providers, issued a report on climate change related losses getting more and more uninsurable in the Netherlands, and the need for insured parties to be aware of that. The report focuses on consumers, but also has relevance for the business (co-)insurance market.

The report itself, and a short introduction to it, can be found (in Dutch) on the AFM website: Schade door klimaatverandering steeds vaker onverzekerbaar | oktober | AFM Professionals.

In summary, the AFM urges insurers to clearly inform policyholders/insureds on increasing cover limitations as a result of climate change. In addition, AFM also suggests to both insurers as well as the Dutch government to take appropriate action to encourage insurability of climate risks in the future, including the option of mandatory insurance or the creation of collective (re-)insurance pools.

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Key developments in 2021

The year 2021 has been marked by the COVID-19 pandemic and the lockdown restrictions imposed to stop the spread of the virus. Latin American countries have seen some of the highest levels of infection and mortality from COVID-19.

One of the first questions which arose was whether having Coronavirus could trigger your property policy, for example, whether having COVID-19 present on your property could constitute physical damage.

Generally speaking, it was widely accepted that Coronavirus cannot cause physical damage and most insurance regulators and legal courts appeared to take that view in the region.

The vast majority of COVID-19 related claims were pursued in the form of business interruption losses as a result of COVID-19 lockdown restrictions where there may be no physical damage typically required under all risks property policies.

Often, however, there is covered physical damage and the Coronavirus restrictions have extended the BI. Insurers sought to adopt a consistent approach across different jurisdictions, which, to date, has not been possible. In general, insurers have taken two different approaches.

Some insurers have taken the approach that the lockdown restrictions are outside the insured's control and if there is a valid physical damage claim, the subsequent BI (including the "Extended BI") should be covered as well. However, there are also some insurers who take the view that that it is too harsh for insurers to be exposed to an un-limited BI (or an extended BI) not directly linked to the physical damage.

It is still unclear whether insurers will be able to adopt a consistent position throughout Latin America regarding coverage for "Extended BI".

(Re)insurers looked at incorporating exclusions to address COVID-19 in policies going forward. New exclusions in most jurisdictions are still to be approved by the insurance regulator, however.

What to look out for in 2022

The COVID-19 pandemic has disrupted many sectors of the global economy and Latin America is not an exception. The impact of COVID-19 and in particular its economic effect is going to continue into 2022. The appearance of new variants is of concern in circumstances where some Latin American countries with large populations do not have access to the vaccines.

Whilst COVID-19 is going to take up a significant part of the region's agenda, climate change continues to be a key theme and we expect the region's attention will eventually be focused on net zero policies.

Following the United Nations Climate Change Conference held in Glasgow, countries are being asked to come forward with ambitious 2030 emissions reductions targets that align with reaching "Net Zero" by 2050.

Whilst some countries in Latin America have started making internal arrangements to achieve carbon neutrality by 2050, including Argentina, Chile, Panama and Uruguay, the largest economies, such as Mexico and Brazil, still depend heavily on fossil fuels.

The policies implemented by companies world-wide towards a low carbon future will also have a direct impact on the insurance market in Latin America.

For example, we expect to see an increase in demand for insuring renewable energy projects like solar, water and wind, the most available natural resources in Latin America. So far, most projects in the region are at a small and medium sized scale.

Local governments have started introducing new construction regulations aimed at increasing energy efficiency. This will have a direct impact on the adjustment of losses in circumstances where repair, rebuild and replace costs may increase in order to fit the new construction standards. In our experience, coverage for improvements is not always clear allowing scope of interpretation.

As regards the construction and operation of highly-polluting projects such as coal power plants, international (re)insurers are now more than ever reluctant to provide coverage for these projects. The lack of insurance, in our view, will prompt governments in the region to discourage the continued operation of and/or investing time, funds and resources in these.

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Key developments in 2021

The COVID-19 pandemic again was a dominant issue in 2021, which featured a return of social inflation, considerable cyber and security activity, and a significant increase in attention to sustainability.

ESG/sustainability

Environmental, social and governance (ESG) criteria or standards – often referred to simply as sustainability – are having a significant impact on all sectors, including, and perhaps particularly, the insurance and financial sector. First and foremost, insurers are focused on their own practices and operations. They are setting and implementing goals regarding their own emissions, carbon blueprints, diversity and governance. Insurance companies are being viewed – with increasing frequency and severity – as agents for imposing affirmative ESG change on other entities such as their policyholders and vendors. The underwriting, pricing, investment, claims and business practices of insurance companies are under increased scrutiny, both internally and externally. State regulators and rating agencies are laser focused on ESG. The Biden administration is implementing an "all of government" focus on ESG, with the Federal Office of Insurance poised to increase the federal regulation of insurance, using climate change as a jumping-off point. ESG factors are driving losses and litigation with increasing frequency.

COVID-19 business interruption and other pandemic coverage litigation

The issuance of various governmental orders requiring businesses to temporarily modify or close their operations led to an almost immediate avalanche of claims and lawsuits involving first-party commercial property policies. By 1 November 2021, there have been approximately 2,062 COVID-19 coverage cases filed, with 1,863 involving business interruption, 1,680 extra expense, 1,600 civil authority, 190 ingress/egress, 106 contamination, 86 event cancellation, and 82 sue and labour. More than 450 cases were filed as putative class actions and 717 cases include allegations of bad faith.

At the trial court level, insurers have prevailed in almost 75% of the rulings on motions to dismiss in state courts and nearly 95% of the rulings by federal courts, mostly on the grounds that the virus claims do not involve "direct physical loss or damage" to property as required under most US policy wordings, governmental orders do not constitute loss of property, and/or virus exclusions preclude coverage. There are numerous motions to dismiss outstanding and many appeals pending. The first six appellate court rulings have all come from US Circuit Courts of Appeal, with insurers prevailing in each case in decisions rendered by the Sixth, Eighth, Ninth and Eleventh Circuits (involving the laws of ten states). The first state appellate court decision, from California, resulted in a victory for the insurer. There have been numerous federal and state legislative proposals addressing COVID-19 coverage, but to date none have become law.

Cyber-insurance

To date, the vast majority of cyber coverage decisions have involved traditional first-party, third-party and crime/fraud policies. Claims under those policies commonly are referred to as silent cyber claims. A key decision under commercial crime and fidelity coverage was rendered by the Indiana Supreme Court. Most insurers in the cyber-insurance market have now issued several iterations of cyber-specific policies. Cyber-insurers experienced an increase in claim activity, driven primarily by ransomware, often coupled with data extraction, and business email compromise events.

Privacy violations

In the absence of comprehensive federal laws, individual states continue to adopt their own privacy laws and regulations. Despite the 2020 enactment of the California Consumer Privacy Act, California residents voted in November to approve the California Consumer Privacy Rights Act (CPRA), which further expands consumer privacy rights. The CPRA also creates a state-wide privacy agency that will be charged with enforcement of privacy laws. This likely will lead to increased enforcement actions for privacy violations in California.

The Illinois Supreme Court found that a claimed violation of Illinois' Biometric Information Privacy Act fell potentially within the coverage of businessowners liability policies affording personal and advertising injury coverage. The plaintiff in the underlying suit alleged she purchased a membership from the policyholder, a salon that granted her access to other salons. Enrolling in the programme required that the plaintiff have her fingerprint scanned in order to verify her identity. Because the policies did not define "publication," the court turned to the dictionary definition and case law, and held that "publication" has at least two definitions and means both the communication of information to a single party and the communication of information to the public at large." As such, the salon's disclosure of fingerprint data to another party constituted a "publication." The court the held the violation of statutes exclusion did not bar coverage for the claim since BIPA was dissimilar from the statutes enumerated in the exclusion. Subsequently, a Massachusetts federal court held that a broader exclusion barred coverage for BIPA claims.

Civil unrest, riots, and strikes

Although 2021 did not see the unprecedented protests and civil unrest activity that was witnessed in 2020 in the wake of demonstrations in response to the killing of George Floyd, the activity continued in 2021. Demonstrations over climate change, police brutality, criminal trials and labor strikes have been on the radar for insurers and policyholders. Civil unrest – coupled with the defund the police movement – has produced a variety of losses for which coverage has been sought under first-party property, third-party liability, and SRCC (strike, riot, and civil commotion) policies.

Lead paint

Coverage issues relating to the US$400m-plus lead paint abatement fund involving three lead paint manufacturers are being addressed in three separate coverage actions. The courts have reached different conclusions in each on motions for summary judgment. The California coverage action involving ConAgra – in which the trial court granted insurers' motion to dismissed based California's known loss statute – is on appeal.

Long-tail claims – contribution among insurers

Traditionally, Florida courts did not allow contribution claims among liability insurers for defence costs. Fl. Stat. § 624.1055 was enacted to expressly provide that courts shall allocate defence costs among liability insurers that owe a duty to defend the policyholder against the same claim, suit or other action "in accordance with the terms of the liability insurance policies". The statute does not apply to motor vehicle liability insurance or medical professional liability insurance, but now brings Florida within the majority of states permitting contribution of defence costs.

Opioids coverage

In the wake of the nationwide opioids epidemic, various state and local governments sued numerous entities involved in the manufacture, sale, distribution and prescription of opioid pharmaceutical products. Facing staggering potential liabilities, these entities have turned to their insurance companies for coverage under CGL and other policies.

November was a key month in the litigation as the Oklahoma Supreme Court overturned a US$465m judgment that Johnson & Johnson sustained in the nation's first opioid trial. Also, a California judge handed a complete victory to drug manufacturers after the nation's second opioid trial. The third trial did not go well for defendants, with pharmacy companies CVS Health, Walmart, and Walgreens being found liable for contributing to an opioid abuse epidemic in two Ohio counties. This marked the first time a jury has weighed in on the controversial "public nuisance" legal theory at the heart of many similar suits nationwide in the context of opioids.

Previously, several significant settlements reached, including pharmaceutical distributors' US$215m settlement with two Ohio counties, the distributors' US$1.179bn settlement with the State of New York and some political subdivisions, Johnson and Johnson's US$230m settlement with the State of New York, and a US$26bn global settlement between drug distributors and a group of state attorneys general in the National Prescription Opioid MDL.

Disgorgement, D&O, and securities law

New York's highest court reversed an intermediate appellate court ruling and held that a US$140m settlement payment by J.P. Morgan Securities Inc.'s predecessor to the U.S. Securities and Exchange Commission was not an uninsurable penalty. The court concluded that the insurers failed to prove the disgorgement payment – "a component of the SEC settlement that serves compensatory purposes and was measured by the profits wrongfully obtained and losses caused by the alleged wrongdoing" – fell under the exclusion for "penalties imposed by law."

On June 21, 2021, the U.S. Supreme Court issued its decision in *Goldman Sachs* holding that, at the class action certification stage, a court may consider whether a company's alleged misstatements were too generic to have impacted its stock price. The decision is expected to make it more difficult to certify a class action in suits alleging securities fraud based on generic company statements.

The Delaware Supreme Court in the *Dole* case ruled Delaware law governed the excess D&O policy even though most contacts were in California, perhaps representing the court's desire to maintain Delaware's status as the home to more US companies than any other state. The court ruled that the profit/fraud exclusion did not apply on the narrow ground that one of the two underlying matters was resolved by settlement and, therefore, did not satisfy the requirement of the exclusion that the underlying matter be resolved by adjudication. It also affirmed the trial court's application of the "larger loss" rule as opposed to the "relative exposure" rule to defence costs and costs of settling one of the two underlying matters.

What to look out for in 2022

Social inflation and ESG will continue to dominate in 2022.

Additional appellate and trial court COVID-19 decisions will be rendered, with a decrease in the number of new business interruption claim filings expected.

Cyber and privacy claims will continue to mount. Silent coverage decisions will continue to be rendered with decisions under cyber specific policies expected.

Civil unrest, riots, and strikes are likely to remain the major political risks in the US.

Cyber attacks, data loss, regulatory risks, health and safety, COVID-19, ESG, climate and employment claims likely will remain among the leading D&O emerging risk areas.

Although most special purpose acquisition company (SPAC) securities class action lawsuits are filed after the de-SPAC transaction has been completed, more suits are being filed before the merger becoming effective. In addition to merger objection lawsuits, more full-blown 10b-5 class actions are being filed. The trend of SPAC-related state court actions being asserting as state law causes of action rather than federal securities law violations likely will continue, with counsel fees being a major consideration. The future of SPACs remains somewhat uncertain.

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MIDDLE EAST AND AFRICA

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Key developments in 2021

Middle East

In last year's Annual Insurance Review we predicted that investment in the renewables sector, and divestment in hydrocarbon industries, would continue at a pace in 2021. That trend has continued to be borne out, with the Middle East Energy Transition Report published by MEED reporting that no contracts were awarded for oil-powered or gas-fuelled power stations in the Middle East and North Africa region in the first half of 2021. By comparison, approximately US$2.8bn of renewable energy contracts were awarded during the same period.

Following up on its plans to invest up to US$50bn in the renewable sector by 2023, in 2021 Saudi Arabia announced its intention to generate 50% of its energy from renewables by 2030. With only 1% of the Kingdom's energy currently coming from renewables that target is ambitious, but that ambition is matched by the level of investment which has been committed. Other Middle Eastern countries have followed suit, with the UAE aiming to reach the same 50% target by 2050.

Africa

In 2021 we predicted that investment in insurer technology and digitisation of insurance would continue to increase. The African Continental Free Trade Agreement (AfCFTA) came into force in January 2021. It is expected that this will make it easier for InsurTech start-ups to do business across the continent by harmonising regulation and creating uniform tariffs.

Both start-ups and existing operators across Africa are reported to be in the process of either raising investment for, or actively developing, digital platforms through which a wide range of insurance products will be available directly to customers. South African consumer insurers such as Naked and Pineapple are setting the benchmark for digital insurance platforms on the continent. In 2021 the latter secured further funding for expansion and growth overseas, including its partnership with Travelers Insurance in the US.

What to look out for in 2022

Middle East

The pandemic has spurred on further investment in green technology and sustainable projects and momentum surrounding environmental, social, and governance financing. In April 2021 a survey of Middle Eastern CEOs by consultancy firm PwC found that 46% of regional respondents said their aim would be to increase investments in ESG and sustainability initiatives over the next three years as part of their post-pandemic transformation planning.

