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Welcome

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Welcome

The events of the last 12 months have provided clear illustrations of the critical uncertainties we discussed in last year’s report that are difficult to foresee but highly disruptive in effect. They also highlight the ongoing tension between the need for both an international outlook and consolidation at a local level. Responding to this, we are delighted this year to have entered into a four-way alliance with the world’s leading insurance law firms. As founding members, DAC Beachcroft, BLD Bach Langheid Dallmayr (Germany), Wotton + Kearney (Australia) and Wilson Elser (US) have formed Legalign Global to meet the legal needs of the growing multinational insurance market.

In our opening thought leadership piece, David Chmiel asks whether we should be "Looking outward or turning inward" in world politics and trade, and highlights the potential consequences to business. Mathew Rutter also updates us as we work towards Brexit and considers three possible scenarios in "The good, the bad and the ugly."

A recurring theme that has emerged in pulling together this year’s 50 predictions is InsurTech, its impact having grown exponentially since its appearance as one of our predictions last year. It is vital to break the silo mentality and pull together across the traditional divides to fully understand the impact of autonomous vehicles, artificial intelligence and blockchain as considered in our three in-depth features. InsurTech is not something to be afraid of but rather an evolution offering us all the opportunity to work together and find the best way to effect significant changes that will benefit brokers, underwriters and customers alike.

I hope you find this year’s report both a valuable reference resource and strategically thought provoking.

Helen Faulkner
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Looking outward or turning inward?

The last year has seen a series of dramatic political and economic upheavals. Add to these the powerful forces of the InsurTech revolution and the agenda for insurers looks very challenging.

On the one hand, the global economy remains highly interdependent, with many businesses recognising that an international outlook remains essential to further growth and diversification. In contrast to this, we have witnessed an apparent political backlash in various parts of the world against free flows of capital, trade and people.

If the first real signs of this tension became evident with the shock decision of the majority of UK voters in last year’s referendum to leave the European Union, they assumed tectonic proportions with the election last November of Donald Trump as the 45th President of the United States. In that one moment, American voters elevated to the world’s most powerful office of state an individual who openly questioned many of the foundations of the international economic, political and security consensus that has existed since the end of the Second World War.

Effects on business
It is hard to overstate the potential consequences to business of the emergence of a greater political will to prioritise national interests over global ones. And while there is not yet absolute certainty as to whether that political momentum is sustainable in many parts of the world, its effects are already being felt to some degree. Consider some examples:

- **Protectionism.** The introduction by one government of tariffs or other measures aimed at protecting domestic industries can, over time, escalate into full-blown trade wars. Governments of countries adversely affected by such measures may face domestic political pressure to respond, rather than simply pledging fealty to principles of globalisation. For example, in response to threats by President Trump to impose duties on Canadian softwood lumber and dairy products, Prime Minister Justin Trudeau said he would consider calls for a ban on shipments of US thermal coal through Canadian ports.

- **Foreign investment review.** Suspicion of the motives behind inbound capital flows can result in the introduction or enhancement of foreign investment review laws. Recently, governments in France, Germany, the UK and elsewhere have all expressed intentions or desires to introduce formal review mechanisms for outside investment in certain strategic sectors. There remains widespread speculation that the Trump administration will expand the scope of the Committee on Foreign Investment in the United States, which has the capacity to block foreign investments deemed to threaten national security.

- **Economic tools of foreign policy.** Governments are demonstrating much greater propensity to see cross-border trade and investment as a way of leveraging broader foreign policy objectives. Sanctions remain the principal tool by

“It is hard to overstate the potential consequences to business of the emergence of a greater political will to prioritise national interests over global ones.”

David Chmiel, Consultant and Managing Director
Global Torchlight
which Western countries are pressuring Russia to change its policies towards Ukraine, for example. Many US government officials remain convinced that stringent sanctions were integral to bringing Iran to the negotiating table over its nuclear programme. Furthermore, compliance measures such as the Bribery Act and Modern Slavery Act offer new, more effective ways to deal with long-standing concerns about human rights and quality of governance. So long as governments remain willing to sacrifice some degree of economic benefit in favour of these broader principles, such measures will remain key tools in their policy arsenals.

- **Living in a multipolar world.** On the campaign trail, Donald Trump routinely questioned the value of America’s continued role as the world’s principal security guarantor through vehicles such as NATO and the ‘hub and spoke’ alliance system in Asia. A host of other countries have demonstrated a much greater willingness to be more assertive of their own interests in the international security environment and are developing the military capabilities to back this up. History tells us that multipolar worlds are inherently unstable and this, in turn, can have consequences for the global economy. It is no longer sufficient to assume that many of the international political and security norms which have prevailed for the past three quarters of a century will be sustained in their present form in the future.

- **Not all doom and gloom.** It must be stressed, however, that while the world may currently appear to be at a potential transition point, we cannot say with absolute certainty that we are all turning inward. For example, while populist and nationalist rhetoric may appear to have captured the political narrative in certain parts of the world, it has been decisively rejected elsewhere with the election of overtly pro-globalist political parties and leaders in places such as the Netherlands and France. In fact, the example of populism in action may be galvanising a drive towards the political mainstream elsewhere.

   Equally, a number of governments have learned that embracing such policies can have adverse long-term consequences in a global environment in which capital will gravitate to markets whose governments are willing to offer investors protection and certainty. This has become a particularly strong refrain in recent times in a number of Latin American countries, where flirtations with overtly populist anti-investment policies have led to capital flight, economic weakness and subsequent rejection of some of the leaders who advocate such views.

- **Navigating stormy waters.** As last year’s *Insurance Market Conditions & Trends* made clear, 2016 was not a unique year in terms of global economic and political upheaval. In the preceding decade, businesses have contended with a global financial crisis, the Arab Spring and the significant deterioration in relations between the West and Russia, among other events. The challenge for these companies and those who support them in their international strategies is to gain a better understanding of the circumstances which can beget events that are difficult to foresee, but are highly disruptive in effect.

   Nor are these issues independent of each other. The legal services and insurance industries are only starting to get to grips with the effects of artificial intelligence and the InsurTech revolution. For manufacturers, however, the disruptive power of technology has presented both opportunities and challenges for some time and associated developments such as offshoring and automation are, arguably, contributing factors to the populist anger that has emerged in places such as the ‘Rust Belt’ of the United States. Equally, restrictions on inbound investment may be inherently tied up with broader politico-military issues, but they can provide a very convenient means of protecting a domestic economy from competition without labelling it as such.

   The former US Speaker of the House of Representatives, Tip O’Neill, famously used to say that “all politics is local”. That statement is only gaining greater resonance in the current fractured and potentially inward looking geopolitical environment. Micro-level local, regional and national factors can be just as important determinants of the growth of global business as are the multinational issues with which
Dame Inga Beale, Chief Executive of Lloyd’s of London, says the market must work together if it is to retain its prime position in the global insurance industry.

To maintain and strengthen our position as a leading global financial centre, and as the world’s hub for specialist commercial insurance, we need the freedom to trade with the world openly. This openness is what has made Lloyd’s and the City of London as a whole so strong.

With the Prime Minister setting out the Government’s direction of travel for the UK leaving the EU, remaining in the single market seems an unlikely outcome. UK insurance companies have been planning for the future against this backdrop of uncertainty. And while EU business is important, one of the main challenges confronting Lloyd’s and the London insurance market is access to global markets.

**Securing future growth**

Our future growth will be in emerging markets like Asia and Latin America which are driving global economic growth and are often the most underinsured. There is an enormous opportunity here to close the global protection gap – particularly as countries like India and China open up. But, even before the Trump presidency, we have seen a rise in protectionism, with a heightened number of restrictive trade measures implemented last year.

New research from the London Market Group shows that while the London insurance market has enjoyed growth from mature markets like the US, its share of insurance growth has declined in emerging markets. This decline is a real cause for concern, particularly when you consider that London’s insurance market employs 52,000 people and accounts for just over a quarter of the City’s overall contribution to UK GDP.

If we’re going to turn this situation around we need better access to these fast-growing markets.

We also need access to the world’s best talent, including those in the EU. Brexit and new immigration policies could make this much more difficult, particularly when it comes to grabbing the best talent or keeping hold of EU staff that we already employ.

We need the Government to prioritise access to talent and wide-ranging trade deals with the world’s fast-growing economies – that way we can protect and strengthen London’s reputation as a global financial centre now, and for the future.

Dame Inga Beale, Chief Executive of Lloyd’s of London

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"London cannot afford to sit back in the face of global challenges."

By David Chmiel, Consultant and Managing Director of Global Torchlight.
Brexit: the good, the bad and the ugly

There is an understandable temptation to try to second guess the direction of the Brexit negotiations and to interpret each statement for clues as to what the final outcome might look like. The truth is that we are unlikely to know for certain until very late on in the process.

The autumn of 2017 is expected to see the Brexit negotiations in full flow, especially once the German federal elections are out of the way. It is to be hoped that some of the posturing and political grandstanding will give way to robust consideration of the details of the exit arrangements and lay the foundations for the UK’s future relationship with the European Union.

There will, inevitably, still be lurches into acrimony and fractious political debate, especially as the minority UK Government is forced to inform and consult Parliament more than it would wish. It is quite possible that this could precipitate another general election in the UK before the Brexit negotiations are concluded.

Even if the negotiations yield a proposed agreement, it may still be subject to the approval of member states and a vote in the UK Parliament, creating a further period of uncertainty. Businesses therefore need all those skills of scenario planning we focused on in last year’s Insurance Market Conditions & Trends report to ensure they are not caught out. Those scenarios might be categorised as the managed transition, the big bang and the crash landing.

Realism has to be the starting point

Hoping that Brexit will go away should be filed under wishful thinking, as the Association of British Insurers’ Director General Huw Evans was quick to remind the industry. “The election result will not, in itself, halt Brexit,” he says. “We should remember that both the main parties pledged in their manifestos to leave the Single Market and Customs Union and deliver the referendum mandate. But a minority Conservative Government will clearly have to consult widely to achieve support for its negotiating position and plan for the future.

“Insurers are preparing for the worst, while still hoping for an orderly and stable process that creates the basis for a mutually beneficial long-term relationship between the UK and EU27.”

One result of the June 2017 general election in the UK has been to increase the uncertainty of any particular outcome. There are plausible arguments that the new Government’s precarious position increases the prospect of no deal and a hard, cliff-edge Brexit, but it can also be argued that a softer Brexit is more likely as the new Government is forced to seek more consensus in Parliament and the Democratic Unionist Party’s concerns about the Irish border and the province’s agricultural sector come to the fore. The latter would certainly be welcome in the UK insurance industry, as it would make access to other European markets after Brexit more straightforward.

However, if negotiations are delayed by the Government’s need to consult, this will make it even less likely that the complex arrangements that need to be put in place will be achieved.

Huw Evans was quick to remind the industry. “The election result will not, in itself, halt Brexit,” he says. “We should remember that both the main parties pledged in their manifestos to leave the Single Market and Customs Union and deliver the referendum mandate. But a minority Conservative Government will clearly have to consult widely to achieve support for its negotiating position and plan for the future.

“Insurers are preparing for the worst, while still hoping for an orderly and stable process that creates the basis for a mutually beneficial long-term relationship between the UK and EU27.”

Huw Evans, Director General
Association of British Insurers
by the end of the two-year window. This may make it more likely that an extensive transitional period will need to be implemented, something the industry should be comfortable with and which is certainly preferable to a legal and regulatory vacuum.

**Three scenarios**

So, how might the three main scenarios play out?

- **The managed transition.** This would be an amicable, softer exit deal with broad agreement about future access to the Single Market. How far this could go without the UK accepting free movement of people in return is hard to say. If both sides are still on good terms and talking at the end of the initial Article 50 process in March 2019, it should mean that a wide range of transitional arrangements are put in place, simply because the complexity of the future relationship cannot be intelligently addressed within the constraints of such a tight timetable. These could retain many of the regulatory structures and equivalence rules that underpin access to the Single Market for the insurance industry, at least for a defined period after March 2019.

- **The big bang.** A well-managed hard Brexit would not be good for the insurance industry and definitely not its preferred choice, but at least it would offer a degree of clarity to help future planning. Although there would have to be some difficult political concessions, it is also likely that transitional arrangements covering many sectors would need to be put quietly into place. As insurance isn’t an area of serious political controversy between the UK and EU, these should ease the exit for the industry.

- **The crash landing.** An acrimonious, inconclusive or fragmented Brexit is the scenario everyone in the industry fears. The prospect that we might reach March 2019 with nothing being agreed and both sides waving accusatory fingers at each other sends shivers through boardrooms. It will be a real challenge to plan for this outcome but it remains a serious possibility. In this scenario, everyone will be left guessing what rules are still in place and how they are to be applied. There will be frantic sector-by-sector discussions between businesses, regulators, consumer groups and politicians about how to create some degree of orderly transition to a destination that itself will be uncertain.

**How well prepared is the insurance market?**

The rush of announcements in mid-2017 from UK-based insurers looking to establish new bases in the EU shows that many have correctly identified the need to plan for either a big bang or a crash landing. This doesn’t necessarily indicate that insurers think that these are the most likely outcomes, but they have to plan for the worst case in terms of their existing passporting rights. Given that it is expected to take at least 18 months to put these alternative arrangements in place, including a transfer of their existing non-UK EU books, insurers cannot afford just to hope for the best, or even to wait and see.

The insurance industry appears to be as well prepared as it can be, given all of the uncertainties, but we will be watching the negotiations closely over the next 18 months.
Forecasting our top 20 InsurTech developments

Click on the key words opposite to access our key predictions and thought leadership.
Making predictions about the future of the insurance market is not for the faint-hearted. Our experts have looked ahead at the challenges you may face and produced 50 focused predictions.
Property

“Drones will play an increasing role through the whole insurance cycle… There is, however, a real need for a regulatory framework that addresses safety, security and privacy.”

Nick Young | Bio
Partner
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Playing tag – expect claims for damages for late payment in policy coverage disputes
We anticipate policyholders tagging claims for compensation for late payment of insurance claims onto most coverage disputes to bolster their negotiating strategy. Allegations extending to ‘bad faith’ are unlikely to be far behind. Insurers need to ensure that their own claims handling procedures, and those of their agents, protect them as far as possible. In practice, it may be difficult to separate out delay by policyholders, leading to increased negotiated settlement payments. The limitation period of one year will also see claims files hanging around for a further year after settlement of the underlying insurance claim, unless well drafted forms of discharge or settlement agreements resolve both the insurance claim and any potential for a claim for late payment.

Escape of water claims may be the new burgeoning area of fraud
Insurers should be on high alert for escape of water claims that may not be as they first seem. Claims resulting from burst or leaking pipes or faults in plumbing systems topped the list of domestic claims in the ABI’s Key Facts in November 2016. This may not just be down to the weather and general lifestyle changes resulting in more white goods and wet areas. Insurers and their advisers need to pay close attention to the detail of these claims and obtain as much information as possible, including financial circumstances, to accurately determine the date and cause of the damage. A leaking tap is an easier route to recovery both in terms of action and risk to the policyholder than arson. This is also a good example of where the internet of things could prove a game changer, especially predicting leaks or giving early warning that a leak has occurred before it causes extensive damage.

Law firms will increasingly adopt contingency fees to pursue clients’ subrogation claims
The current and much criticised Damages-Based Agreements Regulations 2013 permit law firms to use standard damages-based agreements (DBAs) but not any form of so-called hybrid arrangement. Under a hybrid DBA, even if a case is unsuccessful, a law firm would be entitled to at least a reduced fee. The result of the prohibition has been an almost zero take-up of DBAs by lawyers. With the Government remaining unwilling to make any changes to the rules, creative third-party funders and insurers have stepped in to develop several useful funding products which are legitimising the use of hybrid DBAs through another route. We predict that law firms will increasingly work with funders in order to offer insurer clients pursuing subrogated recoveries risk-free DBAs, alongside bespoke funding products.

The use of drones will move beyond visual line of sight
The true potential of drones in property insurance will take off as the Government’s consultation on the safe use of drones lays the foundations for a developed drone market. In the US, insurance is already the fourth largest market for drones, behind industrial inspection, real estate and agriculture. Drones will play an increasing role here through the whole insurance cycle, offering closer, safer, quicker and cheaper site imagery. Opportunities include surveying new risks, monitoring and maintaining infrastructure, mapping at-risk locations with a view to proactively contacting policyholders and assessing damage. There is, however, a real need for a regulatory framework that addresses the clear challenges of safety, security and privacy. Awareness and communication will also be key and insurers need to ensure that they are fully engaged in the process.

Key developments
- Insurance Act 2015
- Riot Compensation Regulations 2017
- Leeds Beckett University v Travelers Insurance Co Ltd
- R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd
- Zurich Insurance Plc v Maccaferri Ltd
Product Liability, Safety & Recall

“Artificial intelligence and machine learning mean that the traditional view of ownership and responsibility will be obsolete and current wordings may need to be re-evaluated.”

Wendy Hopkins | Bio
Partner
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Will standards still provide safety post Brexit?
Many manufactured goods require CE marking, which shows that a product is safe and complies with EU legislation. As CE marking is integral to trade, the UK will continue to recognise CE marks and apply them, at least in the short term, whether products are being sold across the EU or only within the UK. Following Brexit, the UK is likely to ensure product safety standards meet or exceed those operating in the EU to avoid causing confusion and damaging the UK’s competitiveness. However, the UK may lose the benefit of access to initiatives such as RAPEX, the rapid alert system for consumer goods, and manufacturers may need to appoint an authorised representative from within the EU to serve as their local representative. The exit should have no effect on the UK’s participation in European standards bodies, including CEN, the European Committee for Standardisation, as CEN is a European body, not an EU body.

Robot risks
Robotics will require the insurance industry to rethink traditional first- and third-party risks. Artificial intelligence and in particular machine learning mean that the traditional view of ownership and responsibility will be obsolete and current wordings may need to be re-evaluated. For instance, first-party policies may unintentionally provide cover for the actions of property owned by the insured. Third-party cover will see complex issues raised as we push the boundaries of the meaning of damage and functionality.

Silent cyber increases insurers’ exposure to ever-changing technology risks
The Prudential Regulation Authority warned in 2016 about unexpected exposures to cyber risks. As consumers and industry make more use of interconnected products, and with cyber attacks increasing, insurers face exposures even under general insurance covers. For product liability insurers and insureds, the bigger question is how they react to developing technology, including artificial intelligence, which challenges the very notion of what a product is. As a minimum, a clear understanding of cyber risks needs to inform product design, underwriting and risk management.