With the region's ambitious targets for renewable energy generation, huge investment in the technologies required to achieve them can be expected in 2022 and for the next decade. Having some of the highest solar irradiation levels in the world, the Middle East in particular is likely to attract significant investment in solar based technologies. An example of this is evolving PV (photovoltaic) technology, such as bifacial PV cells, which offer greater power output than standard monofacial PV cells, producing solar power from direct sunlight on one side and reflected light on the other simultaneously.

Africa

Before the onset of the pandemic, the African insurance market was expected to grow by 7% annually between 2020 and 2025, a faster rate than in North America, Europe, and Asia. Unsurprisingly, those growth projections have been impacted as a result of the pandemic. However, McKinsey & Company have predicted that the impact will simply delay rather than alter the pattern and potential for future growth. To achieve that level of growth, they note the importance of increasing access through digital innovation and wider distribution. The pandemic has helped accelerate that trend by driving demand for digital and remote channels. This is expected to continue beyond the pandemic.

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OFFSHORE

RPC

Tim Bull | Partner

Key Developments in 2021

The offshore world is dominated by tax, trusts and transparency. Of long-term interest is the decision by the G20 to sign off on 15% Global Minimum Corporate tax rate. This could have a significant impact on incoming business to the offshore jurisdictions of Cayman, BVI, Channel Islands and elsewhere.

The local regulators are also showing their teeth against leading Trust and law firms in offshore jurisdictions, especially relating to Anti Money Laundering issues. Intertrust was fined $4.2m in Cayman for AML breaches, essentially failure to identify beneficiaries under trusts or to carry out proper due diligence on clients. Recently, the Cayman Islands Monetary Authority imposed AML obligations on Maples Group who in turn has sought to have the decision judicially reviewed. CIMA has called the press release issued by Maples as *"inappropriate, professionally irresponsible and crafty"*!

The judicial review proceedings look set to be a hard-fought battleground with the regulator making it clear it will enforce AML obligations in order to preserve the reputation of Cayman's financial services sector.

What to look out for in 2022

The continued relocation of ultra high net worth individuals (UHNW) is expected to be the focus as it has done in previous years. Cayman and Jersey have been particularly active in marketing the benefits of the UHNW set relocating to a low tax country. Also being attracted are businesses in the Fintech, blockchain and cryptocurrency spaces. Legal and other professional advisor firms are, in turn, seeking specialists in these areas. This could pose risks of claims arising out of these relatively unknown markets and related products and services.

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Business line updates

Accountants

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Key Developments in 2021

In 2021 we saw the Supreme Court hand down its landmark judgment in the case of *Manchester Building Society v Grant Thornton*. The decision related to the scope of duty that professional advisers – in this case accountants and auditors – owe their client. The facts of the case are complicated and a full analysis of the case can be found here.

In very brief summary, Manchester Building Society (MBS) claimed that their accountants and auditors were responsible for losses that flowed from them having broken interest rates swaps as it claimed they flowed from the negligent advice given by the accountants to apply hedge accounting.

The Supreme Court unanimously allowed MBS's appeal with the majority holding that the correct approach was to identify the purpose to be served by the duty of care assumed by the defendant, and then to ask whether there is a sufficient nexus between the claimant's loss and the purpose of that duty. In this case, the Court found that the damages claimed by MBS for the cost of closing the swaps were within the scope of the accountants' duty.

It is likely that claimants will use this judgment as justification for trying to recover a greater scope of losses than they perhaps would have done before. Professionals giving advice should, therefore, take note of the 'purpose of duty' question and should check their terms of engagement to ensure that they are absolutely clear on the agreed purpose of the advice being sought and provided.

What to look out for in 2022

Earlier this year the Government opened its consultation "Restoring trust in audit and corporate governance: proposals on reforms". The consultation, which closed in the summer, set out various proposals for widening the scope of the regulator's powers in an attempt to restore public trust in the way the UK's largest companies are run following the sudden collapses of major corporate entities such as BHS and Carillion. The consultation also follows on from the Competition and Market Authority's landmark report from 2019 that sought to break up the dominance of the Big Four in the UK's audit market.

It is intended that the proposed reforms will ensure that the UK's biggest companies are governed responsibly and transparently ahead of a new audit regulator, the Audit, Reporting and Governance Authority,

being established which is expected in April 2023.

If adopted the proposals would permit the new regulator to analyse the entirety of a company's annual report and their accounts as opposed to being limited to scrutinising the strategic report only. The proposals also put forward the idea of the regulator assuming responsibility for making decisions around those who require prior approval to audit Public Interest Entities. Further, the new regulator would no longer be required to go through the courts to get an order to amend company reports, but rather it will have a power to make such orders of its own volition.

However, recent reports suggest that officials are expected to rein in some of the more controversial plans in favour of a more "business friendly" regime apparently in response to industry leaders warning that additional costs could push businesses outside of the UK.

There will be a phased implementation of any new proposals and we expect in 2022 to see more clarity around the outcome of the consultation, to include which proposals are likely to be adopted and the proposed implementation timeline.

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Art and specie

Connie O'Conor | Associate

Key developments in 2021

Non-fungible tokens (NFTs) became increasingly popular throughout 2021. NFTs are "one-of-a-kind" tokens representing digital or physical assets. Whilst one Bitcoin will have the same value as another Bitcoin, the value of an NFT is set by the highest bidder. NFTs provide unique proof of ownership and the record of ownership cannot be modified. In March 2021, digital artist Beeple sold an NFT for US$69m at Christie's and in October 2021, the total value of NFTs issued on the Ethereum blockchain was estimated at US$14.3bn.

The NFT market is immature (and volatile) and insurers are only just beginning to consider the potential exposure. Risks associated with NFTs are increasingly apparent: broken links have seen the art that an NFT represents disappear, accounts have been hacked, devices damaged, and passwords forgotten. If the value of certain NFTs remains high for the rest of 2021 and into 2022, then the market for NFT insurance products may grow.

The existing gap in protection represents an opportunity for insurers to develop suitable products: likely to be a hybrid of property, crime and cyber coverage.

There are some cryptocurrency insurance products available, but these are unlikely to cover NFTs. Most existing fine art policies provide coverage for physical loss or damage and NFTs, as intangible assets, do not fall naturally within this remit. For example, in its standard policy wording, one well known art insurer defines "Art" as "anything that could be bought or sold at a reputable auction house…" (which would include NFTs), but excludes liability for "damage to information on computer systems or other records, programs or software…" (which would exclude NFTs).

What to look out for in 2022

2021 has seen increased calls for accountability and decolonisation in the art world and, in turn, an increased risk that items will be claimed by their origin states. Restitution is in the air in museums: the German Government has announced the return of Benin Bronzes to Nigeria and an ancient Gilgamesh tablet was returned to Iraq by US authorities. Restitution is part of a wider cultural shift in attitudes towards the history of Western colonialism.

The impact of this shift on the commercial art market and private collectors has been more mixed. Outside the US, there has been limited enforcement of restitution in these spheres and the UK is in fact in the process of repealing an import prohibition derived from EU law designed to stop the import of goods unlawfully removed from their origin states. However, as we move into 2022, the success of restitution claims among museums might encourage origin states to pursue the commercial art market and private collectors as well.

If 2022 does see a rise in restitution claims against private insureds, then there is likely to be a knock-on effect of increased claims against insurance policies. Insurers may wish to prepare for this possibility, perhaps by re-assessing the extent to which cover is offered against this risk.

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Brokers

Tim Bull | Partner

Key developments in 2021

COVID related notifications against brokers are still being made.

By far the main brokers E&O case this year was *ABN Amro Bank NV v Royal & Sun Alliance Insurance Plc and others*. In a 200-page judgment delivered in January this year, Mr Justice Jacobs covered just about every insurance law issue, including duties of disclosure, construction of policy terms, avoidance, affirmation, rectification of policy terms and the duties of a broker.

The judgment reaffirmed the harsh regime that exists when assessing a broker's duties to its client. A broker is under an obligation to identify the scope of cover required and to advise its client on that cover, as well as taking reasonable steps to arrange cover and ensure it meets the client's requirements.

It is this last requirement that was under scrutiny in the case. The law places a very high bar on brokers. The case of *FNCB v Barnet Devanney (Harrow) Ltd* (1999) held that a broker was under a duty to procure cover that "clearly and indisputably meets the client's requirements and thereby does not expose the client to an unnecessary risk of litigation".

For a detailed review of the case, please refer to our previous article. On the facts, the brokers did procure the cover sought by the client. Indeed, on almost all issues, the Bank and the brokers succeeded. However, the judge held that the cover was not clear and indisputable; the meaning of the particular clause in the policy that was the subject of the dispute was only determined after three years of hard fought litigation. The brokers (represented by RPC) argued that the clause was drafted by eminent insurance lawyers and was clear. The Underwriters took a spurious point on meaning (along with a host of other spurious points in order to avoid paying the claim. The brokers should not be liable for thoroughly bad points taken by insurers. The judge agreed on the principle but held nevertheless that on the facts, taking into account the factual matrix and the consequences of the construction (ie affording credit risk cover under a cargo policy), although Underwriters' arguments "paid little or no regard to the actual wording of the [clause]", the arguments were not spurious.

The brokers would therefore have been liable for any loss suffered by the Bank, including any irrecoverable costs.

The case is important as it reinforces the view that brokers are subject to an especially harsh regime, in many ways harsher than that faced by other professions. In this particular case, given the clear wording of the clause, it is difficult to envisage a situation when insurers would be found to take a "spurious" point such to exonerate brokers.

What to expect in 2022

There will always be claims against brokers. The ABN case is an example of a relatively routine matter that metamorphosis into a major case reviewing current insurance law. In terms of systemic claims, we predict brokers will still be the target of disgruntled policyholders who have had Covid related claims declined.

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Casualty

Lucy Dyson | Partner

Key developments in 2021

We continued to see an upsurge in actions for collective redress and environmental litigation. These two trends appear to be intertwined, with multinational companies facing group litigation for pollution or climate change related acts or omissions.

We are increasingly seeing foreign litigants pursuing group litigation in the English courts against English domiciled parent companies of foreign subsidiaries. The long-awaited *Okpabi* decision was handed down in February 2021, concerning pollution claims brought by Nigerian villagers against Royal Dutch Shell (RDS). The Supreme Court held that the there was a real issue to be tried as to whether RDS's corporate structure allowed for delegation of authority in relation to safety issues and environmentally responsible operations.

In the *Municipio de Marina v BHP* case, the Court of Appeal granted permission for some 200,000 Brazilian claimants (concerning the Fundao dam disaster in 2015) to appeal a strike out of group litigation against BHP in the English courts. The High Court had dismissed the proceedings as an abuse of process, on the basis that parallel claims in the Brazilian courts and voluminous documentation (making the case unmanageable) should preclude litigation in this jurisdiction. The Court of Appeal will hear the substantive appeal during 2022.

These *Okpabi* and *BHP* cases followed the 2019 *Vedanta vLungowe* case, in which the court held that Zambian claimants should be allowed to bring group litigation concerning alleged pollution by Vedanta's subsidiary, on the basis that (i) there were real prospects of establishing parent company control over the subsidiary's practices and a duty of care owed to third parties (ii) there was a substantial risk of the claimants not accessing substantial justice in Zambia, due to their impoverished status, the lack of legal aid funding and suitably experienced legal teams within the jurisdiction.

There is an increasing wave of organophosphate claims (concerning pesticides and herbicides). In the US, multi-district litigation concerning herbicides, glyphosate (RoundUp) and paraquat (now banned and alleged to cause diseases such as Parkinson's, respiratory problems and increased risk of cancers), continues. At the end of 2020 claims were also commenced by agricultural communities in relation to the pesticide, chlorpyrifos (widely expected to be the next toxic tort).

What to look out for in 2022

The *Vedanta*, *Okpabi* and *BHP* decisions will have significant implications for the liability insurers of multinational companies and pave the way for more group litigation to be brought in the English courts (particularly in relation to environmental issues). We also await the outcome of the next stage of appeal in the BHP case during 2022, which ultimately will likely go all the way to the Supreme Court

We will continue to see environmental litigation both in relation to historic pollution and climate change and against corporates and governments concerning emissions commitments. There is likely to be more litigation concerning forever chemicals (PFAs), with the textiles, cosmetics and other manufacturing industries under increased pressure to abandon the use of these substances. In addition, we can expect an uptick in actions brought in relation to microplastics.

For liability insurers, these trends present novel coverage issues concerning date of injury, fortuity/expected/intended and whether CGL or absolute pollution exclusions should apply.

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Claims handling

Sarah Armstrong | Head of legal

Key developments in 2021

Volume claims handling in professional and financial lines in 2021 has seen evidence of the hardening market and tough trading conditions across all lines of business. This development has led to a significant increase in co-insurance at primary layer with reduced limits and a punishing renewal cycle for insureds, underwriters and brokers around the old common renewal date in the solicitors' market. Claims volumes have remained consistently high with an intense focus on cost control from all stakeholders.

Consolidation within the marketplace has seen a number of firms fall into run off with some high-profile volume firms failing. The claims fallout of this kind of movement is an increase in policy attachment issues with greater chance of disputes as between insurers arising and in the solicitors' market a rump of Run-off policies which will have a long tail over the next few years.

In the solicitors' market some excellent work has been accomplished to obtain helpful rulings to limit insurers' exposure to the many ground rent claims. Although, there is still work to do as tenants negotiate to vary onerous terms and some homeowners are still discovering that they may have a claim. Court backlogs and delays which are COVID-19 related have seen some claims which arose as a result of remote working and sickness and more claims are likely to be revealed as the backlog in hearings is worked through by the Courts. The Legal Ombudsman backlog is also holding up claims resolution and at present a realistic plan to reduce the backlog within a reasonable time is not on the table.

What to look out for in 2022

In 2022 within the solicitors' market we anticipate claims arising from the termination of the SDLT holiday, which will be a direct cause of claims as well as an indirect cause arising from the potential for a drop in the standard of work as a result of pressure of work on fee earners as well as the impact of remote working through the pandemic. Conveyancing claims continue to stand out as the foremost cause of claims within this line of business and we expect that trend to be maintained.

Across all lines of business we anticipate an uptick in claims arising out of or impacted by insolvency and the withdrawal of government support for business alongside an increased appetite for pursuing claims against professionals. As recent premium increases will have focussed insureds' minds on the cost of claims, we may also see insureds attempting to avoid notifying claims leading to an increase in breaches of policy terms and coverage disputes. In such a market, payment of the excess can quickly become a hurdle to claims resolution which can also be a point of tension as between insurers and the insured.

Finally, we anticipate further growth in claims arising from data breaches and the fallout of system penetration by criminals within the professional sector, where insureds are often holding large and sensitive amounts of data.

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Contingency

Naomi Vary | Partner

Key developments in 2021

The striking point about the update for the contingency market for 2021 is the lack of material on which to base the update. Whereas the COVID-19 pandemic caught event organisers by surprise in 2020, by 2021 it had become an all too familiar presence. Although the vaccine development and rollout proceeded faster than many could have imagined, this was not enough to lead to the sport, hospitality and entertainment sectors returning to business as usual.

2021 has seen tension between the desire to return to normality and the need to safeguard against the impact of rapidly changing Government guidelines when faced with an increase in infections, or a new variant of concern. Football matches played out in front of empty terraces, and Olympic medallists took to the podium without applause from the stands. Concern in the insurance market meant that most event organisers could not obtain cover for COVID related cancellations, leading to a dearth of events throughout the year.

Although some new entrants came into the market, and some innovative solutions were explored in order to provide cover, the insurance market played a smaller part in the events industry than in previous years. The Government pilot scheme enabled some summer festivals to go ahead, under strict conditions.

Before the emergence of the Omicron variant confidence was increasing, the recent Rugby Autumn Nations Series at Twickenham boasted crowds of over 80,000 spectators. There was cautious optimism that there would be no more lockdowns, and that the event industry could start its recovery.

What to look out for in 2022

The emergence of the Omicron variant, with suggestions that the England-South Africa Twickenham match may have been a super-spreader event, caused the brakes to engage towards the end of 2021. At the time of writing the symptoms of the Omicron variant appear mild, and cancellation of events arises not due to fear of the variant itself but out of practical concerns driven by the strict self-isolation requirements for anyone in contact with someone infected by the variant. Cancellation arising from these concerns is unlikely to be covered even if a contingency policy does not exclude pandemics. Should the variant engender more concern we may see a return to the lockdowns of the past, with the inevitable impact on events.

Despite this end of year setback we expect that 2022 will see an increase in events; perhaps not to pre-pandemic levels, but an increase nevertheless. The insurance market is likely to play a part in this. Ever adaptable, we expect that creative solutions will be engineered so that policies can provide some level of protection. The question of COVID passports is extremely sensitive, but many large events are likely to continue to require evidence of vaccination or a negative test, and we may see requirements based on this find their way into the Policy wording so that insurers are satisfied that robust procedures are being applied.

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Construction

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Key developments in 2021

As anticipated, the ongoing pandemic and hardening insurance market has led to considerable financial pressure being placed on the construction industry. Whilst construction has continued, and construction output has increased, many construction firms operate without large capital reserves, and the pandemic has put many companies and, accordingly, projects in a vulnerable position.

Financial pressure has caused disruption in supply chains, additional project delays and labour shortages. It is not all about COVID, albeit it has, in some cases, been the straw that has broken the camel's back, with cashflow issues proving fatal to many companies. Brexit, higher insurance premiums and the increased demand for construction work are also responsible for the financial pressures faced by construction companies.

Of course, in a construction project, when one company 'goes down' it has serious implications for the whole project. This can, in turn, lead to fingers being pointed at other parties to the project, who may have done very little wrong, to recover losses (particularly if they are, or should be, insured).

The construction industry has seen a significant increase in the demand for (and, accordingly, cost of) labour. Trades have increased their rates on account of being inundated with work and, finally, construction projects have been affected by a real shortage of materials, caused by a slowdown in the production of materials during the pandemic, the shortage of lorry drivers and the current boom in demand. Manufacturers and suppliers are struggling to build up stock level, and this is likely to remain an issue into next year.

On a separate note, in our last review, we mentioned an anticipated review by the Architect Registration Board on its investigatory processes and procedures. The ARB has set out a number of proposed changes to the Investigation and Professional Conduct Committee Rules, the Acceptance Criteria and Sanctions Guidance. Stakeholders have been anticipated to take part in the consultation on the proposed changes. Given the apparent increase in ARB disciplinary investigations into its members, we would recommend those stakeholders to provide input where possible.

What to look out for in 2022

Cladding does remain an issue in the industry, and new cladding claims are still coming in when perhaps it might have been expected that new notifications had run their course. The new claims

tend to relate to more unusual systems or products, and there is a risk that the systemic issue is proceeding ever further into the building, starting with the panel, then the cavity barriers and finally insulation. Indeed, we anticipate that new claims may relate increasingly to materials that sit on the other side of the insulation and compartmentation.

The big topic in construction in 2022 is likely to be ESG. The built environment produces 30% of total greenhouse gas emissions and 40% of energy use worldwide, and construction expends 32% of the world's natural resources. This is occurring at a time when clients and investors are increasingly selecting brands based on their ethical behaviour and their record on climate change. Simultaneously governments are putting into effect regulations requiring companies to be more transparent in matters from diversity to carbon emissions. The construction sector has a crucial part to play in this, whether through the selection of building materials or by minimising the carbon output of buildings being designed and constructed. In addition, in order to improve consciousness of environmental issues across the sector, construction companies should look to have an ESG framework which recognises and measures such issues. It is likely that a company's approach to ESG is increasingly going to be a consideration when selecting companies to work on projects.

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Construction all risks

Mark Errington | Partner

Key developments in 2021

The construction industry has seen increased uncertainty, higher material costs and project delays due to the continuing COVID-19 pandemic. While many projects have continued (although often subject to various extensions), shutdowns, labour supply shortages (including due to difficulties moving labour across borders), delays in obtaining materials, staggered shift schedules, and social distancing requirements have all fed through to increased costs and often project scheduling delays.

Upwards rate pressures during the continuing hard market conditions have been reinforced in the construction all risks (CAR) market by poor loss experience in recent years and, as a consequence, numerous carriers scaling back their appetite (or withdrawing altogether).

The hardening market and recent poor loss experience have also prompted increased underwriting discipline, with many insurers insisting on stricter terms of cover and higher deductibles. Capacity has been utilised more selectively, with insurers preferring to vary rates according to the nature of the specific project and on clients with more favourable loss history.

Delays to project schedules have also resulted in an increase in requests for extensions of cover for on-going projects. Such extensions have often not been automatically granted and, where they have been granted, have typically been subject to stricter terms. The withdrawal of capacity from the CAR market in recent years has also led to some difficulties in obtaining reinstatement capacity for extensions on long running projects (and, where reinstatement capacity has been available, this has come with higher pricing).

In relative terms fewer disputes have emerged under delay in start-up (DSU) policies as a consequence of government mandated COVID-19 shutdowns, as compared with operational business interruption cover.

Standard DSU policies are triggered by physical damage and typically do not incorporate the type of non-damage notifiable disease extensions found in operational policies, so are much less likely to respond to such delays. The widespread adoption of “for the avoidance of doubt” COVID-19/communicable disease exclusions in policies incepting or extended from mid-2019 onwards has ended most debate on this issue.

However, the UK Supreme Court’s ruling in *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, and in particular its findings in respect of the ‘but for’ causation test (when determining that *Orient Express Hotels v Generali* [2010] EWHC 1186 was wrongly decided), may have significant long term potential ramifications for DSU claims unless insurers act to revise standard wordings in the current hard market.

What to look out for in 2022

As we enter 2022, there is significant global economic uncertainty and supply chain issues. Labour shortages and increasing inflation (as well as anticipated further interest rate increases to combat this) will see construction costs increase. This will be compounded by continuing social distancing regulations and recurrent lockdowns in some jurisdictions as COVID-19 persists, leading to further delays, lower productivity and increased costs.

Supply chain issues, manifesting in numerous sectors globally, are likely to have a knock on effect on project schedules due to delays in getting physical materials to many sites. Likewise, labour shortages, including due to delays in skilled workers crossing international borders due to continuing quarantine requirements, will amplify this.

Extensions to project schedules will increase associated risk (and higher material and labour costs will feed into claims inflation) and it can be expected that 2022 will see further rate increases as well as continued focus on coverage terms.

Furthermore, concerns over potential defaults by Evergrande, China’s second largest property developer, and potential ripple effects (other developers are also weighed down with debt) could have significant repercussions for the property and construction markets as well as the global economy. This may prompt insurers to pay closer attention to inevitable uncertainty arising out of potential insolvency problems in the construction sector.

However, more positively, the fact that global construction output is anticipated to grow significantly over the next few years (with much of the forecast growth in Asia Pacific) in parallel with increasing rates may tempt insurers to increase capacity in (and in certain cases re-enter) the CAR market.

New technologies will also continue to be increasingly adopted both during construction (including smart project management and construction equipment telematics to monitor the performance of machinery and equipment) and at the

claims stage (with increasing utilisation of solutions such as drone technology).

With a longer term view, ESG will drive risk behaviour including a growing focus on green-infrastructure and green-financing. Furthermore, the need to factor in risks arising out of unpredictable extreme weather events brought about by climate change will increasingly impact design considerations but also lead to new opportunities.

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Cyber

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Key developments in 2021

In 2021, we expected to see the release of the UK Supreme Court's decision in the case of *Lloyd v Google*, a class action brought by Mr Lloyd against Google. The claim arose out of use of a workaround that allowed Google to place a third party cookie on iPhones, bypassing default privacy settings to collect and sell information on users' browsing habits.

The *Lloyd v Google* judgment, released 10 November 2021, was hotly anticipated and addressed key questions on damages and the permissibility of opt-out class actions. On damages, the judgment cemented that there must be a material level of distress below which you cannot recover damages. However, there was no further guidance on what constitutes "material". Another key issue was whether the loss of personal data had value in and of itself such that damages could be recovered even if the loss of data did not lead to any distress. This was rejected by the Supreme Court and, although it was noted that this decision is being made under DPA 1998, it is expected that the decision with have force in terms of the GDPR also. Finally, on the question of whether representative actions are permitted for mass data privacy claims under Civil Procedure Rule 19.6 the Supreme Court said that, in principle, this could work, but, in reality, each person would be affected in a different way.

These outcomes will come as welcome news to data controllers and processors. However, the Supreme Court highlighted that they would have been happy for there to be a representative action for liability only and, if such liability is established, a declaration that any member of the represented class who has suffered damage by reason of the breach is entitled to be paid compensation. This could perhaps leave a door open in certain circumstances.

What to look out for in 2022

At a time when cyber insurance is more important than ever, with cybercrime remaining very prevalent and Jeremy Fleming, Director at GCHQ, announcing a doubling of ransomware attacks over 2021, it is becoming more difficult to get cyber insurance cover.

In 2022, we expect to see the cyber insurance market continue to harden.

Following Lloyds of London's phasing out of silent cyber cover, it will become increasingly rare to see cyber incidents being covered by other insurance policies. This is a welcome development in principle. But it comes at a time when the capacity of the cyber market is being tested given the prolific impact and cost of ransomware that cyber insurance has had to address over the last 12 months in particular.

Whilst we can expect to see an increase in standalone cyber insurance products in 2022, prices are expected to remain high. Lloyd's insurer Beazley said that cyber price rises "continue to exceed expectations" and the FT reported that, in the third quarter of 2021, cyber insurance prices rose 73% in the UK. This is a good opportunity for cyber insurers to get the price right and provide cyber insurance at a good rate. It is also potentially a good time to enter the cyber market with the lure of more balanced premiums and without the encumbrance of legacy ransomware losses. There remains much to be positive about in the cyber insurance market, but this is a line of business which is growing up quickly.

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D&O

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Key developments in 2021

Following a significant hardening and self-correction of the D&O market in 2020, 2021 saw the market gradually stabilise with an inflow of new capacity following continued demand and more attractive premiums.

As lockdowns gave way to changing restrictions and disruption from health and safety measures throughout 2021, many businesses (particularly in hospitality, travel and entertainment) struggled to trade in challenging economic conditions. This compounded existing business exposures for D&O insurers, such as cyber security threats and large regulatory investigations (with the SFO agreeing three further DPAs and the FCA pursuing high profile criminal prosecutions for money laundering offences).

As expected, litigation related to sustainability and diversity issues continued to increase, with regulators, investors and legislators expecting companies to implement increased reporting on ESG issues and targets for board diversity, bringing further risk of litigation.

The active US market for shareholder class actions showed no signs of slowing, with emerging trends of claims related to SPACs and supply chain disruption. Attempts to pursue class actions in the UK and EU (particularly the Netherlands) have continued and are gaining traction in the public consciousness, despite the UK Supreme Court decision in *Lloyd v Google* not to approve an opt out class action for data breaches.

Despite these ongoing challenges, we did not see the anticipated wave of company insolvencies and related claims against directors materialise, mostly due to the continuation of government support measures, including the extension of the furlough scheme in the UK until the end of September 2021.

What to look out for in 2022

In the wake of COP 26, climate change remains firmly at the top of the agenda for 2022 with wide ranging measures in the UK, EU and US soon to be brought in requiring companies to make climate related disclosures in prescribed forms as well as measurable commitments to help reverse the effects of climate change.

We expect ESG related exposures to mature beyond activist shareholder claims, to companies and senior managers being held accountable for perceived discrepancies in reporting or failures to meet (voluntary or mandatory) commitments. The devil will be in the detail. ESG exposure to regulatory investigations (or claims following falls in share price) may also arise not only from external forces but internally from employees, as the SEC reported a new record high number of whistleblowing reports during 2021.

As the number of insolvencies in the UK crept back up to pre-pandemic levels and profit warnings continued throughout 2021, we still expect to see a delayed increase in insolvencies, and insolvency-related claims against directors, though it is likely to build slowly rather than snowball, as businesses have had time to prolong viability through additional funding and price increases.

We also expect the often forgotten "G" in ESG to get more focus in 2022 with new

rules to improve corporate governance as a necessary means for executive teams to manage risk and business resilience. Given the ever increasing range of risks that businesses and their executives are exposed to, effective risk management will remain of vital importance to D&O insurers and insureds.

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Energy

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Key developments in 2021

In our last Annual Insurance Review, we predicted that 2021 would see a growing acceptance and drive for 'greener', more sustainable energy resources. This was evident throughout the year from campaigners, businesses, and governments alike, noting in particular the COP26 summit which took place in November.

The coal and oil and gas sectors have come under further pressure to take steps to minimise their contribution to climate change. 40 countries have signed the 'Coal Pledge' which aims to phase out the use of coal. China and the US, two of the world's largest coal-dependent countries, have separately announced that they would be working together to 'cut emissions'. Canada, the US and the UK are also among 20 countries who have signed a statement to halt the use of public funding for international unbated fossil fuel energy projects by the end of 2022. These are just a few examples of the many pledges which were agreed during the COP26 summit.