A new approach to the safety of medical devices
Pharmaceutical and medical device manufacturers can expect a fairer hearing when facing claims under the Product Liability Directive. The strict liability approach adopted in earlier decisions has been challenged by Wilkes v DePuy. The court recognised that no medicinal product can be entirely risk-free. Instead, its potential benefits must be weighed against its risks when determining if it is acceptably safe. With this new willingness to assess a product’s safety in relative terms, manufacturers will want to show that there have been no manufacturing or design issues and rare, unpredictable product failures will not necessarily be viewed as defects.

Key developments
- General Product Safety Directive
- Insurance Act 2015
- Howmet Ltd v Economy Devices Ltd and others
- Wilkes v DePuy International Ltd
- Autonomous Vehicles
Construction & Engineering

“Underwriters must innovate construction covers to adapt to the advent of smart construction techniques, while also monitoring claims data and margins.”

David Bear | Bio
Partner
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Increase in claims arising from PFI projects
It is expected that there will be a continued increase in claims brought by public sector bodies in order to achieve financial clawbacks from expensive long-term Private Finance Initiative (PFI) contracts. The PFI underpinned over 700 public infrastructure projects over the last 20 years. In recent times, public sector bodies have sought to pursue rising numbers of claims against PFI contractors with a view to addressing public debt. This has sharpened the focus on the quality of the work undertaken. Allegations against contractors in relation to hospital works has become a growing theme. PFI schools have also come under the spotlight with the recent issues in Edinburgh schools highlighting the lack of independent quality control in the PFI contract model.

Competing demands in UK housing policy – costs and building standards
The Government is committed to promoting extensive house-building, although the February White Paper ‘Fixing our broken housing market’ shed away from specific targets. This recommended encouraging the construction of new homes through streamlining a faster build process and opening the housing market to new contractors. The possible consequences of these steps could have had a detrimental effect on housing design and workmanship standards. Moving forward, building standards across the whole industry have fallen into sharp focus. In likelihood the Government will now have to reflect again on how it fixes the short supply in Britain’s homes.

Brexit at the precipice – a brave new world for construction
The skills shortage in construction is acute. The Farmer Review of the UK Construction Labour Model pulled no punches. It described an industry tottering at a precipice and made multiple recommendations to address process and training issues to reduce the industry’s structural vulnerability to skills shortages – but the skills outlook remains bleak. The Royal Institution of Chartered Surveyors considers that the construction industry may lose 8% of its workforce post Brexit.

The construction industry may now have to enter a brave new world, involving pre-manufactured solutions and re-devised contract obligations. Insurers must respond to any transition with broader proposal enquiries, collaborative risk improvement programmes (focusing on training and experience), project risk surveys with realistic subjectivities, backed up with complementary reasonable policy exclusions.

Innovative underwriting must underpin smart construction
Underwriters must innovate construction covers to adapt to the advent of smart construction techniques, while also monitoring claims data and margins. Smart construction is growing proportionately faster than conventional building. There has been an exponential increase in the use of technology in procurement, development, design and construction management. This will revolutionise the industry, but construction insurers need to be ready to respond. Robotic demolition, artificial intelligence in design, automated construction, wearable technology, Building Information Modelling Level 3 and cybernetic buildings pose real challenges. However, the replacement of human involvement with technology brings a greater ability to plan for, anticipate and react to traditional construction risks.

Key developments
- Insurance Act 2015
- Basia Lejonvarn v Peter Burgess (1) Lynn Burgess (2)
- Impact Funding Solutions Ltd v AIG Europe Insurance Ltd
- Zurich Insurance Plc v Maccaferri Ltd
- Farmer Review of the UK Construction Labour Model
Marine, Aviation & Transport and Energy

“The Maersk/IBM cross-border supply chain utilising blockchain will lead other shippers to follow suit in benefitting from the transparency and efficiency of a fully digitised supply chain.”

Anthony Menzies  |  Bio
Partner
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Digitised supply chains imminent
As the move to embrace technology to improve efficiencies in the global supply chain gathers pace, cargo insurers will look to see how they can also benefit. The impact of events such as the explosion at Tianjin has focused insurers’ minds on how to mitigate against large cargo accumulation losses. This is particularly relevant to containerised cargo, where currently insurers do not have certainty as to the contents or value of the cargo in a specific container or where that container is at any one time. One solution may be the use of blockchain technology. The Maersk/IBM cross-border supply chain utilising blockchain will lead other shippers to follow suit in benefitting from the transparency and efficiency of a fully digitised supply chain. This may also benefit insurers, who can use this technology to better track insured cargo.

Increased sophistication in Marine, Aviation and Transport cyber products
As the risks of cyber attack are increasingly recognised (the recent Petya cyber attack on Maersk’s entire global shipping operation being a prime example), there will be a greater demand for specialist cover and exclusions to allow companies flexibility in assessing and managing their risks. For instance in specie risks, where atmospherically controlled containers are critical, companies may consider the risk of hackers interfering with the settings and the relative costs of improving cyber security and purchasing narrower cover or obtaining specialist cover. More sophisticated threats will require the market to work in partnership with clients to ensure the products available meet their increasingly specific needs.

Rate pressure and tired fleets will compound fraud in shipping
The temptation for owners to exaggerate genuine claims into constructive total losses will increase, particularly given the persistent low rates for shipping, the increasing size of vessels and the potential additional costs of compliance with the Ballast Water Management Convention (developed by the International Maritime Organisation with the aim of protecting the marine environment from the transfer of harmful aquatic organisms in ballast water carried by ships). This is causing problems with older vessels with limited capacity, which have no potential for resale and very limited scrap value. The pressure on ship owners to stay afloat will lead to an increase in attempted manipulation of losses or negotiated settlements with insurers who are equally pressed by the low premiums.

Slowly re-energising the energy market
The sustained period of low oil prices has led to more efficient methods of working which will improve profitability but impact long-term energy production. The rate of return for oil and gas companies in the UK increased for the first time in six years, demonstrating the efficiency strategies paying off. Revenues for companies supporting oil and gas production in the UK fell by over 30% between 2014 and 2016, but should now stabilise. Companies are likely to remain cautious, however, and continue to prefer short-cycle projects. While market volatility continues, insurers will need to remain alive to issues of credit risk in the offshore sector, as well as accumulation risks arising from stacked rigs and drops in maintenance standards generated by cost saving drives.

Key developments
- Insurance Act 2015
- Alfaavios-Navegacao LDA v Navigators Insurance Co Ltd and others
- Gard Marine & Energy Ltd v China National Chartering Co Ltd
- Automation at Sea
“Risk will accumulate in unexpected ways due to the increased reliance on technological solutions and new risk modelling will need to be employed to measure such exposures adequately.”

William Allison | Bio
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Big Data = big risk
We predict that risk will accumulate in unexpected ways due to the increased reliance on technological solutions and new risk modelling will need to be employed to measure such exposures adequately. The FinTech industry and financial institutions more generally are increasingly turning to Big Data and the use of artificial intelligence in financial modelling to devise products and inform their sales and distribution networks. In theory, at least, automation can reduce the risk of human error, for example in sales, which has seen significant claim volumes in recent years. However, with the increased use of technology comes new risks and new challenges for financial institutions and their insurers.

Litigation funders will encourage more sophisticated claims and test cases
Shareholder activism has found its voice in sophisticated high-profile test cases backed by litigation funding. Collective shareholder actions were instigated against RBS and its directors for misstatements in its 2008 financial prospectus (Rights Issue Litigation) and against Tesco and its directors for overstatement of its profits in 2014. The claims concerned the appropriate measure of damages under the Financial Services and Markets Act 2000, which provides statutory redress for misleading listing particulars and inaccurate financial disclosures. These remedies had not been pursued by claimants to date and accordingly the outcome of these cases was eagerly awaited. Unfortunately, it seems we may have to wait a little longer for the answer as the majority of the claimants have now settled and the scheduled trial has been called off. Whilst it is conceivable the small minority of claimant investors yet to settle may still try to resurrect the trial, that possibility looks increasingly unlikely.

Increasing pressure and focus on corporate governance
The first question the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) are likely to ask senior management when something goes wrong is ‘who is responsible?’ Requirements to map managerial responsibility will extend to all regulated entities from 2018, including insurers and insurance brokers. Implementation requires clarification and documentation of the chain of responsibility between risks and the executive management team, certified staff and staff subject to conduct rules. There are clear implications for recruiting, contracts and discipline. The FCA/PRA can use the Responsibilities Map to identify senior managers responsible for breaching the statutory requirements and conduct rules and take action for their failure to take reasonable steps to avoid the breach occurring, identify the breach or stop it continuing.

Directors beware increased cyber risk
Cyber risk has been identified as a top-five risk on the boardroom agenda for a number of years. Cyber attacks continue to increase in frequency and severity. However, save for a handful of almost entirely unsuccessful claims against directors in the US, there has been little litigation specifically against the board resulting from a failure to prevent a cyber attack. We predict this will change as the litigation environment is worsening for directors. In particular it is proposed to make directors personally liable for breaches of the Privacy and Electronic Communications Regulations with fines of up to £500,000 being imposed by the Information Commissioner’s Office.

Key developments
- Criminal Finances Act 2017
- Policing and Crime Act 2017
- RBS Rights Issue Litigation
- Corporate Liability for Economic Crime Consultation
- Payment Protection Insurance
Cyber & Data Risk

“Often it does not take a hacker to take down an electronic system… Companies should increase their focus on being cyber ‘resilient’ and not just cyber ‘secure’.”