ESG continues to become an increasingly important subject for businesses. Lloyd's of London and a number of insurers announced climate change policies and 'Net Zero' targets. Eight major insurance and reinsurance carriers also founded the 'Net-Zero Insurance Alliance' which intends to "accelerate the transition to net-zero emissions economies".

The strategic shift in rebalancing risk portfolios has continued. Major carriers including AXA and Generali introduced renewed underwriting guidance and investment restrictions regarding oil and gas which echo the measures adopted in recent years in relation to coal. Many insurers have grown their capacity for renewables to provide for an increase in the number of renewables projects, including those owned by the traditional energy companies who have begun to turn their attention to 'greener' energy sources.

What to look out for in 2022

Expect much of the same in 2022. The transition to greener energy will continue to gather pace, as will the focus on ESG.

Insurers will continue to face increasing pressure to play their part in tackling climate change. Part of this is likely to involve aligning their underwriting portfolios with net zero targets in mind. As a result, we expect that more carriers will rebalance their exposures and the focus on renewables will increase. For those carriers who continue to write the more traditional downstream risks, there is likely to be further pressure not to underwrite certain new projects.

Fossil fuel companies will need to continue to access capital and insurance but may find there is less appetite across the market than had been the case previously. This is likely to result in higher premiums and more restrictive terms. Stricter terms may also lead to an increase in the number of coverage points that insurers are willing to take. We expect that this will align with the general trend across the industry towards a harder market.

Expect major oil and gas players to divest more into sustainable ventures, with a key focus on decarbonisation. This may be implemented by moving towards hydrogen production, or using greener feedstocks such as biomasses. The implementation of autonomous processes within downstream facilities is also expected to increase. With any new technology or process comes new risks. Rating is likely to be more difficult, particularly for projects where there is minimal data on similar risks/previous losses. The ESG profile of a company is also likely to become an important consideration for underwriters in line with renewed underwriting guidance.

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ESG

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Key developments in 2021

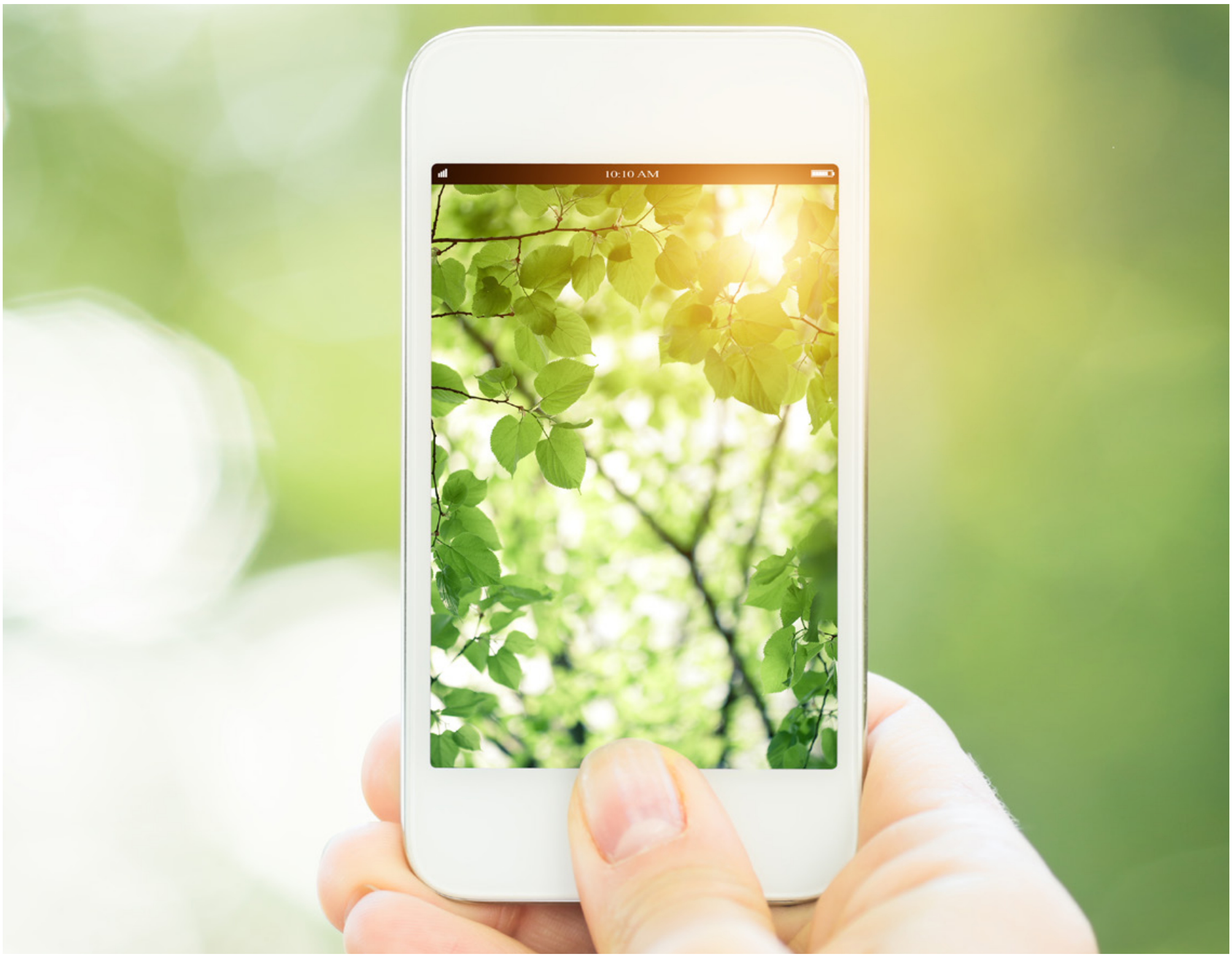
Lloyd's focuses on a more sustainable future

Lloyd's published its first Environmental, Social and Governance (ESG) Report at the end of last year. While this is a fairly new focus area for Lloyd's, the report emphasised: a) Lloyd's long record of contributing to communities and helping them to recover from disaster; and b) insurance's role in protecting society and supporting global economic growth.

Lloyd's stressed its commitment to playing its part in the global transition to net zero. This will include the risks it shares, the investments it makes and the way in which it supports societal progress more broadly.

Some headlines from the ESG Report include:

- setting targets for responsible underwriting and investment to help accelerate society's transition from fossil fuel dependency, towards renewable energy sources
- Lloyd's to phase out insurance cover for, and investments in, thermal coal-fired power plants, thermal coal mines, oil sands, or new Arctic energy exploration activities
- from 1 January 2022, Lloyd's managing agents will be asked to no longer provide new insurance coverages or investments in the activities referred to above
- managing agents will be asked to phase out the existing coverages referred to above by 1 January 2030 to enable



the market to support their customers who are making the transition away from these energy sources towards sustainable energy and business models

- committing to the phasing out of the market's and the Corporation's existing investments in thermal coal-fired power plants, thermal coal mines, oil sands, or new Arctic energy exploration activities by the end of 2025.

What to look out for in 2022

Nature-positive Insurance

In September and October 2021, the UN hosted a series of webinars on nature-positive insurance, chaired by Butch Bacani (the programme leader at the UN for the Principles of Sustainable Insurance Initiative). The focus was on how insurance can assist in the preservation of sensitive ecosystems and the protection of global biodiversity. There were speakers from both the public and private worlds, including insurers and reinsurers.

Loss of biodiversity should be viewed alongside climate change. According to the Taskforce on Nature-related Financial Disclosures, more than half the world's economic output is moderately or highly dependent on nature. Furthermore, as global temperatures rise, it is estimated that up to 1,000,000 species may become extinct and land use will change as, for example, savannah turns to desert.

The webinars highlighted developments with coral reefs and mangroves, both of which are essential buffers between the sea and the land. It has been estimated that mangroves alone may protect 80 million people worldwide and may save many billions of dollars in storm damage. Innovative insurance products are now available for the restoration of both after storm damage. In 2019, Swiss Re underwrote an insurance policy for a coral reef at Quintana Roos, Mexico. In 2020, the Nature Conservancy, with technical expertise from AXA-XL, created a product for the insurance of mangroves.

In years to come it will be fascinating to see how insurance innovates to protect other sensitive ecosystems such as rivers, saltmarshes, forests and peat bogs.

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Financial institutions

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Key developments in 2021

Whilst COVID-19 related exposures and mitigation/relief efforts for financial institutions continued in 2021, on the regulatory landscape the past year has seen some interesting further developments in relation to financial crime.

At the beginning of the year, on 1 January 2021, the US Congress introduced substantial anti-money laundering/ counter terrorist financing amendments and enhancements in the form of the Anti-Money Laundering Act 2020 (AMLA). The AMLA establishes uniform beneficial ownership reporting requirements for companies and financial institutions aimed at discouraging the formation of shell corporations used to disguise and move illicit funds.

In a similar vein, the UK Government has recently closed its Consultation on Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, with further UK legislation expected in 2022. One of the proposed changes is to require cryptocurrency exchanges and digital wallet providers to record information pertaining to the originator and beneficiaries of crypto asset transfers in excess of £1,000, with the Financial Action Task Force considering that such proposals should extend to all financial institutions.

In a year which has seen high profile prosecutions, judgments and ongoing investigation in relation to the cum-ex scandal that has swept across Europe, it is not surprising that there is growing pressure on financial institutions from regulators to crack down on transactions that facilitate financial crime. Consistent with this, the uptick in the SFO's use of the Bribery Act 2010 (coinciding with its ten year anniversary of being in force) and a number of new Deferred Prosecution Agreements are success stories in an otherwise difficult year for the SFO marked by the high profile collapse of its Serco case.

What to look out for in 2022

The world is becoming increasingly concerned about environmental, social and governance (ESG) matters and we expect that financial institutions will be targeted increasingly in 2022 and beyond for ESG failings by regulators, employees, investors and shareholders alike.

Indeed, the London School of Economics has reported that litigated cases related to climate change have more than doubled globally since 2015 and are now targeting a wider range of "private sector and financial actors", whilst using more diverse arguments by incorporating themes such as "breaches of fiduciary duty" and "greenwashing" in their allegations.

Such litigation can be initiated by governments for non-compliance with specific climate related legislation

(eg the new rules requiring Britain's largest companies to disclose climate-related risks and financial information proposed to come into force in the UK from April 2022) or by shareholders against financial institutions for their investment decisions (eg the recent action brought by action group "Fossil Free" against the Dutch pension fund for civil servants and teachers (ABP) which led ABP to announce in October 2021 that it was divesting £15bn worth of holdings in fossil fuel companies).

Financial institutions could also face claims in relation to their own ESG-related statements if those statements prove to be (or are even alleged to be) misleading. This could lead to shareholder claims under s.90/90A FSMA in the UK, regulatory actions and/or mis-selling claims, as faced in July 2021 by the UK's largest asset manager, LGIM, when it was accused of "greenwashing" by marketing a fund investing in state-owned securities as ESG compliant. In addition, if financial institutions provide advisory services to companies exposed to ESG risks, because there is no "one size fits all" definition of ESG, the scope for negligence actions is wide.

Financial institutions, and their insurers, should therefore be prepared for more ESG-related claims in 2022 and beyond as the ESG movement gathers momentum.

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Financial professionals

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Key developments in 2021

Once again, our key development this year concerns defined benefit pension transfers. During 2021 the FCA published further finalised guidance (FG21/3) which stressed what it expects of advice firms. It also updated its redress methodology (FG17/9) with one change being that advisor charges now have to be factored in to calculations, increasing redress costs further. This year has also seen the FCA press for customers of firms in liquidation to be written to, alerting them to potentially unsuitable advice. On top of this, there has been a raft of requests to firms pressing for full past business reviews. This follows the FCA's publication of further market data in January (covering October 2018 – March 2020) noting a decrease in conversion rates and a fall in the number of active advice firms.

The question is: where does the FCA go next? British Steel remains a concern; the FCA has contacted former members twice by post and hosted clinics extolling the virtues of bringing a complaint. Nikhil Rathi of the FCA wrote to MPs in July stating that he was looking at an industry wide review under s.404 of FSMA (something we haven't seen since the Arch Cru review). The FCA then cooled on this idea, stating that they needed additional information before making a decision, but in the Autumn the National Audit Office announced that it was conducting a probe into the FCA's handling of poor pension transfer advice, with a focus on British Steel. The involvement of the NAO could mean that s.404 is very much back on the table.

What to look out for in 2022

2022 might see a more aggressive approach from the FSCS in looking to recover compensation. Whilst the levy for 2021/2022 was lower than expected, this comes as a result of anticipated failures having simply been postponed, as the FSCS' first forecast for 2022/2023 is £900m, £400m of which relates to failures that are yet to occur. As touched on above, the FCA is insisting that liquidators of pension transfer advice firms write to customers who may have received inappropriate advice, which will further increase the likelihood of claims to the lifeboat fund. This approach follows the publication of FG21/4, which provides that an insolvency practitioner is to write to entire populations of customers "who may have a claim for redress against the firm". Interestingly, this comes at the same time as the FCA is consulting on whether to remove financial losses suffered following the failure of advice firms from the FSCS' remit. This could mean a lower levy for firms in the future, leaving more cash available for businesses to pay excesses/ PI premiums.

In the short term, the FSCS is under its statutory duty to pursue recoveries and the Third Parties (Rights Against Insurers) Act) 2010 has simplified the process for bringing a claim against insurers if an insured has entered insolvency. The ultimate result is that large scale insolvencies are unlikely to mean insurers are able to close their books and the risks of the past few years (including SIPPs, NMPIs and pension transfers) may rear their head again in the future in the form of FSCS claims against insurers using assigned rights.

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General liability

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Key developments in 2021

Last year we anticipated the introduction of Regulations implementing a new claims procedure for whiplash injuries sustained in road traffic accidents after 31 May 2021. Data published on the official injury claim website states that in the first three months of operation 45,718 claims were processed. Only 4,331 (9.47%) were claims made by unrepresented Claimants. Initial indications are that those making claims are not confident in using the new procedure without help.

The Court's guideline hourly rates for solicitors were updated and implemented on 1 October 2021. This was the first revision since 2010. More regular reviews have been promised.

In *Griffiths v Tui* (7 October 2021) the Court of Appeal decided by 2-1 majority that a judge was entitled to reject expert medical evidence even if no contrary evidence or challenge to the expert's opinion had been put before the court. Although the Defendant had been given permission to obtain its own medical evidence, it had been served late and permission to rely upon it had been refused. The Claimant's expert evidence was put before the court in writing only. The Defendant argued through submissions to the judge at the end of the trial that the Claimant's expert evidence was inadequate to prove causation on the balance of probability. The judge agreed and the claim was dismissed. The Court of Appeal upheld the original decision.