Hans Allnutt | Bio
Partner
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Privacy and cyber security issues will combine in the build-up to the GDPR

As boards continue to budget for and have oversight of cyber security, it naturally follows that they should do the same for the General Data Protection Regulation (GDPR). The GDPR will introduce sanctions of up to 4% of worldwide turnover of the relevant undertaking or €20m, plus a new regime of mandatory breach notification to both regulators and individuals affected, in certain circumstances. While it is primarily a privacy law, a key tenet concerns data security. There is therefore an inevitable link between them. The UK National Cyber Security Strategy expressly states that the GDPR will be used to drive up cyber security standards. Cyber security has rightly featured as one of the most pressing corporate risk areas for the last few years. Political, corporate and public awareness surrounding the need to improve cyber security has increased and the expected increase in sanctions for cyber security breaches will encourage corporates to take preventative steps and look for increased insurance cover.

Cyber threats will manifest as an increasing risk of cyber terrorism...

There is an increasing threat of effective cyber terrorism as the skills required to conduct malicious cyber attacks are becoming less complex and more accessible. Recent events have shown terrorists’ focus on carrying out attacks on our home soil. Cyber enables terrorists to do so from anywhere in the world. While there is a debate around whether terrorists using cyber means amounts to cyber terrorism or whether it simply remains terrorism, there is no avoiding the fact that terrorists will be prepared to use whatever means available to further their objectives. The UK National Cyber Security Strategy noted in 2016 that “The technical capability of terrorists currently remains limited but they continue to aspire to conduct damaging computer network operations against the UK, with publicity and disruption as the primary objective of their cyber activity”.

…and an increasing frequency of systemic IT outages, either maliciously or by operator error

The global WannaCry ransomware attack in May 2017, which hit organisations from all sectors across the globe, highlighted corporate and institutional vulnerability as a result of the exponential increase in computer power. Our ever-increasing reliance on electronic systems and networks in every part of our private and commercial lives allows cyber criminals to deny access to systems and data (through ransomware or Denial of Service attacks) or simply threaten to do so. However, often it does not take a hacker to take down an electronic system. Human error, software bugs, and the integration of new systems into legacy systems, are just some non-malicious causes of major outages. In light of this, companies should increase their focus on being cyber ‘resilient’ and not just cyber ‘secure’.
Awards of compensation for privacy and security breaches increasing

In much the same way that someone might have suffered a slip or trip 20 years ago without further thought but would now seek compensation, it is clear that a similar change is underway in the field of privacy and data protection compensation. As a firm, we have seen a marked increase in such claims being made against companies and organisations across all sectors. Individuals are increasingly aware and concerned about the volume and variety of their personal data that companies are storing and passing on to third parties. The judiciary is also more prepared than ever to recognise the effect on individuals caused by the breach of their privacy or the misuse of their private information. Over the last two years, UK courts have issued a string of judgments enhancing such rights and increasing compensation awards. The General Data Protection Regulation will enshrine such rights across the whole of the European Economic Area.

Key developments

- General Data Protection Regulation
- Network and Information Security Directive
- TLT and others v Secretary of State for the Home Department
Complications for surveyors valuing residential investment property

The comprehensive 2016 Royal Institution of Chartered Surveyors guidance note on ‘The valuation of buy-to-let and HMO (Houses in Multiple Occupation) properties’ is both a help and hindrance for surveyors. As growth in the private rented sector looks set to continue, particularly given its focus in the recent Housing White Paper, there is likely to be far greater demand for secured lending. The guidance note illustrates the many complexities which surveyors will face. However, when things go wrong, these complexities will be the very matters that lenders are likely to seize on to assert default. This guidance, once again, brings the balance of risk against reward into sharp focus and, from a risk perspective, should be treated as creating a particularly specialised category of residential property valuation.

Increase in regulatory claims against solicitors

A marked increase in investigations by the Solicitors Regulation Authority (SRA) into the affairs of larger solicitors’ firms means prosecutions involving partners in Top 20 law firms will no longer be uncommon. The SRA is particularly interested in breaches of the Solicitors Accounts Rules and specifically Rule 14.5 which prohibits a solicitor from allowing funds to pass through a client account unless they are instructed in relation to the underlying legal transaction to which those funds relate. Although the same criteria are applied whatever the size of the firm, the SRA is concerned that larger firms can potentially fall prey to the demands of their powerful corporate clients and step outside the regulatory regime, albeit inadvertently. The risk to firms is not merely financial but also reputational. Insurers will be concerned by the high cost of investigations and defence of any subsequent prosecution. It will be the larger law firms who buy additional cover to respond to these threats. Proposed amendments to the Solicitors Account Rules, which include allowing solicitors to use third parties to hold client funds, are unlikely to have a significant impact on this exposure.

Pensions – revolutionary technological innovation

The pensions dashboard is the new technological fix to the problem people face in keeping track of how much they have saved for old age and how much they should save going forwards. Due to go live in 2019, the dashboard will show on a single screen all of a person’s pension investments and their projected income on retirement. It is hoped that this revolutionary tool will bring greater understanding, engagement and ultimately increased savings to fund old age. What those future pensions will look like we don’t know. No recent government has been able to resist changing pensions, due to the sheer amount of money involved. We can expect further reconsideration of a variety of tax reliefs, savings limits and regulatory powers at the very least. This endless change is a minefield for those providing advice; mistakes will inevitably result and claims will be made.
Supreme Court decision will provide a major boost to solicitors facing claims

Lord Sumption’s judgment in *BPE Solicitors v Hughes-Holland* will provide a major boost to solicitors and their insurers over the coming years. The decision overruled previous case law on the application of the SAAMCO principle to solicitors. Previous decisions had effectively created an exception to SAAMCO where a solicitor should have put a lender on notice of the risk of fraud. However, Lord Sumption emphasised that even information which is critical to the transaction decision must be treated as being provided under a limited duty. This will impact significantly on lenders and co-defendant surveyors in any future waves of lender litigation. Lenders may now review terms of engagement in an attempt to limit their exposure, but the boldness of the ruling will assist all professionals.

Key developments

- *AIG Europe Limited v Woodman and others*
- *BPE Solicitors and another v Hughes-Holland*
- *Impact Funding Solutions v AIG Europe Insurance Ltd/Wood v Capita Insurance Services Ltd*
- *Lowick Rose LLP v Swynson Ltd and another*
- *Solicitors’ Professional Indemnity Insurance*
Reinsurance

“The operational risk posed to companies who employ automated solutions in their business is both difficult to measure and can result from issues spanning entire business sectors.”

Julian Miller | Bio
Partner
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First disputes under Insurance Act
Given the scale of changes brought in by the Insurance Act 2015, coverage disputes between insureds, insurers and reinsurers are inevitable. How the late payment regime will operate when the reinsurer has claims control and fails to act promptly, or the reinsured has the benefit of follow settlements provisions, or where the lead reinsurer delays payment with financial repercussions for the following market are all novel issues. Reinsurers may need to ensure that reinsureds have a tight grip on claims handling procedures to minimise the risk of damages for late payments being passed up the chain. Adjustments to reinsurance wordings will be necessary as case law on interpreting the Act filters through.

Nationalism presents opportunities for reinsurers
Reinsurance will have a bigger part to play in cross-border risk transfer to the extent that globalisation gives way to populist nationalism. When this has happened historically it has resulted in protectionist regulation for local financial markets, including insurance. Reinsurance is not of course a new solution for risk transfer from emerging to mature insurance markets where regulation prohibits non-admitted insurance. We anticipate that demand will increase significantly on the back of the changing political environment, marking opportunities for global reinsurers.

Reinsurers will face increased exposure to risk accumulation due to automation
The operational risk posed to companies who employ automated solutions in their business is both difficult to measure and can result from issues spanning entire business sectors. Traditional measures of risk accumulation may prove inadequate for this type of exposure which has the possibility of giving rise to losses across multiple traditional lines of business, for example professional liability, property and public liability as well as the more obvious cyber products. Insurers have been tasked by the Prudential Regulation Authority with ensuring such risks are properly rated – reinsurers must equally ensure that the accumulation of risk has been adequately assessed and priced.

Key developments
- Insurance Act 2015
- Mic Simmonds v AJ Gammell
- Blockchain: a glimpse of the future
Medical Malpractice

“The supply chain is changing from a simple one to an extended, multi-level model, involving AI, diagnostic and software suppliers to augment individual practitioners.”

Simon Perkins | Bio
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Increase in personalised and digitised healthcare
The delivery of healthcare is changing, bringing with it the availability of personalised healthcare insurance. The introduction of robotics and machine learning and the proliferation of healthcare wearables and diagnostic artificial intelligence (AI) bring huge change, with both advantages and risks for consumers and healthcare providers. The supply chain is changing from a simple one to an extended, multi-level model, involving AI, diagnostic and software suppliers to augment individual practitioners. Insurers of healthcare providers will need to obtain additional knowledge of the diagnostic intelligence and software suppliers being introduced into the supply chain so that they can properly assess their risk.

Litigation will retain focus on consent
Causation and consent will remain a fertile battleground for litigation. The Court of Appeal in Webster v Burton Hospitals NHS Foundation Trust has reaffirmed that the Bolam test has no place in determining breach of duty when considering consent in medical malpractice cases: the only test will be that laid down in Montgomery. While we have further guidance for assessing the significance of a particular risk (including the claimant’s education, conduct throughout the treatment and evidence during the litigation), further case law will be required to determine the precise extent of a doctor’s duty to delve into a patient’s particular idiosyncrasies.