To avoid similar challenge, experts will need to be careful to explain their reasoning in support of their opinion and conclusions.

What to look out for in 2022

The Government intends increasing the small claims limit for non-road traffic injury claims from £1,000 to £1,500 in April 2022. The initial proposal to increase the limit to £5,000 was resisted on the basis that complexities in Employers' and Public Liability claims require professional assistance.

It is generally possible for a Defendant to offset a costs order in its favour against liability to pay costs to the Claimant. On 6 October 2021 the Supreme Court decided in *Adelkun v Ho* that this is not

possible in claims governed by Qualified One Way Costs shifting (QOCS) where costs orders in the Defendant's favour can be set off only against damages. This difference arises through the wording of the Rules relating to the enforceability of costs orders against a Claimant when QOCS applies.

The court recognised that this decision might favour Claimants unduly and suggested that the Civil Procedure Rules Committee should investigate whether this upsets the level-playing-field objective of QOCS to the extent that rule changes need to be made.

Although the prospect of the fixed costs regime being applied to higher value claims in the very near future appears to be receding, the pre-action Protocols might be reviewed. Significant elements of the Protocols, particularly in relation to information required to be provided by the parties to each other, are often not followed. This makes litigation more likely and is inconsistent with the policy of encouraging early settlement. So far, the Courts have generally ignored breaches of pre-action Protocols. This might change.

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Health and safety

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Key developments in 2021

2021 saw the continued impact of the COVID-19 pandemic and how the nation's authoritative bodies responded. Within their data, published on 23 October 2021, the HSE reported that from 10 April 2020 to 23 October 2021, 36,589 disease notifications of COVID-19 in workers (where occupational exposure was suspected) were reported to enforcing authorities, including 417 death notifications.

In addition to those cases reported directly to the HSE, they have also carried out spot-checks on businesses to ensure their compliance. In September 2021, it was stated that around 316,000 such spot-checks had been carried out.

However, in contrast to these high figures, there has only been one reported prosecution to date: in September 2021, Manchester Magistrates' Court heard that on 9 July 2021, a spot-check was carried out at a construction site and COVID-19 (amongst other) breaches were identified. The principal contractor was issued with a prohibition notice and two improvement notices. However, upon the HSE's return inspection on 17 August 2020 little improvement had been made and further action was taken, which included the issue of a further prohibition notice.

Following continued non-compliance, Umar Akram Khatab (who had traded as A&A Contractors) was prosecuted and pleaded guilty to breaches of s.2(1) of the Health & Safety at Work etc. Act 1974 and Regulation 13(1) of the Construction (Design and Management) Regulations 2015.

The HSE advised that this was, "...the first prosecution to arise from the spot-check programme." and that they had "repeatedly stressed that prosecution is the last resort, but [the] case clearly illustrates that where there is a consistent disregard to COVID or other risks to employees' health and safety, HSE will use its powers to take action."

From the available data, it appears that the HSE have more focused on ensuring compliance with risks associated with COVID in workplaces via consultation with the duty holders, as opposed to commencing prosecutions where possible.

What to look out for in 2022

The Building Safety Bill ("the Bill") was drafted following Dame Judith Hackitt's review of the building safety regime (Building a Safer Future). The Bill is expected to receive Royal Assent in around mid-2022, with the indication being that some of the provisions will come into force in late 2022, with the remainder in early 2023.

The draft Bill seeks to improve safety standards for higher risk residential buildings, which are defined as buildings in England which are at least 18 metres high or have at least seven storeys and two residential units.

It includes provision for a new Building Safety Regulator which will have a variety of responsibilities seeking to improve building safety systems including encouraging the improvement of competence of those in the building industry, advising Ministers on changes to Building Regulations and implementing a new regulatory regime for higher risk buildings.

The Building (Appointment of Persons, Industry Competence and Duty Holders) (England) Regulations, which have been published alongside the draft Bill, set out the proposed responsibilities of various Duty Holders involved in the design, planning and implementation of building works with a requirement that they comply with competency requirements. The draft Bill introduces the role of the Accountable Person, who will be legally responsible for safety in the building. Their responsibilities include applying for a Building Safety Assessment prior to the building being occupied as well as an ongoing duty to assess both building safety and fire safely measures within the building. Failing to comply with these obligations will amount to a criminal offence and will expose the Accountable Person to a fine or a term of imprisonment of up to two years.

Other changes include the introduction of a new national regulator for constriction products which will have the power to withdraw unsafe products from the market and bring prosecutions. The draft Bill will also strengthen the Regulatory Reform (Fire Safety) Order 2005 by increasing the obligations of the Responsible Person in relation to the monitoring and implementation of fire safety measures in higher risk buildings.

The draft Bill will be introducing and/or increasing responsibilities of building owners and managers as well as construction professionals and failure to adhere to the legislation could give rise to both civil and criminal liability, which should be borne in mind by Underwriters and Claims Managers.

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International arbitration

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Key developments in 2021

Are we virtual(ed) out?

2021 promised a great deal in terms of a return to something approaching 'normality'. However, as at the date of drafting this chapter that promise appears unfulfilled. Countries across the globe remain under some form of restrictions and the idea of packing at least ten people into a, perhaps, less than well ventilated room for an arbitral hearing is something of a distant memory.

The 'What to look out for in 2021?' section of last year's chapter speculated whether virtual arbitration would become the norm. The pandemic has certainly required parties and arbitrators to become more creative, and assertive, when it comes to the arrangement of hearings. Anecdotes throughout the market reflect strict rules being applied for parties and counsel in the run up to final hearings, almost akin to self-isolation to avoid precious hearing dates being vacated at the last minute due to illness. Discussion amongst arbitration practitioners in the last 12 months appears to suggest that the world of Zoom/Teams hearings will remain a relatively standard form of procedure, but that parties and Tribunals will adopt a '*horses for courses*' approach – meaning neither that they will become the default position, nor that the (hopeful) end of the pandemic will see a return to the level of travel experienced by those involved in arbitration pre-2020.

High Court reminders on the importance of clear drafting and negotiation of arbitration agreements

Arbitration-related English court decisions during 2021 have highlighted (i) the importance of clear drafting of arbitration clauses together with the approach to adopt in ascertaining the governing law of arbitration provisions, and (ii) the point at which parties become bound by such dispute resolution provisions. Both of these points are critical to insurers' thinking during the policy negotiation stage when considering how potential disputes are to be resolved.

RPC successfully acted for the Respondent before the English Supreme Court in one of the key cases of 2021 – *Kabab-Ji S.A.L v Kout Food Group*. The background to the dispute concerned the interpretation of a 10-year Franchise Development Agreement (FDA) that provided for English law to govern the provisions of the contract, but for any disputes to be settled via arbitration, seated in Paris. One of the original parties to the FDA subsequently became a subsidiary of the Kout Food Group (KFG) and the other counterparty brought arbitral proceedings against that entity for breach of the FDA, not its original counterparty. The arbitral tribunal determined that the question of whether KFG was bound by the arbitration agreement was a matter of French law (given the Paris seat in the arbitration clause), but that the issue of whether there had been a substantive transfer of rights and obligations was governed by English law (due to the governing law clause).

Following the arbitration award, KFG sought to resist enforcement in England on a number of grounds, including which law governed the arbitration agreement and the extent to which it was bound by the dispute resolution provisions in the contract (and, therefore, the award). Both the High Court and Court of Appeal found in favour of KFG and determined that the parties had made an express choice of English law to govern the arbitration agreement given the wording of the governing law provision, notwithstanding the choice of Paris as the seat of arbitration.

The Supreme Court followed the lower courts' decisions, finding that the governing law clause and its reference to 'this agreement' being governed by English law meant that there was no good reason to infer that the parties intended to carve out their arbitration agreement from the remainder of their choice of law for the remainder of the contract. This ruling was consistent with earlier decisions, including *Enka v Chubb* as referenced in the 2021 version of this chapter.

While one might say that this case provides comfort to parties who intend the governing law of their contract (including an insurance policy) to govern all provisions. However, for certainty, insurers would be advised to state expressly the law intended to govern the arbitration agreement in their policies. This is especially important in the context of cross-border insurance in international markets where policyholders may seek to have 'home' arbitration incorporated, but where insurers wish to have the relative certainty of English law governing the contract. Uncertainty as to the law applicable to an arbitration provision can cost significant time and money to resolve.

The issue of arbitration clauses as distinct from the remainder of an insurance policy was also considered in the High Court case of *Markel Bermuda Limited v Caesars Entertainment Inc*. The underlying facts related to a business interruption and property damage claim arising out of the COVID-19 pandemic. Caesars Entertainment Inc (CEI), a large entertainment company in the USA which owns numerous properties such as casinos, hotels and restaurants, sought to claim an indemnity from Markel Bermuda Limited

(Markel) and other insurers. The claim, brought in the District Court of Clark County, Nevada, relied on the dispute resolution provision contained in the policy wording actually provided by Markel; Markel asserted that the policy wording provided was incomplete, did not reflect the agreed terms, and that any disputes were, in fact, subject to the 'Bermuda Form' arbitration clause.

The High Court was required to determine whether to grant Markel a permanent anti-suit injunction restraining CEI from continuing the Clark County, Nevada proceedings. Having walked through the pre-contractual exchanges, including, critically, the terms quoted by Markel for the renewal of the policy and the request to bind received from the broker, the judge found that the parties were bound by the Bermuda Form arbitration clause agreed during the negotiation stage, although not contained in the wording provided to CEI. While the judge found that the policy wording was incomplete and that the agreed terms incorporated the arbitration clause into the policy, he also addressed the potential scenario of the dispute resolution provisions being agreed, but other clauses still being open to negotiation. He determined that in that scenario any dispute that arose prior to the finalisation of the policy would be subject to the arbitration provision as, by that point, it would have become binding between the parties.

This case is a salient reminder that during the negotiation of policy wordings Insurers can find themselves bound by arbitration provisions, even in the absence of a final agreed contract. This is because, under English law, an arbitration clause is a distinct agreement from the contract within which it is associated. This means that disputes over issues such as the very existence of a policy can be subject to arbitration, even pre-binding. It remains important that Insurers give due care and attention to policy dispute resolution provisions during the negotiation process and not simply wave them through while concentrating exclusively on the terms of cover.

What to look out for in 2022

While hoping to move on from the pandemic and the issues it has raised for the arbitration of disputes, this may not be achievable. Whether hybrid-hearings are suggested and/or accepted, with certain parties/counsel present in person and others 'dialling-in', is very much open to question. This raises the ominous spectre of the potential for an unsuccessful party to raise allegations of bias and/or unfair treatment – whether justified or not – to avoid compliance with a final award. How tribunals square the circle of one party wanting an in-person hearing and another seeking virtual proceedings may take longer than the next 12 months.

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International property

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Key developments in 2021

The market for catastrophe bonds and other insurance linked securities ('ILS') has remained robust in 2021 as reinsurers have sought greater protection against rising catastrophe losses. As of October, ILS or third-party capital had expanded to US$97bn, a rise of US$3bn compared with last year, with S&P reporting that around 15% of global reinsurance capital is sourced from the capital markets, through ILS structures such as funds, catastrophe bonds and collateralized reinsurance vehicles.

With 2021 having reinforced the expectation that freak weather events are set to become more commonplace, so the appetite for ILS structures also looks set to continue. In February 2021 the state of Texas suffered a major power crisis as a result of three severe winter storms, with record low temperatures being recorded in some areas. 40,000 MW of generation was offline due to issues with gas pipelines, generators and frozen wind turbines. It has been reported that insured losses arising from the 'Texas freeze' could hit US$15bn, which would make it the costliest weather event in the state's history.

This year's Atlantic hurricane season has been reported as the third most active on record. Hurricane Ida made landfall in Louisiana on 29 August 2021 becoming the second most destructive hurricane to hit the US state since Hurricane Katrina in 2005. Just as the hurricane season closed in December, several US states were hit by a devastating series of tornadoes which levelled houses and factories and left hundreds of thousands without power. Losses from these events are currently estimated to be US$3bn. Tornadoes in the US are extremely rare outside the spring and summer and this devastating event caps off a year of unusual and unmodelled catastrophe losses.

What to look for in 2022

In July 2021 Lloyd's published its roadmap for climate action. The report acknowledged the critical role that Lloyd's and the global insurance industry has in building a more sustainable, greener future. It set out the sustainability and decarbonisation ambitions of the sectors which it deems critical to a successful global transition to a low carbon economy, along with a climate action roadmap which highlights the ways in which the global insurance industry will need to support and accelerate this transition.

This transition will necessarily involve the consolidation and continued development of products available for established renewable lines such as offshore wind. Additionally, as new markets emerge and new technologies develop in 2022 and beyond, the global insurance industry will need to be similarly innovative in the way it delivers risk transfer products, using its expertise to innovate risk management and transfer solutions whilst investing in greener opportunities.

One way the industry may seek to do this is by expanding coverage to ensure capacity constraints do not limit growth in new technologies such as Hydrogen and adapting its offerings in the longer term to reflect these new risks. In the roadmap, Lloyd's has advised carriers to engage with companies in the hydrogen production chain to understand the challenges they face and the specialised cover they require. In the years coming, we should see the development of products to facilitate the progression to green energy, driving a change in the types of subject matter and risks which are covered.

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Legal practices

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Key developments in 2021

The Supreme Court's decision in *Manchester Building Society v Grant Thornton* was the key development for those who deal with claims against solicitors in 2021.

The decision represents a move away from the long-established "information/advice case" test in SAAMCo for assessing the extent to which a claimant's loss falls within the scope of a solicitor's duty of care. This 1997 House of Lords case has been enormously important to insurers of law firms and has saved hundreds of millions of pounds in indemnity payments over the last 24 years. Where a solicitor only provided "information" their liability was limited to those losses which were a direct consequence of the information being wrong and not all of the loss occasioned by the claimant entering into the transaction in reliance on the incorrect advice.

The Supreme Court has now moved away from that distinction. Courts are now required to consider the purpose for which a solicitor's advice was sought and the risks which the advice was intended to guard against. A loss will be found to fall within the scope of a solicitor's duty if it is the result of one of those risks materialising.