Fixed costs will be introduced in medical malpractice
After some delay, the Government has now produced its public consultation for a scheme to introduce fixed recoverable costs for medical malpractice litigation. The Government’s current preference is to fix the costs recoverable by claimants for all claim awards between £1,000 and £25,000. This preceded Jackson LJ’s recommendation that the Department of Health should work with the Civil Justice Council to implement a stand-alone procedure for clinical negligence claims (of up to £25,000). A fixed costs regime will be welcomed by insurers for providing certainty for losses at this level. However, the detail of the regime is to be decided, together with the transitional arrangements for its implementation. While the scheme will encourage earlier resolutions of claims when introduced, insurers should brace themselves for an increase in notifications in the lead up to introduction and, if implemented, potentially significant procedural change where parties are to be expected to disclose their expert evidence within their pre-action protocol letters of claim and response.

Key developments
- Webster v Burton Hospitals NHS Foundation Trust
- Fixed Recoverable Costs
"The next stage of vehicle automation, with the introduction of limited hands-off motorway driving, is due to be permitted by 2019 and will raise tricky issues for insurers."

Tom Baker | Bio
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**Limited hands-off driving to be piloted on motorways by 2019**

The next stage of vehicle automation, with the introduction of limited hands-off motorway driving, is due to be permitted by 2019 and it will raise tricky issues for insurers. Drivers of vehicles fitted with sophisticated assistance systems will be able to take their hands off the steering wheel for up to three minutes at a time. Crucially, the driver must remain engaged and will be responsible for taking back control of the vehicle in the event of an emergency situation or system failure. This transition could pose problems when deciding liability for accidents. Effective investigation and settlement will depend on being able to access the data from the vehicle and collaboration with vehicle manufacturers will be crucial. Notwithstanding the Automated and Electric Vehicles Bill that will put in place the necessary insurance framework for level 4/5 ‘driverless’ vehicles, it is not anticipated that fully automated driving, whereby the driver can engage in non-driving related activities while the vehicle is in motion, will become a reality on Britain’s motorways until at least 2021.

**Subrogation claims portals set to reduce life cycles and claims costs**

The use of portals that match subrogated claims between insurers, before automatically analysing and settling them without the need for human intervention, is gathering momentum, with a number of large composite general insurers having already signed up to new digital platforms. While the ultimate success of such InsurTech solutions is reliant on widespread industry use, by removing manual intervention, claims will be settled quicker and more efficiently, avoiding unnecessary litigation and freeing up insurance claims handlers to focus on more complex claims requiring technical human input.

**New qualifying criteria will regulate behaviour and enable MedCo to show its teeth**

Prior to the introduction of the new qualifying criteria in late 2016, MedCo had been hampered by gaming of its system of randomised allocation of Medical Reporting Organisations (MROs) for the provision of first reports in soft tissue injury claims. The new beefed-up criteria will prevent shell MROs from operating within the MedCo space. By significantly tightening the definition of an MRO, so that each organisation must be a functioning entity in its own right (responsible for day-to-day activities such as instructing medical experts, managing appointments, validating and managing expert accreditation and ensuring experts comply with legal and regulatory requirements), the loopholes in the system have been plugged. The new criteria will also provide MedCo with the necessary teeth to penalise those organisations that fail to comply.
Civil Liability Bill set to tighten the definition of whiplash ahead of soft tissue injury reforms

The last Government’s proposed whiplash reforms, which promised to reduce compensation payments for minor injuries using a tariff-based system and also increase the small claims track for road traffic claims to £5,000, were stalled when the Prisons and Courts Bill fell away when Parliament was dissolved before the snap general election in June. The new Government remains motivated to tackle the UK’s compensation culture and bring down the spiralling cost of motor insurance for consumers, and has proposed the Civil Liability Bill to achieve these aims, alongside stronger regulation of Claims Management Companies through the Financial Guidance and Claims Bill. The definition of whiplash was very narrow under the Prisons and Courts Bill, meaning soft tissue shoulder and lower back injuries were potentially exempt. Expect the definition to be broadened under the Civil Liability Bill.

Key developments

- Automated and Electric Vehicles Bill
- Civil Liability Bill
- McBride v UK Insurance/Clayton v EU Ltd
- R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd
- Vnuk – Consultation on Changes to Domestic Road Traffic Legislation
Casualty

“If the small claims limit for casualty claims is increased in the future, an online system for handling these claims will clearly be required.”

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Abuse claims against sporting and voluntary organisations to increase
The aftermath of the Jimmy Savile scandal has raised awareness of the extent of sexual abuse in a wide range of organisations. In particular, there have been high profile allegations made that football coaches sexually abused young players in their care. As more professional and amateur sportsmen and women reveal that they were abused as youngsters, it is anticipated more victims will come forward. Large claims should be expected, not only against football clubs but also against other sporting and voluntary organisations. The passage of time makes the investigation of historic claims challenging, but organisations must ensure that they have the right policies and procedures in place to respond to such allegations efficiently and sensitively. Looking ahead, organisations should seek to ensure that they implement robust safeguarding procedures to minimise the risk of harm to those in their care.

Is the small claims track the appropriate venue for injury claims?
Alongside the proposed introduction of tariffs for whiplash injuries, the ceiling of the small claims track for personal injury claims is to be increased from £1,000 to £5,000 for road traffic accident claims and £2,000 for all other claims. The costs recoverable in the small claims track are strictly limited, a fraction of the fixed costs which would otherwise apply even under the Low Value Protocols. One consequence of this costs restriction may be an increase in the number of personal injury claims presented by litigants in person, although there are very few casualty claims that will fall below the £2,000 limit. Given the limited numbers, it is unlikely that an extended portal will be required for casualty in the same way that it will be required for road traffic accident claims. However, if the small claims limit for casualty claims is increased in the future, bearing in mind the horizontal extension of the Low Value Protocols from motor to casualty in 2013, an online system for handling casualty small claims will clearly be required.

Sickness on holiday may be the ‘new whiplash’
As fees paid to claimants’ solicitors are squeezed further, it comes as no surprise to see firms that have specialised in injury claims seeking to move into new areas of work. One area that has attracted their attention is sickness on holiday. This includes claims for food poisoning and upset stomachs, particularly on all-inclusive package holidays where claimants may assert breach of the Package Travel, Package Holiday and Package Tour Regulations 1992. A recent report by ABTA, The Travel Association, has recorded a 434% increase in gastric illness claims by Britons since 2013, despite reports of sickness in resorts remaining stable, suggesting that many are fraudulent. The Solicitors Regulation Authority is investigating whether illicit referral fees are being paid to generate claims and the Ministry of Justice has warned the public that fraud in this area may be punished by imprisonment. The Lord Chancellor has asked the Civil Procedure Rule Committee to look urgently at the rules governing the costs of holiday claims, which could lead to the extension of fixed recoverable costs to cover claims arising abroad and stricter controls on the pay-outs made by tour operators, a view which is supported by Jackson LJ’s Review of Civil Litigation Costs. We have noted a significant increase in the volume of claims, in both our British and Madrid offices, and tour operators, hoteliers and their insurers should expect this trend to continue.
Is ‘very risk averse’ a true reflection of claimant investment strategies?
The discount rate, the assessment of the net return on investment from which multipliers for future loss are set, was the subject of dramatic change from 20 March 2017. The reduction of the rate from 2.5% to -0.75% saw multipliers increase dramatically, beyond the expectation of many actuaries, with a significant impact on the forecasting and reported profits of many insurers. While the then Lord Chancellor felt that she had no choice but to reduce the discount rate, her announcement was followed by a consultation paper reviewing the legal framework for setting the discount rate, raising such questions as the level of investment return realised by claimants in practice, how the rate should be set in the future, who should set it and the use of Periodical Payment Orders rather than lump sum settlements. Consultation closed on 11 May 2017 and we predict that the Government will bring forward legislation later this year to vary the basis on which the discount rate is set.

Key developments
- Civil Liability Bill
  - Financial Guidance and Claims Bill
  - X v Kuoni Travel Ltd
  - Fixed Recoverable Costs
  - Sentencing Guidelines – Counting the Cost of HSE Prosecutions
**Insurance Advisory**

“*InsurTech in all its forms seems certain to change the way insurance is priced, sold and how claims are paid. This will be an evolutionary process, albeit fast-paced.*”

Mathew Rutter | Bio
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**Brexit – legal gaps and uncertainty**
The legal complexity of the UK’s withdrawal from the EU is becoming clear, demonstrated by the UK Government’s White Paper published at the end of March 2017 and the eight separate Brexit bills in the Government’s legislative programme. One challenge comes where current legislation refers to an EU law or institution, or assumes UK membership of or access to an EU regime or body. Another comes from the sheer number of laws and regulations – it seems inevitable that some provisions will be missed or will be incorrectly applied. This is exacerbated by the fact that we do not know what the end-game will look like. If transitional terms are agreed in a number of areas, these will create further legal complexity that cannot yet be catered for.

**GDPR – no bonfire of red tape**
The General Data Protection Regulation (GDPR) comes into force on 25 May 2018 and we expect its terms to be largely replicated in corresponding UK laws following Brexit. Apart from the fact that the implementation costs will already have been incurred before Brexit takes effect, it seems likely that the UK would want its laws to meet the adequacy test under the GDPR (as is currently the case for Switzerland and the Channel Islands, for example) to facilitate the transfer of personal data between the UK and the EU post Brexit. However, there may be scope for greater flexibility, with a view to making the UK an attractive place to do business, while protecting individuals’ privacy.

**InsurTech – change is inevitable, but more by evolution than revolution**
InsurTech in all its forms seems certain to change the way insurance is priced, sold and how claims are paid. This will be an evolutionary process, albeit fast-paced. As new players, products and distribution methods emerge, insurers will remain essential because they are authorised to underwrite insurance and have the balance sheet and capital to support that. The changes may, however, pose a challenge and a threat to insurers struggling with legacy IT platforms and relying on others to distribute their products. Many insurers are alive to these threats and are themselves at the forefront of InsurTech either by internal innovation or external partnerships. The pressures of InsurTech may lead to some consolidation, but the unique position of insurance underwriting will provide some protection from the InsurTech whirlwind.

**ILS – UK regime will make progress if it is competitive**
Plans for a UK regime for insurance-linked securities (ILS) were delayed by the general election, but the UK Government has since announced it is to press ahead with its proposals largely unamended. Indeed, given the uncertainties for the UK insurance market following Brexit, creating a market in this area to rival those of, for example, Bermuda or Gibraltar, arguably takes on even greater significance. Given the absence of any obvious ‘killer’ legal or other elements of the UK proposals when compared with the existing regimes available in other jurisdictions, the success of a UK-based ILS regime will depend on the willingness of HM Treasury to ensure that the tax and regulatory aspects of the regime in particular are kept competitive with those of competing jurisdictions.

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**Key developments**
- European Union (Withdrawal) Bill
- General Data Protection Regulation
- Insurance Distribution Directive
- Markets in Financial Instruments Directive II
- Senior Managers and Certification Regime
Cross Sector Issues

“AI will create significant challenges in terms of corporate structures, property portfolios and handling sensitive personnel issues.”

Helen Faulkner | Bio
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M&A on hold but will return
The days of mega-mergers in the insurance industry may be behind us. Activity has dropped significantly from the peaks of 2014 and 2015 as the industry steadies itself in the face of waves of global economic and political uncertainty. The over-arching sentiment is to wait and watch, but that is unlikely to prevail as we go into 2018. There are multiple pressures building up. Digital innovation has reached the top of corporate agendas and the search for the best solutions should stimulate M&A activity. Alongside this, Solvency II is having a significant impact, especially in the life insurance market where several major funds have closed and in the general insurance market where activity in the run-off sector is on the rise. International influences such as the fall in the value of the pound and the ambitions of large Asian insurers will also combine with these other factors to rekindle M&A activity.

Gender remains a key diversity issue for insurers
Insurers have been working hard to address the lack of women on boards and in senior management and still have work to do to meet, let alone exceed, expectations. The market will continue to support the many excellent initiatives to help address this. As it does, attention will move further down corporate structures as the gender pay gap reporting rules begin to bite. This will expose inequalities in firms and make it easy for prospective employees to see shortcomings, pushing female talent towards the best performing firms. Some firms will have to take drastic, and costly, action to address this.

The robots are coming
The insurance industry has belatedly woken up to the huge potential impact of artificial intelligence (AI) on the sector. Up until now the focus has been mainly on the automation of admin-heavy processes, but academic research shows the potential of AI to replace high-level actuarial, underwriting, pricing and claims roles. New entrants to the market will not carry these high fixed costs and that will accelerate a review of roles in established insurers. We will see a new generation of data scientists, some of whom will also have actuarial and underwriting skills, emerge as key roles. AI will still have a major impact on large numbers of largely administrative roles, even customer-facing ones, as customers are attracted to digital platforms to interact with insurers. This will create significant challenges in terms of corporate structures, property portfolios and handling sensitive personnel issues.

The certainty of political uncertainty
The clearest consequence of the inconclusive general election in June is a period of heightened political uncertainty. With the Government trying to push through the hugely complex Brexit-inspired legislation without a majority in the Commons or the Lords, the potential for it to fail and provoke another election within the next 18 months is high. This will affect business confidence and investment decisions are likely to be delayed as a consequence. Insurers will be also nervous that the new Government will return to Insurance Premium Tax (IPT) to raise money as its spending and borrowing plans come under pressure. The industry has made a powerful case for not increasing IPT further after the sharp rises of the last two years with the core rate now at 12%. IPT is already set at 20% for travel insurance and mechanical breakdown and closing this gap could be tempting for the Chancellor.
In-depth analysis

Fresh thinking on today’s big issues. These thought leadership pieces offer insight into the opportunities provided by the evolution of InsurTech and its impact on the industry and its customers.
Autonomous vehicles: from theory to reality

Autonomous vehicles are being tested on public roads around the world just as the first crewless ships are being trialled in open water. Is the insurance industry ready for the potential huge shift in coverage this will entail with a switch from traditional motor accident damage and marine protection and indemnity policies to product liability and recall cover?

A world where much of our transport is fully autonomous is rapidly moving from theory to reality: driverless cars are being tested around the world, small cargo ships without crews are almost ready to be launched and planes have for many years been controlled by autopilots most of the time they are in the air.

When it comes to autonomous vehicles, insurance, the laws surrounding transport and public attitudes have been racing to catch up with the almost breathless pace of development being forced by motor manufacturers.

In the UK, this has brought us to the crucial level 3 stage in the development of autonomous cars where cars will be able to drive themselves, but will hand back to the driver when facing situations they can’t handle (see graphic). In Germany, the pace of change is even faster as new laws have just been passed to allow fully autonomous – level 5 – cars on public roads.

At the junction
In some ways, insurers are more comfortable with the fully autonomous vehicles than they are with the transitional phases, says Peter Allchorne, Partner at DAC Beachcroft. “Level 3 automation brings with it many risks and in many ways we would be better skipping this stage entirely. It highlights the absolute need for serious public awareness and education. When you are looking at these developmental phases that fall just short of driverless, there is a real danger that a driver could be lulled into thinking they are driverless when they should be taking control.”

This concern is shared by some major motor manufacturers. Jim McBride, autonomous vehicles expert at Ford, said recently that Ford wants to move straight to level 4, since level 3, which involves transferring control from car to human, can often pose difficulties. “We’re not going to ask the driver to instantaneously intervene. That’s not a fair proposition,” he said.

In the UK, we have to accept that many level 3 vehicles will soon be on our roads – ahead of the planned introduction of level 4 in 2021 – says David Williams, Technical Director at AXA. “I understand and share some of the concerns around level 3 operation. We would rather level 3 didn’t exist but the reality is that it does and it will soon be with us. Level 4 has similar handover concerns but the handover there is entirely at the driver’s behest.”

Williams says AXA is developing protocols and relevant safety features in the trials it is running with manufacturers in Bristol. This would lead to recommendations going to government for inclusion in legislation, including around driver training: “It should be an obligation on the manufacturers to promote training so that the driver can use the vehicle safely, especially during the handover phase.”

“These vehicles are going to be complex and we would still have to show that the manufacturer or installer is negligent if we are to recover from them, and they will still have the state of the art defence to rely on.”

David Williams, Technical Director
AXA Insurance
Allchorne agrees that driver training has to be addressed: “It is about the ‘here and now’ and that education has to happen now ahead of the advanced automation systems becoming available. It will be too late once they are on the road”.

Andrew Parker, Partner and Head of Strategic Litigation at DAC Beachcroft, says that imposing an obligation on drivers seems the obvious route to achieving this, but warns that it might meet resistance: “Developing a certificate of competence with some statutory underpinning short of an additional driving test seems the sensible course, but it wouldn’t please everyone. It could restrict the market for the products and the vehicle manufacturers would have something to say about that”.

**Mapping the future**

While insurers might be nervous about this transitional phase, they are much more comfortable with the way the Automated and Electric Vehicles Bill proposes dealing with the compulsory insurance obligations, says Williams: “The Bill definitely moves the conversation on in a very positive way. There will still have to be an RTA compliant policy in force and the motor insurer must handle the claims regardless of the cause and even though in some cases the driver could effectively be a passenger”.

Insurers will then have the option of pursuing recovery from a product liability or professional indemnity insurer if one of the...
increasingly complex parts or systems failed due to design issues or wasn’t installed properly. This won’t be automatic.

“These vehicles are going to be complex and we would still have to show that the manufacturer or installer is negligent if we are to recover from them,” continues Williams, “and they will still have the state of the art defence to rely on.”

Recovery won’t be a simple process, says Olya Melitchouk, Senior Associate at DAC Beachcroft. “It puts the onus on the insurance company to recover from not only component manufacturers but also potentially software providers and highway authorities. There are a lot of complexities”.

Many people have assumed the main interface when it comes to recovery will be between the frontline motor insurer and the insurers of the component manufacturers, installers and repairers, but this will only be part of the story says Wendy Hopkins, Partner and Head of the Global Practice Group at DAC Beachcroft: “The interconnectivity and the ability of the vehicle to communicate effectively with the highway infrastructure is absolutely key.”

There was a recent accident involving a Tesla in autopilot mode which drove into a wall due to poorly marked lane dividers. In another trial, a driverless car stopped in the middle of the road because it came across a pothole and didn’t know what to do.

“These highlight the need for a major new investment in the highway infrastructure. The authorities have a maintenance obligation now, but this is obviously a huge extension of that,” says Hopkins.

These issues will play out in a similar way in the US says Francis Manchisi, Partner and Head of Product Liability, Prevention and Government Compliance at Wilson Elser: “Apportioning liability in the US legal system will become more complicated for accidents involving autonomous vehicles – especially before the vehicles reach the level 5 stage of full automation. Did one or both of the drivers take over control of the vehicle? Should they have taken control? Did they act negligently once they did so? ”

“The product liability issues will not be limited to the manufacture of the autonomous vehicle. The issue of whether the software in the vehicles was defective must be examined. Did the driver/owner update the software on the vehicle to ensure that the vehicle was driven with the most recent software? What instructions/warnings were provided to the vehicle owner in this regard? The potential issues in the autonomous vehicle accident go far beyond the frequent car accident litigation cases in the US today in which a jury often determines the outcome based upon the testimony of the drivers involved.”