There is a debate as to whether the decision has changed anything – the Supreme Court was not purporting to change the law. However, the re-defining of the relevant tests has surprised a number of lawyers and will give rise to a period of uncertainty while new decisions emerge from the courts applying the new guidance.

What to look out for in 2022

2021 saw an increased use in technology across the legal sector and that trend is likely to continue into 2022. There is a move away from traditional 'face-to-face' meetings as clients now expect to be offered the possibility of video conferences instead. Video conferences offer a great deal of flexibility and save the time and costs previously incurred when travelling to and from meetings in-person.

The disruption to office/home/hybrid approaches looks likely to continue well into 2022 and the new technology has come with fresh challenges and risks. A particular challenge will continue to be the supervision of teams and communication with junior lawyers. Break downs in communication can lead to confusion over who in a team is doing what with the risk that work is not done or deadlines are missed.

Similarly, cyber-attacks will continue to be a major concern with vast amounts of sensitive information held on law firm computers and the risk that employees working remotely could fall foul of phishing and other scams. There is also the ongoing concern of claims arising in the event of a cyber breach if solicitors are unable to access the information required to allow them to serve their clients.

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Life sciences

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What to look out for in 2021

Following the Brexit referendum, Life Sciences companies had been waiting to see how far the UK would go in agreeing to follow EU standards concerning medicines. The Brexit Trade and Cooperation Agreement (the TCA) between the EU and UK entered into force on 30 April 2021 and went a long way to addressing those questions.

The TCA acknowledges that Brexit has created barriers to trade but contains provisions to streamline how trade between the EU and UK is conducted in certain products. Medicines are catered for by a specific Annex to the TCA. The Annex contains provisions relating to mutual recognition of Good Manufacturing Practice (GMP), concerning record keeping, documents and inspections. These were welcomed by business as reducing the cost of duplicating the need for evidence of GMP compliance.

What was of more interest was what the UK has agreed to in terms of the future direction of travel for medicines regulation. Under the Annex, the EU and UK have agreed to promote "regulatory approaches that are in line with the relevant international standards". The parties have also agreed to consult each other on proposals to introduce changes to technical regulations and cooperate over developing and implementing internationally agreed standards.

The UK's commitments in the TCA fit with the trend, which existed before Brexit, of countries' regulatory regimes converging. Convergence makes sense for companies as well as patients. Business benefits where similar regulations are in force around the world. Development costs are reduced and more markets become available.

Pharmaceutical companies will look back on 2021 as a welcome moment of clarity after years of uncertainty created by Brexit.

What to look out for in 2022

Reform to medical devices regulation will move up the agenda in 2022. The government has published its response to the recommendations made by the Independent Medicines and Medical Devices Safety Review (chaired by Baroness Cumberlege – reported in last year's Annual Insurance Review). In addition, the Medicines & Healthcare products Regulatory Agency (the MHRA) has consulted on reform to the regulatory regime for medical devices.

The Medicines and Medical Devices Act 2021 allows the Government to amend the Medical Devices Regulations 2002. Following the MHRA's consultation, we expect the Government to reform the regulatory regime by placing an emphasis on improving patient safety and supporting innovation and growth in the UK's Life Sciences sector.

During 2022, companies and their insurers can expect to see reform that is based upon the "lessons learned" that are set out in Baroness Cumberlege's findings. Amongst those are likely to be the appointment of a Patient Safety Commissioner, to champion patients' interests, and a tightening of requirements to ensure that patients are provided with better information to inform consent before clinicians prescribe medical devices.

The Government is keen to ensure that reforms also provide a commercial boost to the sector, by including within the reforms new frameworks for regulating software and artificial intelligence as medical devices, updating classification of products and placing a greater emphasis on 'guidance' than fixed laws, to help the MHRA keep pace with innovation in the sector.

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Medical malpractice

Sian Morgan | Senior Associate

Key developments in 2021

The Supreme Court decision on costs in *Ho v Adelekun* seemed to come from nowhere but has truly struck a costly blow for those defending medical malpractice claims.

Since Qualified One-Way Costs Shifting was introduced in 2013, insurers have had to accept that the default position in injury claims is that they will be unable to recover defence costs – even if the claimant fails in their claim (the three exceptions being: fundamental dishonesty; strike out; or an offset against damages if the claimant wins at trial but fails to beat a Part 36 offer). Defendants could, however, limit their costs exposure by offsetting any costs orders in their favour against claimants' costs orders. Ho removes that possibility once and for all. The Supreme Court commented that its conclusion "may lead to results that at first blush look counterintuitive and unfair" and "no one has claimed the QOCS scheme is perfect".

In higher value claims, the decision is less damaging because the possibility remains of offsetting defendant costs orders against damages awarded, but, in low value cases, well pitched Part 36 offers have now lost most of their teeth, and claimant lawyers may feel that they can take frivolous procedural points with impunity, as their costs are now more thoroughly insulated than even the claimant's own damages.

To read more about the impact of this decision, do look up James Davies' October blog on the RPC website.

What to look out for in 2021

The recent growth in sports injury litigation has extended its reach to claims against clinicians who work with professional sportsmen and women and is expected to mushroom over coming months.

With a group of former professional rugby players bringing a claim against World Rugby, the Rugby Football Union, and the Welsh Rugby Union for allegedly causing them to incur chronic traumatic encephalopathy and/or early onset dementia, there has been much publicity around the management of concussion in sport. Those interested in this area will observe that the players in the group action face an uphill challenge to succeed on both breach of duty and causation, and it will likely be some considerable time until the outcome of the litigation is known.

In the meantime, claimants are taking what they see as a more straightforward and direct route to recovery, by claiming against clubs and/or their doctors for failing to timeously remove players from the pitch when the risk of damage was, or should have been, known. We are already seeing (and robustly defending) such cases. This is certainly an area to watch for insurers, who would be forgiven for previously assuming that the risk of exposure on policies for sports club medics was relatively low.

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Miscellaneous professional indemnity

Stacey Davies | Associate

Key developments in 2021

The effects of COVID-19, multiple lockdowns and widespread working from home have, undoubtedly, brought with them a raft of new challenges – which also means new and increased risks for all manner of professions. HR and IT consultants were kept very busy throughout 2021 as companies tried to adapt to new ways of working remotely, in circumstances many hadn't dealt with before. It is fair to say that, back in early 2020, COVID-19 was anticipated to be relatively short-lived, with a need for short-term "quick fixes" to enable people to do their jobs. However, 18 months later, it became clear that COVID-19 had no intention of moving on and more substantial changes were required, which caused some companies to revisit, or even restructure, their entire way of working.

Aside from employment considerations (including furlough schemes and redundancies), companies had to consider the physical aspects of lockdown (such as the provision of suitable equipment and ensuring that office space had adequate safeguards in place). Health and wellbeing was a prominent theme throughout 2021 and there was an increased awareness of mental health and an expectation on employers to provide adequate support and make "reasonable adjustments" for employees working from home.

With far less people in the office, IT assistance was undoubtedly sought by other means (such as email or phone), thereby putting companies' IT infrastructure under additional strain. Moreover, given the greater number of people working remotely, IT infrastructure became all the more business-critical and carried a greater degree of risk of failure or inefficiency – and, in turn, an increased risk of claims.

It is difficult to ascertain, with any certainty, the causative impact of the above issues on the number of claims actually made against HR and IT consultants in 2021, owing to the absence of data and statistics; such is the nature of miscellaneous PI. However, it is highly likely that both professions will have seen (or soon will) an increased number of claims as a result of these issues.

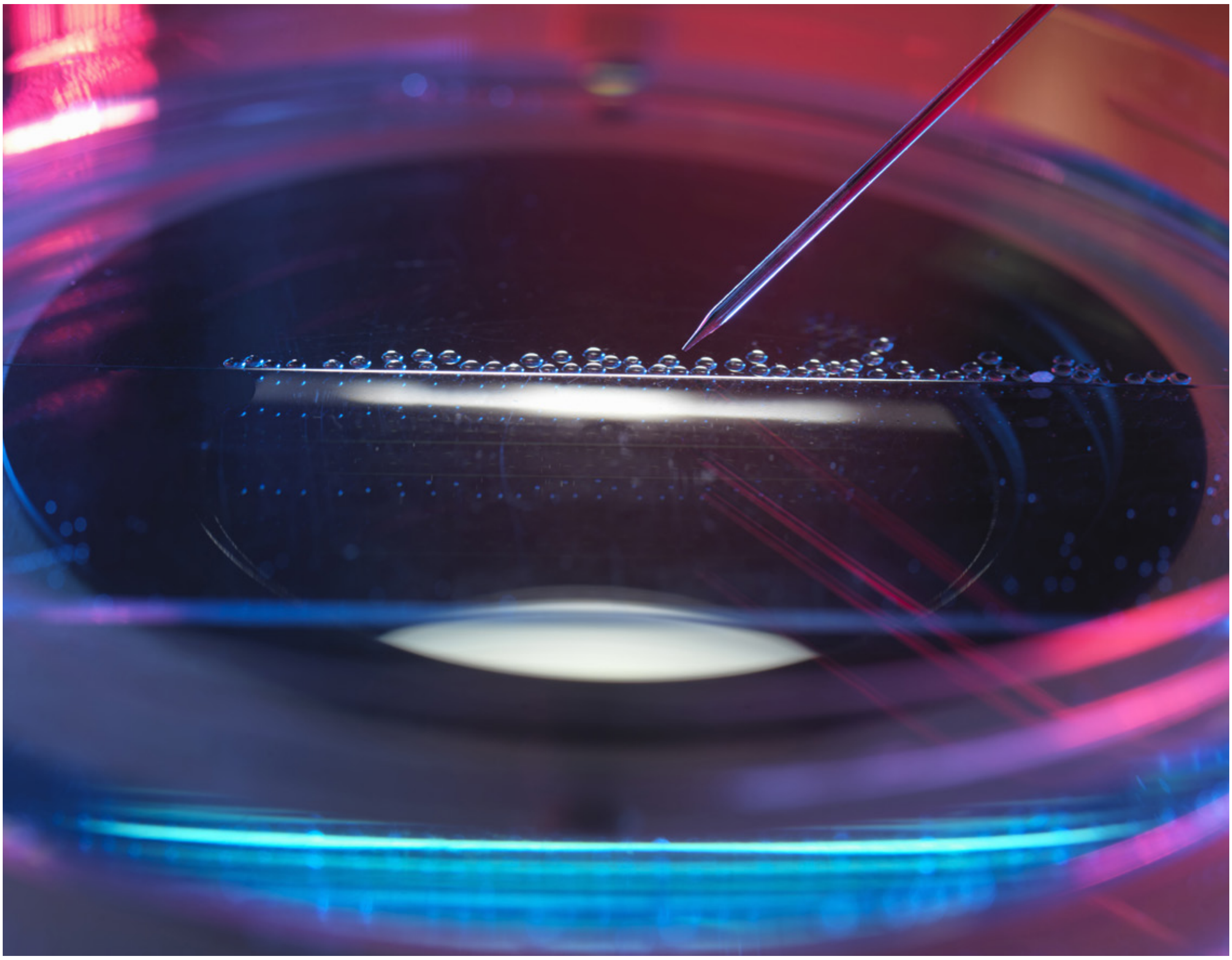
What to look out for in 2022

The new Omicron variant and the reintroduction of preventative measures – namely that everybody continues to work from home – is likely to mean that HR and IT professionals continue to face a greater risk of claims in 2022. The increased demand on IT services during 2020 and 2021 has led to a rise in systemic software vulnerabilities (ie with third party software, such as Microsoft Exchange). Hackers are becoming more sophisticated by the day and if they are able to exploit these vulnerabilities, the affected businesses are likely to look to their IT service providers to explain why the vulnerability wasn't patched. This could lead to tech disputes.

We anticipate that estate agents are also likely to face additional claims resulting from the longevity of the pandemic and the ongoing need to provide alternative solutions in order to generate business. For example, many firms have increased the marketing of online "virtual" viewings (which surged in popularity during the pandemic). Technology plays a key role here and, aside from the potential glitches caused by software and technology (which may also lead to claims against any IT consultants who marketed, installed or managed those products), it is easy to see how properties may not be accurately represented on a mobile phone or computer screen. A whole host of problems – including smells, noise and damp – are not always visible on video, which leads to an increased risk of claims.

Virtual viewings also inevitably limit the contact between estate agent and client and even viewings in person may create a distance, thanks to social distancing measures. This increases the margin for error, particularly where clients are asked to process tenancy paperwork virtually as well as viewing the property online.

Virtual viewings are just one way that firms have adapted to working remotely. As COVID continues to dictate how firms do business, new and ongoing opportunities for innovative thinking will emerge. One area that is likely to see change is underwriting, particularly where more experienced professionals retire and are replaced by a younger cohort, armed with a different appreciation and experience of technology and a desire to create something new. We anticipate that this will lead to revised policy terms and conditions and, in some cases, tailor-made policies for some insureds.



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Pensions

George Smith | Senior Associate

Key development from 2021

Claims against Self Invested Personal Pension Scheme (SIPP) operators have been centre stage for a number of years now. In last year's Annual Insurance Review we highlighted the High Court's decision in *Adams v Carey*, which considered the duties and obligations of SIPP operators around due diligence in the context of a civil claim. The decision represented a rare win for SIPP operators as the Court found that the starting point for assessing a SIPP operator's compliance with the Financial Conduct Authority's (FCA) Conduct of Business Rules (COBS) required consideration of its contractual arrangements with its clients. This more restricted view of SIPP operator liabilities contrasted sharply with the view taken by the Financial Ombudsman Service (FOS).

The High Court's decision in *Adams v Carey* was appealed and the Court of Appeal handed down its decision in April 2021. The Court upheld the High Court's findings in respect of the SIPP operator's alleged breach of COBS, but departed from the High Court in respect of the other issue appealed: the operator's alleged breach of s.27 of the Financial Services and Markets Act 2000. The Court held, in essence, that this technical provision rendered the SIPP unenforceable, on the basis that it had been put in place by the operator as a consequence of things said and done by the unregulated introducer involved, in breach of the FCA's 'general prohibition' on providing financial advice without authorisation. The Court of Appeal's decision will therefore be unhelpful to SIPP operators looking to defend claims in circumstances where an unregulated party, such as an introducer, has played a role in the transaction. To some degree the decision represents the Court pushing the risk of clients dealing with unregulated introducers onto the regulated SIPP operators, an approach more in line with that taken by the FOS to date.

The Court of Appeal's decision in *Adams v Carey* is certainly not the end of the road for the current trend of SIPP claims and complaints, and indeed we understand that the decision has been further appealed. The latest published data on FOS complaints also reveals that SIPPs remain the most complained about product in the investment and pensions category for 2020/21. Despite the number of total annual SIPP complaints having fallen somewhat from a peak around 2018/19, new SIPP complaints being referred to the FOS remain significant in number and have increased over the last 12 months. In addition, none of the SIPP operator cases in the civil courts to date, including *Adams v Carey*, has addressed the important issue of a SIPP operator's common law duty of care, and the standards to be expected of a reasonably competent SIPP operator. There therefore remains scope for further litigation, and expert evidence, to address this issue in the future, and there will no doubt be further claims against SIPP operators to come.

What to expect in 2022

The Pensions Schemes Act 2021 (the PSA) received Royal Assent in February 2021. Many of its provisions came into force in October/November 2021 with further provisions anticipated to come into effect over the course of 2022. The anticipated impact on the UK pensions industry of this new legislation is likely to be a significant and developing news story over the next 12 months, with many changes requiring secondary legislation and likely to result in updated guidance. In addition to trustees themselves, this will have a significant impact for all professionals involved with pension schemes, including lawyers, actuaries and administrators.

The PSA has already introduced new criminal offences, most significantly in relation to avoidance of employer debt and conduct risking accrued scheme benefits. These offences are punishable by up to seven years' imprisonment and/or an unlimited fine, so will no doubt weigh heavily on trustees' minds when they make significant scheme decisions in future. The PSA also expands the scope of the Pension Regulator's (tPR) anti-avoidance power to issue Contribution Notices, which require third parties to make contributions to scheme assets. The expanded scope of these powers, allowing tPR to use them in additional circumstances, will potentially result in these powers being used more frequently in future. Other changes introduced by the parts of the PSA newly in force include requirements for trustees to ensure certain conditions are met before allowing scheme transfers to take place. While this will allow trustees greater scope to refuse transfers suspected to be linked with scams, it also places onerous new duties on them, and we may see claims and complaints against trustees who allow transfers to proceed in breach of these obligations.

Further provisions of the PSA implemented in 2022 are likely to see changes to the notifiable events regime coming into force, with schemes required to alert tPR at an earlier stage in relation to significant transactions. The Government is also consulting on new regulations setting out the detail of a new scheme funding regime under the PSA, which is likely to result in a significant shake-up of the current regime. Similarly, the Government is expected to consult on draft regulations relating to the implementation of pensions dashboards.

Overall, there will be a lot for scheme trustees to keep track of over the next twelve months, and a raft of new duties and obligations for trustees to ensure they keep in mind if they wish to avoid potential claims and regulatory action.

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Political risk and Trade credit

Paul Baker | Legal Counsel

Key developments in 2021

Last year's version of this chapter focused on COVID-19 and its potential to impact the Trade Credit market in 2021. The good news appears to be that the market has weathered this storm relatively well during the last 12 months. We are told, anecdotally, that the very significant capital reserves built up by underwriters expecting to be inundated with claims appear to be in the process of being released, potentially freeing up capacity for new business. We discuss in a moment whether it is perhaps too early to pop the champagne on this front.

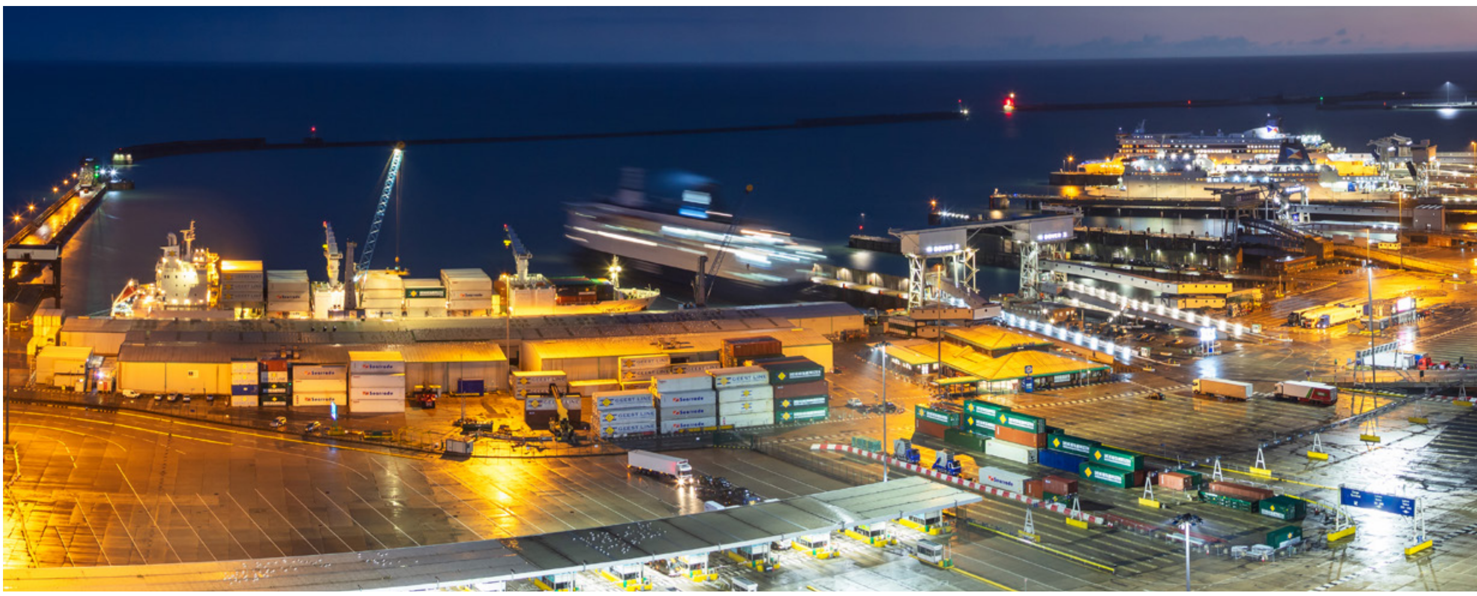
That said, it has not been plain sailing. The last year continued to shine a light on the complex nature of cross-border financial instruments (see, for example, the continuing fall-out from the Greensill scandal) and the role of insurance. Trade Credit insurance is a critical component of global trade flows and it is critical that its place and operation is not questioned unreasonably due to the actions of certain entities/individuals. In fact, the Trade Credit market is often the target of bad actors seeking to defraud underwriters via claims based upon fictious transactions. The underwriting and claims process in this market has remained as complex as ever over the last year.

Peering into our crystal ball in 2020, we also considered the potential impact of Brexit and negotiations on the future trading relationship between the EU and UK. The EU-UK Trade and Cooperation Agreement (TCA) was, eventually, concluded, but the Office for Budget Responsibility (OBR) has indicated that trade flows have reduced following the end of the transition period on 1 January 2021. The OBR indicates that the full impact of Brexit on trade flows will not be known until the TCA has been fully implemented and business has had an opportunity fully to adjust to the changes to trading conditions; this includes potential changes to supply chains. With change also comes risk and the trade credit market is clearly well placed not only to facilitate trade but also mitigate against these risks.

Looking forward to 2022

At the time of writing, the UK Government has just announced new measures to combat the spread of the Omicron variant. It therefore appears that the next 12 months will not be the return to normal for which most had hoped. The new variant, and public heath measures in response, have the potential to impact both the Trade Credit and Political Risk markets, as well as those underwriting, or excluding, political violence risks.

For Trade Credit insurers, there still remains the 'known unknown' of the degree to which unprecedented government measures such as grants and COVID-recovery loans over the previous 18-months artificially propped up buyers that would otherwise have faced financial difficulty. At present, there is little indication that similar measures to those deployed at the height of the pandemic will be forthcoming once more (from the UK Government, at least). Could it be that COVID-related buyer defaults will eventually find their way to the market,



en masse? This may depend on several factors, but it certainly appears too early to predict low loss-ratios for the coming 12 months. That said, Euler Hermes predicts global trade volume will rise by 5.4% in 2022 and 4% in 2023 as global supply chain issues, caused predominantly by supply chain and logistical bottlenecks, ease. With increased trade one might hope, and perhaps expect, greater premium to follow.

From a political risk perspective, Governments across the globe face the prospect of trying to convince weary populations that renewed restrictions are necessary. We previously referred to the prospect of Governments seeking 'quick wins' divert from internal issues and/or change a problematic narrative. A foreign investor perceived to be benefiting from Government subsidies and/or a State's resources can represent a tempting target. This kind of political environment is becoming more dangerous for foreign investors in countries that may not have been commonly associated with the kinds of actions protected against by a CEND policy. The populist leanings of the Host Government will need to be carefully considered by an underwriter on the presentation of new risks. Similarly, existing risks coming up for renewal may require greater scrutiny than might otherwise have been necessary.

Finally, we have already seen an increase in civil unrest and disquiet in Western Europe and beyond as a result of renewed COVID measures. This unrest, with the possibility of more as the Omicron variant spreads, will likely lead to restless nights for both property and political violence underwriters. SRCC and political violence insuring clauses (and exclusions) often list a series of different events that, to a lay person, may seem very similar but through a combination of case law and market practice have particular bespoke meanings. The task of determining whether a particular event leading to damage/loss falls within one state of affairs or another can be a difficult task, requiring substantial evidence. Significant sums can and often do turn on this analysis. While we hope that civil unrest is minimal across the globe, underwriters may be wise to select their risks with significant caution.

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Power

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Key developments in 2021

The last 12 months have seen an increased focus on the climate crisis leading up to the United Nations Climate Change Summit, COP26, at which some 200 countries aimed to state their plans to cut emissions by 2030 with a view to reaching net zero carbon emissions by 2050.

There was some scepticism around the conference given that green-house gases in the atmosphere have continued to rise despite the various agreements and mandates dating back to Berlin 1995. Nonetheless, COP26 has seen the making of various pledges to phase out the use of coal and other fossil fuels within the next ten to twenty years.

The insurance industry has also contributed to efforts in reaching net-zero. The Net-Zero Insurance Alliance (NZIA) is one way the insurance industry is playing its part in the transition to a net-zero emissions economy. Members include Allianz, AXA, Aviva, Munich Re and Zurich. Using their underwriting, claims and risk management experiences, the members of NZIA will assist in the transition to net-zero by working towards decarbonising their investment portfolios.

At the forefront of these initiatives, insurers each have their own environmental, social, and governance (ESG) goals. With around two thirds of onshore and offshore large risk losses coming from companies involved in fossil fuels, arguably, the transition to net zero is not only environmentally responsible, it also has potential financial benefits.

However, the world still needs energy. Since May 2021 the prices of oil and gas have soared by 95% due to shortages, which caused panic and reminded us that society needs an abundance of stable power sources.

What to look out for in 2022

The transition to net-zero is set to continue through 2022 and beyond, but according to The Economist, investment is currently running at half the amount needed to meet the net-zero goals. In the years to come, following COP26, it is to be hoped investments in clean energy sources will increase significantly and aid their advancement.

One of the greatest challenges with renewables is their instability, which means a continuing search for new technologies to find ways to deal with the issue of intermittency. Battery technology can be used as storage for solar power, allowing businesses to generate power at the most cost-effective times and providing an uninterruptible source.

Currently solar and wind dominate the renewables industries, but new types of clean energy sources are set to become

more prominent. Hydrogen is mooted as a clean energy source that could help curb emissions to net zero as it releases water instead of carbon. Toyota has already developed a bus that runs on hydrogen in Tokyo, and the use of hydrogen could be upscaled in the following years to be used in larger industries.

While investors are keen to support climate friendly projects, there remains hesitation given that we are dealing with new technologies and therefore new risks. Insurance services need to adapt by expanding coverage of such risks. The industry has already began facilitating the development of such schemes, for example by AXA XL creating the first mangrove insurance. In 2022, we should see the progression of changes in underwriting and investment to manage risks and support more ESG-friendly products.

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Product liability

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Key developments in 2021

October 2021 saw the Food Information (Amendment) (England) Regulations 2019 ('Natasha's Law') come into force. The Law means the Pre-Packed for Direct Sale (PPDS) foods are now subject to more stringent guidelines and any packaging must now list the name of the food and a full ingredients list, with any of the 14 major allergens being emphasised therein.

Enforcement is tasked to Local Authorities. In the first instance, businesses will be given advice but failure to act on this may result in an Improvement Notice being issued. Non-compliance thereafter will result in a penalty fine, or, in the most serious cases, prosecution.

The Food Standards Agency has issued extensive guidance to assist businesses and research conducted indicates food product recalls due to failure to correctly label allergens in the last year has dropped by 10% in the last year, potentially due to increased awareness in the industry. However, at the time of writing, we anticipated that the end of 2021 would see the start of prosecutions for those not complying now the Law is in force. As such, both underwriters and claims professionals should be mindful of the possible exposure of businesses in relation to the new regulations.

Also, in October 2021, the Medicines & Healthcare products Regulatory Agency (the MHRA) issued updated guidance relating to the licensing of e-cigarettes (and other nicotine-containing products). The MHRA's guidance seeks to clarify the requirements that manufacturers must satisfy in order to be granted a licence.

Manufacturers now have more certainty over the evidence that must be submitted before authorisation is granted, and how reference products can be used in order to make the regulatory process quicker. This initiative may lead to England becoming the first country in the world to prescribe e-cigarettes as a licensed medical product. To guard against litigation and regulatory risks, we expect insurers to request information from manufacturers that shows they have engaged with the MHRA in order to fully consider product safety.

What to look out for in 2022

Following Brexit, the Government previously set a deadline of 1 January 2022 at which point all products placed onto the UK market required UKCA marking (alongside and/or instead of EU CE marking). However, following the continued impact of the pandemic and to provide more clarity, the deadline has now been extended until 1 January 2023.

The Government has been keen to highlight that this is a "final" deadline and that businesses "must take action" to ensure compliance and as such, we anticipate that 2022 will see these changes come into force and a surge in businesses seeking guidance on how to comply with the new rules. In the longer term, we predict seeing cases of where businesses have failed to comply raising the possibility of enforcement action.

In 2022, we also expect to see manufacturers invest in artificial intelligence (AI) products that depend on machine learning. Machine learning has particular potential in the healthcare sector where it can transform how patients are treated, by deriving insights from the vast amount of data generated in hospitals every day. Governments and hospitals are drawn to such products due to the savings that AI can generate in swifter and cheaper patient care.