Automation at sea

The marine insurance market is watching the motor market closely to see how the complex mix of liability coverage issues play out, says Toby Vallance, Senior Associate at DAC Beachcroft. “They are going to get a much longer lead time than with automated vehicles. They will also benefit from seeing how the shift to product liability will be worked out.”

There are some small-scale trials of crewless ships starting, run by Rolls-Royce and by MUNIN (Maritime Unmanned Navigation through Intelligence in Networks), a European Union funded project. Rolls-Royce says it expects to launch the first remotely-operated local vessels by 2020 when it has completed the current trials in the Baltic. Following that roll-out, Rolls-Royce estimates that there will be remotely controlled coastal vessels by 2025, remotely controlled ocean-going ships by 2030 and fully autonomous, unmanned ocean-going ships by 2035.

Looking towards the horizon

Despite this relatively long timeframe, governments and international maritime bodies are already turning their minds to how the laws of the sea and associated regulations will need to evolve. Vallance says many of the legal and regulatory issues are being worked on in the UK in the Maritime Autonomous Systems Regulatory Working Group which is due to report shortly to the Maritime and Coastguard Agency. From there, the discussion will go global at the International Maritime Organisation.

Recognising the growing demand for regulatory support for unmanned vessels, the international classification society Lloyd’s Register announced on 13 June 2017 that it has launched the LR Unmanned Marine Systems Code, which it says provides a goal-based code that takes a structured approach to the assessment of unmanned marine systems against a set of safety and operational performance requirements. Currently crew safety is a big driver behind maritime regulation. Consequently, the advent of crewless vessels will lead to a significant shift in regulation. Vallance says the priority will move from crew safety to vessel security, particularly in the context of cyber risk. Concerns around the risk of cyber attack will lead to stringent cyber security requirements if fully or even semi-autonomous vessels will be allowed to operate in the open seas.

He says he has been disappointed by the relative lack of engagement: “I’m not sure the shipping industry has come to terms with the concept of not having humans on board.” This means some tricky issues, such as mechanical failure, are not high enough up the agenda.

“The issue that hasn’t been dealt with, is what happens if something goes wrong mechanically. Ships at the moment have engineers on board who can make running repairs but what happens when a crewless ship breaks down in bad weather, potentially drifting for 24 hours?”
Data battleground

Overlaid on this increased complexity will be the additional data generated by the vehicles and the infrastructure. This is going to be a key battleground for the insurance industry, says Williams. “We want it to be shared appropriately and we think there needs to be some legal requirements put in place to ensure that happens.”

The current legislation needs to be strengthened to make sure there is clarity about how data should be shared, according to Parker: “It is going in the right direction, but it isn’t there yet. The key will be the data that will be held by the vehicle manufacturer and that will tell us whether the vehicle was operating in autonomous mode and what happened. It lies at the heart of the connected relationship and we must deal with that in a joined-up way. It certainly won’t be best to deal with it in a frictional litigation environment”.

The powerful German motor manufacturers are pressing for this exchange and sharing of data to be handled through a third-party clearing house, something that could be pushed through into European regulation. It isn’t something that would cause a problem in the UK, according to Williams as the Motor Insurers’ Bureau is already an effective central repository for a lot of third-party data.

There is a long shopping list of other issues that the industry will have to address as we move through the phases of automation, says Hopkins, with cyber liability and recall key among them. “Recall and corrective action programmes are likely to become commonplace, reflecting the increased scope for safety defects arising from a vehicle’s sensors, software and electronics. Technological advances additionally render the vehicle vulnerable to third-party influences such as hacking, breakdown in communication networks and deficiencies in highway infrastructure. Such interdependencies beg the question ‘what is the product?’ and make it increasingly difficult for insurers to assess the underwriting risk. Global supply chains – and the analysis of where liability rests – will become ever more complex.”

It is important that people don’t get too distracted by the challenges autonomous vehicles are bringing or fall into the trap of thinking there will be a simple, single answer to all those challenges, says Williams. “Not all vehicles are going to be the same so we will need to understand the capabilities and technologies in different vehicles. But, most importantly we mustn’t lose sight of how much safer these are going to make our roads.”
Artificial intelligence: the legal and regulatory challenges

It seems like only yesterday when everyone was talking about the impact of Big Data on the insurance industry. Talk about Big Data now and you will almost seem old-fashioned – it’s all about artificial intelligence and InsurTech.

Artificial intelligence (AI) will soon be everywhere. It is making decisions about what we buy, when we buy it and how much it costs. It is controlling interactions between customers and suppliers. It is even talking to customers. The insurance industry is facing huge changes as AI steps boldly into every aspect of its internal operations and external relationships wearing the bright new clothes of InsurTech.

To some this seems like a revolution with all the instability and upheaval that it brings in its wake. In reality it is part of a rapid evolution of which Big Data was a crucial phase. It has brought new players into the insurance market with some, like Lemonade, the world’s first peer-to-peer insurance carrier powered by AI and behavioural economics, experiencing phenomenal growth over a very short time.

It is estimated that around £1.32 billion was invested globally in the InsurTech arena in 2016, up 32% on the previous year. The lion’s share of this was in the United States but the UK and Europe are increasing their investment (see chart on page 35).

Incumbents or disruptors?

By no means all of this investment has gone into start-ups – the disruptors that many commentators claim are going to change everything we know about insurance. A significant proportion of that investment has been made by established players in innovations of their own.

“It is on everyone’s agenda, but how it plays out will vary enormously,” says Mathew Rutter, Insurance Advisory Partner at DAC Beachcroft, “and no one quite knows where the smart money should be going and what is going to take off. Large insurers have created digital garages to accelerate development and that seems to be working well. But there are also plenty of small insurance start-ups that could develop niche products. Their lack of size might enable them to move very quickly.”

He believes the huge importance of AI and associated technologies was vividly illustrated at the British Insurance Brokers’ Association conference in Manchester earlier this year: “One of the striking things at the BIBA conference was the sheer number of stands taken up by a wide variety of technology exhibitors.”

There are differing views on both sides of the Atlantic, but many experts feel established players have as much chance of success as start-ups.

Adrian Jones, Head of Strategy and Development
SCOR Global P&C

“The biggest winners from InsurTech may be those innovative challenger incumbents who find better ways to underwrite through better use of technology.”
losers, and over time the best underwriters displace the rest of
an otherwise lousy market," said Adrian Jones, Head of Strategy
and Development at SCOR Global P&C in a recent article.

“Trying to stand aside from this rapid evolution is simply not
an option,” says Rutter. “Part of the issue for insurers is that even
if they don’t invest and adapt they will need to respond to the
technologically-driven changes around them, such as driverless cars.
It is hard to see old business models being fit for this new world.”

Rhiannon Webster, Head of Information Law at DAC Beachcroft,
agrees that it will be impossible to ignore the new world of
increased connectivity and constant data flows: “The internet
of things is going to generate a huge amount of new data. It will
require a step change in the capability of insurers’ systems.”

Widespread innovation
The InsurTech label tends to be slapped onto anything that
looks innovative and has technology and data at its heart, but
it takes many different forms and some of them won’t look
that exciting to the outside world. “It might just be a more
efficient claims process,” continues Webster. “The customer
may not see the technology, but will be better served. Smarter
use of technology and data will enable a smoother process to
be put in place for the customer, while for the insurer it will
mean lower costs.”

Other innovations, such as fractional insurance where customers
buy on a pay-as-you-go basis or peer-to-peer insurance, will have
a deeper impact. “These innovations will change the risk and a lot
of focus is on the consequences of that.”

Embracing those changes and their consequences requires a
major shift in the culture of the industry, according to Webster.
“This isn’t an entirely new challenge but insurers are approaching
it in different ways. Some have had trips out to Silicon Valley to
see what they might invest in because they want to find new
thinking and new ways of working. Many of them will invest
and develop these as a separate business.

“This isn’t a new approach. HSBC did it with First Direct which
is operationally a separate business. Others might want to
integrate the new way of thinking into their business, such as
Aviva’s ‘no questions’ approach to home insurance.”

Webster argues that no one can say one approach is preferable
to the other: “It might be better to let new ventures grow
separately and develop the new systems required to cope with
the vast amounts of new data and new ways of working”.

Overcoming challenges
For Rutter, one of the key cultural challenges for the insurance
industry is going to be its cautious approach to regulation. “Regulation
is usually designed to be tech-neutral, but insurers will be looking
for reassurance. It is a lot to do with culture. Many organisations
have a low-risk or no-risk approach to regulatory compliance.
Anything that pushes the boundaries might ring alarm bells.”
The Financial Conduct Authority is the lead regulator in this area and it has been trying to engage the industry, setting up a ‘sandbox’ to encourage insurers to work with it to explore the impact of regulation on technological innovation. In particular, it will be aiming to test the boundaries of legislation such as the Insurance Distribution Directive (IDD). This could present problems.

“The IDD still largely assumes that most insurance is sold through brokers in face-to-face contact,” says Rutter. “It does have a bit of a feel of being where the UK was ten years ago. One potential effect of Brexit is that the FCA could be more flexible in varying or waiving rules that might inhibit innovation.”