Insurers should be prepared to work with their clients to guard against the risks associated with machine learning. Such risks include products that are developed without input from clinicians on the possible risks to patients, data that is used to 'train' machines that are not representative of the intended patient population, and products that are placed on the market before the risks of injury and side-effects are adequately investigated.

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Property and business interruption

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Key developments in 2021

January 2021 saw the publication of the Supreme Court's Judgment in the FCA Test Case (*FCA v Arch* [2020] EWHC Comm 2448, [2021] UKSC 1), a claim by the FCA against eight insurers concerning the interpretation of selected non-damage business interruption extensions and the potential availability of cover for COVID-19 business interruption losses under them.

Such were the complexities of the Supreme Court's decision that it took another six months to finalise the wording of the Declarations giving effect to the Judgment. The FCA Test Case was successful in clarifying various issues common to many COVID-19 business interruption claims across the market, thereby helping to confirm for many claims whether there is cover, and allowing the mammoth task of adjusting and paying claims to be completed.

However, the FCA Test Case was not, and could never be, a panacea. There remain numerous undecided issues which have provided fertile ground for dispute in these difficult times.

Many policies providing disease cover do so by reference to a closed list definition of "Notifiable Disease". Unsurprisingly, as a newly emerged disease, COVID-19 was not included in such lists. Policyholders have nevertheless argued that existing diseases within such lists, such as "plague" or "acute encephalitis", should be construed as including COVID-19. Such arguments were firmly rejected in *Rockliffe Hall Ltd v Travelers Insurance Company Ltd* [2021] EWHC 412. Interpretation of a contract will depend on the specific words used in that particular instance, but this case makes it unlikely that Policyholders' arguments on comparable forms of wording would succeed. It however remains to be decided whether an exclusion for "atypical pneumonia" in the ongoing case of *Smart Medical v Chubb* is to be similarly regarded, or whether its meaning is in fact capable of extending to COVID-19.

Another issue which was not directly addressed in the FCA Test case was the approach to be taken in relation to

extensions requiring disease to be present "at the premises". The geographically specific nature of such a requirement differs from the one to twenty-five mile radius requirements seen in the FCA Test Case. Despite this difference, some policyholders have sought to rely on the multiple concurrent cause approach to causation applied by the Supreme Court to radius clauses (under which it matters not that a business's interruption is caused by the pandemic as a whole rather than cases within the radius).

The English courts are yet to opine on this issue, but it has attracted comment in the Irish case of *Brushfield Ltd t/a The Clarence Hotel v AXA* [2021] IEHC 263. The policy provided cover in connection with closure due to defects in *"drains or sanitary arrangements at the premises"*. In rejecting the claimant's argument that social distancing fell within the scope of this cover, the Court considered that social distancing was not a "sanitary arrangement" and social distancing rules were not defects in them. Notably, the Court also placed emphasis on the words "at the premises" as indicating a requirement for a premises-specific order.

The effect of "at the premises" requirements is likely to receive further attention from the Irish courts in *Devlin v RSA*, a case involving a requirement for the disease itself to be present at the premises. The Judgment in that case is expected in the coming months. The issue is also currently before the English High Court in *Smart Medical v Chubb*.

The status of certain issues decided by the Divisional Court which were not subject of appeal to the Supreme Court may also receive further judicial attention, as has been suggested in the arbitral award in *Policyholders v China Taiping Insurance (UK) Co Ltd*. Although arbitral awards do not set binding precedents, the arbitrator was Lord Mance whose views, as a former Justice of the Supreme Court, may be of persuasive effect. The case ultimately turned on whether *"Police of other competent local authority"* in a denial of access clause could extend to measures taken or advice given by central government. Lord Mance concluded that it could not, despite the opposite conclusion of the Divisional Court in the FCA Test Case that a similar form of wording ("competent local authority" in the Ecclesiastical Insurance Office's policy).

Given this finding, Lord Mance found it unnecessary to reach a conclusion in relation to the insurer's argument that the disease needed to be local, rather than national, in scope. He nevertheless took the opportunity to express difficulty in resolving the Supreme Court's multiple concurrent cause approach to causation with the conclusions of the Divisional Court not subject to appeal that there was no cover for COVID-19 losses resulting from the national epidemic under certain wordings because they indicated a localised form of cover (eg the requirement for a *"danger or disturbance in the vicinity of the premises"* in the MS Amlin 1 wording and for *"an emergency likely to endanger life or property in the vicinity of the Premises"* in RSA1 and 2). He expressed doubt that Divisional Court would have reached the same decision had it had the benefit of the Supreme Court's judgment.

What to look out for in 2022

It remains to be seen how the courts will seek to resolve this apparent tension. Further guidance may emerge from the case of *Corbin & King v Axa*, which involves a denial of access extension requiring a danger or disturbance, like the MS Amlin 1 wording, but within a 1-mile radius rather than "the vicinity". The judgment in that case is expected in January 2022.

Aggregation, and its effect on applicable sub-limits, is another issue which is the subject of various disputes. They include the case of *Stonegate v Amlin*, which is scheduled for trial in June/July 2022.

Given the various issues which are subject of ongoing disputes, 2022 is likely to see a number of court decisions on COVID-19-related business interruption claims. First and foremost, this should help to bring many currently unresolved claims to a conclusion. Looking beyond these immediate concerns, the judgments expected in 2022 should provide valuable insight into judicial thinking for reference by those drafting policy wordings in the years to come.

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Regulatory

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Key development in 2021

The Financial Conduct Authority (FCA) delivered on the promise it made in its 2020/21 business plan to continue its work on delivering fair value in the digital age.

In May, the FCA published a policy statement (PS21/5) introducing new rules to improve the way general insurance markets function and to address the harms identified in its September 2020 consultation. This development built on the FCA's final report on general insurance pricing practices (MS18/1.3) which found firms that were using complex and opaque pricing techniques for home and motor insurance to identify customers who were more likely to renew with them and increasing pricing for these customers at renewal, a practice which known as 'price walking'. Some were also engaging in practices that could discourage customers from shopping around.

The rules consist of a package of remedies in relation to:

- **pricing**: a firm must offer a renewal price to a consumer that is no greater than the equivalent new business price that it would offer a new customer
- **auto-renewal**: firms are required to provide a range of easy and accessible methods for opting out of an auto renewal. The auto-renewal rules do not apply to private health, medical or pet insurance
- **product governance**: enhanced requirement to ensure products offer fair value to customers. In this context, fair value is where there is a reasonable relationship between the overall cost to the end customer and the quality of the products and services
- **reporting**: enhanced reporting requirements in relation to home and motor insurance products. An extensive list of metrics concerning pricing and claims experience will be required to be reported to the FCA on an annual basis by 31 March in relation to the preceding calendar year.

These new rules aim to ensure consumers receive fair value and support the FCA's other work to deliver certain target outcomes, including the new Consumer Duty and its recently published guidance for firms on the fair treatment of vulnerable customers (FG21/1).

What to look out for in 2022

Expect further regulatory focus on fair value and improving customer outcomes, as the FCA published its second consultation on the new Consumer Duty on 7 December 2021 and expects to make new rules by 31 July 2022.

The FCA's current proposal for the new 'Consumer Duty' involves three key elements. Firstly, a "consumer principle", which reflects the overall standards of behaviour the FCA wants from firms and requires firms to act to deliver good outcomes for retail clients; secondly, cross-cutting rules, for example, requirements to act in good faith and to avoid foreseeable harm to retail customers; and finally, four outcomes which give more detailed expectations for the key elements of the firm-customer relationship.

This new duty would set higher expectations for the standard of care that firms provide to customers. The FCA notes that, for many firms, this will require a significant shift in both culture and behaviour, so they consistently focus on consumer outcomes, and put customers in a position where they can make effective decisions. The consultation closes in mid-February.

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Surveyors

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Key developments in 2021

Last year, we reported on the first instance judgment in *Hart v Large* and the guidance it provided regarding the scope of a surveyor's duty and the assessment of damages. Mr Large was granted permission to appeal the judge's finding on the issue of the measure of damages and the Court of Appeal handed down its judgment in January 2021.

At first instance, the Court had awarded damages calculated as the difference between the value of the property as it had been reported by Mr Large and its value incorporating all the defects affecting the property, including those that Mr Large could not have been expected to identify when undertaking his inspection. On appeal, Mr Large contended that damages should be limited to those reflecting only the defects he ought to have noted and reported in the Homebuyer's report.

The Court of Appeal upheld the first instance decision, concluding that the measure of loss applied by the trial judge was appropriate and that any other measure would not have compensated the Claimants for Mr Large's negligence. This was the case even though Mr Large could not reasonably have identified all of the defects on his inspection. He should, however, have "seen enough to give rise to a trail of suspicion" and to recommend obtaining a Professional Consultant's Certificate (PCC), which, if obtained, would have provided the Claimants some protection against the risk of latent defects. While an unusual case on the facts, the Court of Appeal concluded that this was an 'advice' rather than an 'information' case and that, but for Mr Large's failure to recommend that the Claimants seek a PCC, the purchase would not have gone ahead.

Surveyors will need to ensure they properly report any need for further investigations, and consider what documents a purchaser might want to request, with a failure to do so being potentially costly for both them and their insurers.

What to look out for in 2022

The Fire Safety Act 2021 (the Act), anticipated to come into force in early 2022, will impose new fire safety obligations in relation to multi-occupancy residential buildings and clarify who is responsible for assessing, managing and reducing fire risks.

The Act widens the scope of the Regulatory Reform (Fire Safety) Order 2005 (the FSO) to apply to the structure, external walls (including balconies, windows and doors) and common parts of, and doors between units within, a multi-occupancy building, ie one which contains two or more domestic premises. It will extend the role of those considered the "Responsible Person" under the FSO (who may be the owner, landlord and/or the managing agents) and will require them to make sure that the building's fire risk assessment and overall fire safety strategy apply to all of these aspects and to update the strategies accordingly. The Responsible Person will need to take steps to identify any dangerous cladding on the buildings (regardless of height) and implement interim measures and remedial works to ensure that the building can be occupied safely.

Managing Agents and their insurers will need to be aware of this extension to their responsibilities under the FSO, with enforcement action against and/or prosecution of any Responsible Person who fails to comply with the FSO potentially leading to unlimited fines and/or criminal prosecutions.

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Technology

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Key developments in 2021

Over the course of 2021, prompted by the wave of cyber-attacks since the start of the COVID-19 pandemic, the NCSC has worked with the Alan Turing Institute to explore the use of AI in detecting online malicious activity. There is an increasing awareness that a strong AI infrastructure has become more of a necessity than a convenience for the underpinning of a safe cyber environment.

The UK is aware that foreign threat actors are also considering the use of AI to conduct criminal activities in the cyber space. Developing a strong AI infrastructure will be necessary to avoid making the UK an easier target for cyber criminals.

Currently, the NCSC is undergoing an AI exploring phase with the following objectives:

- identifying malicious software by analysing patterns of activity on networks and devices
- characterising criminal or hostile behaviours
- revising the understanding behind attacks and correlating it with reported cyber-criminal activity.

Data from GCHQ shows that almost half of UK businesses and a quarter of charities reported having a security breach or cyber-attack in the last 12 months, with one in five of these leading to significant loss of money or data. The cyber insurance market has inevitably hardened as a result. Although this additional tool in the armoury is still at a very early stage, it may, in due course, help reduce the underwriting risk of those organisations that chose to implement it.

What to look for in 2022

There is increasing awareness on how the creation of quantum software and hardware may threaten the security of current cryptography. It is believed that quantum computers, once developed/fine-tuned and if in the hands of malicious organisations, will allow an attacker to access encrypted information. This led to leading nations and technology companies making significant investments in quantum computing and quantum-safe cryptography which will likely result in substantial developments by 2022-2024.

Due to its complexity, it is likely we will see an extended research of quantum computing applicability before working devices can be employed effectively. It is believed this will mark a drastic technological revolution and this now futuristic concept will mark the start of a technological new age. The applicability of quantum computing to cybersecurity will help contain a threat profile and reduce vulnerabilities as well as faster upgrades, patching, and verification methods which will lead to a smaller window for attack. This will be an important development for IT service providers that host or manage data for third parties, who will likely face greater exposure to claims in the event that data under their control succumbs to a data breach but is not fully protected/encrypted once this technology becomes available.

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Warranty and indemnity insurance

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Key developments in 2021

2021 saw a huge increase in deal volume and in overall demand for warranty and indemnity (W&I) insurance. Aside from the traditional buyers of such insurance, 2021 also saw an uptick in the purchase of such policies by corporate buyers. From a claims perspective, certain trends from previous years remain largely unchanged; such as notification frequency (at a rate of approximately 1 in 5 policies) and breach type (tax; financial statements and accounting; material contracts). However, one marked development in the last year has been policyholders' increasing familiarity with W&I as a product. This is particularly reflected by the significant increase in the number of notifications made within the first 12 months of a policy period, suggesting at least in part that policyholders are now getting better at identifying and notifying risks.

In last year's review, we focused on the impact that COVID-19 could have on underwriting in 2021, flagging that underwriters would likely place more weight on the due diligence process. This has certainly been the case, although the underwriting process has been further complicated by the fact that the state of flux that many companies have faced has meant that due diligence quickly becomes outdated and difficult to rely on as an indicator of "known issues". From a claims perspective, perhaps a little surprisingly, COVID-19 appears to have had very little impact on claims to date and in particular, has not yet led to the wave of "buyer's remorse" claims that some commentators predicted. However, the COVID-19 pandemic is far from over and there are some areas which we consider are likely to result in claims in the future.

What to look out for in 2022

The market has yet to be materially impacted by COVID-19 related claims. However, we consider that, over the next year or so, at least two claims trends are likely to emerge. Firstly, reports in the press about widespread fraudulent claims for furlough or other wage support schemes provided by national governments will likely translate into claims made under W&I policies. Secondly, and in an effort to increase tax revenues, we expect that tax authorities will open up more tax investigations and pursue these more aggressively, which may well lead to an uptick in tax claims made under W&I policies. We expect that underwriters will be keen to limit their exposure in respect of each of these areas.

COVID-19 aside, one of the emerging risks in the W&I market which we see as becoming increasingly prominent is cyber. The global wave of data breach and ransomware attacks over 2021 is only set to increase in 2022 and cover for cyber claims is consequently likely to be a key issue in the W&I market in 2022. While some underwriters are taking the view that cyber cover should be excluded in its entirety (on the basis that target companies should purchase standalone cyber cover), other underwriters are offering limited cover and this may well be an area of competitive differentiation for underwriters going forward.

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