He sees regulation as having an important role to play and says it need not be a negative influence or an inhibitor of innovation. “The FCA also has responsibilities to promote competition and the new entrants could improve consumer choice. There may be regulatory risk but there may also be regulatory benefit.”

Those bringing new insurance offerings to the market see the challenge of regulation in a different light, according to Dylan Bourguignon, Chief Executive of so-sure, a social insurer launched last year, writing in a recent article first published in FinTech Times: “Insurance regulation is even tougher than banks. In the lending market, there was a regulatory loophole with simple loans which were not regulated as parent-child loans existed before the banks did. This loophole led to the emergence of peer-to-peer lending platforms, as an alternative to bank loans.

“In insurance, there was no such thing as ‘simple insurance’ before Edward Lloyd’s coffee shop in the 1680s, so every insurance product sold in the UK is regulated. While it is required (as it protects the consumers), this regulation is such that if one tries to save money bypassing segments of the traditional value chain, the costs are such that they ‘kill’ the economics. So entrepreneurs have to work with the industry unless they recreate the whole value chain.”

Data risks
One area of regulatory risk that will definitely have to be kept to the fore is data and privacy, especially when working with partners in fragmented supply chains, many of whom may not be familiar with data protection regulation, especially the new European General Data Protection Regulation (GDPR). This will be implemented in the UK by the proposed Data Protection Bill announced in the Queen’s Speech, with additional privacy law requirements.

“The new rights given to individuals to check and control how their personal data is used are extensive, including the right to be opted out of automated processes. All of this has to be factored in at the product and process design stage.”

Mathew Rutter, Insurance Advisory Partner
DAC Beachcroft

“Insurers need to understand that once automated decisions have been made, you can’t pull back from them by cancelling policies. That is hardly treating customers fairly.”
Regulatory responsibilities will reach right up to board level. “Boards will have to ask probing questions about what checks and balances are built into the new AI-driven systems and ensure that the quality of management information is appropriate. Saying you don’t understand how it works won’t wash with regulators. This happened with the wholesale banks and algorithmic trading – many at board level were not sufficiently able to assess the risks.”

There will be some InsurTech applications that get it wrong, predicts Rutter, potentially selling large numbers of policies to the very people underwriters don’t want on their books: “Insurers need to understand that once automated decisions have been made, you can’t pull back from them by cancelling policies. That is hardly treating customers fairly.”

There will be failures and mistakes amid the whirlwind of innovation, but that isn’t a good reason for standing aside: “Often the only way to find out what is going to be best for a business and its customers is to try it,” says Webster.
Blockchain: a glimpse of the future

Distributed ledger technology offers insurers the potential to become more efficient, create new business models and launch innovative products. But can the so-called ‘Internet of finance’ live up to the hype?

Distributed ledger technology (DLT), also known as blockchain, is one of those types of innovation that appear to offer companies huge potential to operate more efficiently and serve customers better, but is not quite developed enough to do so. For that reason, the insurance industry has exercised understandable caution in assessing the technology’s utility. “The problem with that approach,” says Julian Miller, Partner at DAC Beachcroft, “is that companies that wait too long may end up missing the boat.”

Distributed ledgers are shared databases comprising digital lists of transaction records. Their unique characteristic is that identical copies of the ledger are ‘distributed’ among multiple hosts, who validate transactions written as ‘blocks’ through a consensus process. Once validated, blocks are secured by a cryptographic ‘hash’, or fixed-size alphanumeric string, which allows hosts to verify input data but stops anybody from reconstructing data.

Conceptually, cryptographic distributed ledgers are similar to peer-to-peer payment networks or lending platforms, in which the intermediary is redundant and replaced by technology. Transactions can be executed instantaneously and directly between contractors, creating an immutable shared record and theoretically eliminating settlement risk and reconciliation risk from the system. The ledger also minimises fraud by enabling asset provenance and transaction history to be established within a ‘single source of truth’.

As with any apparently disruptive technology, the development of blockchain has been accompanied by a significant amount of hype. Almost every large financial institution has paid lip service to its potential and many have put money to work in innovations labs, start-ups or ‘sandboxes’, in which developers are invited to try out software in a secure environment. Even the Bank of England has one.

Still, behind the hype there has also been some heavyweight support for blockchain. The World Economic Forum, known for the annual meeting in Davos, said in a report last year that blockchain will “live up to the hype” and “form the foundation of next generation financial services infrastructure”.

“It is early days for this technology, and it’s often observed that markets overestimate what can be achieved in a year but underestimate what can be achieved over five to ten years,” says Miller. “Blockchain may be a prime example of this, resulting in substantial changes in the medium term.”

Perhaps the most notable application of distributed ledger technology to date is the payment system Bitcoin, launched in 2009. The Bitcoin blockchain comprises a record of every transaction using the currency, the market capitalisation of which has jumped sharply in recent months to reach almost $35 billion in late May 2017. This appreciation reflects Bitcoin’s
rising acceptance as a payment method, but has also sparked talk of a bubble.

Game-changers
From an insurance perspective, on the face of it the technology offers game-changing opportunities, from transforming the industry’s complex web of relationships to automating business processes including customer due diligence, contract placement, claims management, accounting and settlement.

The database itself can be used for identity confirmation, timestamping, transacting and record keeping in the insurance market, while so-called smart contracts sit on top of the database and can be programmed to automatically execute processes and support non-core functions such as customer lifecycle management and compliance.

“The insurance industry is hunting opportunities for growth and dramatic reductions to distribution costs,” says Miller. “Distributed ledgers are being taken seriously because they may provide an answer to both challenges.”

Traditional insurance markets are comprised of complex and multi-layered document trails between clients, brokers, underwriters and reinsurers. The system relies on numerous manual processes to make it work, and is susceptible to delays, inaccuracies and mismatches, all of which increase costs. If all members of the industry value chain were joined to a distributed ledger, delays would be limited to the time it takes to write transactions to the ledger (for Bitcoin just a few minutes on average), following which any member of the network would be able to access and verify the same permanent record in real time.

So-called smart contracts (they are rarely contracts in themselves) meanwhile bring the apparent benefit that they can offer self-enforcing mechanisms, increasing efficiency and reducing the risk of fraud or breach. They can also be executed more quickly and offer a lower (some say zero) chance of errors. Because the rules of the contract are pre-programmed, there is almost no possibility of legal disputes over their intention.

In the insurance context, smart contracts have numerous potential uses, from automating payment cycles to validating simple claims based on a predefined set of triggers. An example would be an insurance agreement that pays out when a specified transport service is delayed for more than an agreed amount of time. The contracts can also capture coverage conditions, syndicate insurance agreements and insurer/reinsurer agreements. They can automate the claims process, enabling digital claim submission (via sensors or internet-connected data sources) and processing (eliminating the need for brokers and loss adjusters) and making payments. Where there is a syndicate, a smart contract can automate the liability calculation for each carrier, or specify reinsurance liabilities.

“Certainly where there are simple claims or the quantum is small there is an argument for the withdrawal of human intervention beyond auditing,” says Miller. “Large complex claims may still require human input.”

Joint ventures
Given the potential offered by distributed ledgers, it is not surprising that some companies have launched initiatives to try to capture value or jointly develop programmes. In October 2016, Aegon, Allianz, Munich Re, Swiss Re and Zurich launched the B3i Blockchain Initiative, which invited insurers to join an industry group to explore the potential of distributed ledger technologies. The group agreed to run a pilot, using anonymised transaction information and anonymised quantitative data, aiming to achieve a proof of concept for inter-group retrocessions.

“Another trend we are seeing is more collaboration between major players and tech companies,” says Michael Peeters, Technology Projects Partner at DAC Beachcroft. “Such a shared approach should allow a less revolutionary and more evolutionary pace of development and testing in this area, as well as hopefully leading to interoperability standards.”
The London Market Group (LMG), set up to help develop a vision for the future of insurance between members of the International Underwriting Association, Lloyd’s Market Association and London and International Insurance Brokers’ Association, has run two blockchain proofs of concept through its Target Operating Model Innovation work stream. The first was a claims (bordereau) submission and the second a ‘know your customer’ coverholder application. Following successful outcomes, the LMG recommended moving to pilots and ensuring that distributed ledger solutions are considered as part of any future work.

In addition, distributed ledgers may in future form the basis for new financial instruments, LMG said in a January 2017 report. For example, they may be used to distribute micro-insurance, which provides cover for a short time period. Micro-policies could become tradeable commodities in a blockchain-based marketplace, allowing units to be bought and sold. Another new class of policy could be a binary bet/event protection contract, providing an alternative means of risk transfer, LMG said, though there is some debate over whether this type of contract would contain an ‘insurable interest’, which distinguishes an insurance contract from gambling.

A related trend is raising interest among investors. London-based Eos Venture Partners is one of a few independent specialists looking at applications in the insurance sector.

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Certainly, there is palpable excitement in the industry around the potential for a more efficient and safer infrastructure. However, for all their promise, distributed ledgers inhabit the frontiers of the insurance technology landscape. Very little investment has progressed beyond proof of concept, and there are significant questions over whether the ledgers can perform at the volumes necessary for modern insurance markets. The jury is still out for the new kid on the block.

Fresh competition
Away from established industry players, new entrants are also looking to leverage the power of shared cryptographic ledgers. Among recent initiatives, start-up Everledger is working with insurance companies to provide transaction verification, while Plex.ai is an automotive telematics platform that uses blockchain technology, artificial intelligence and machine learning to provide insurance for self-driving cars. InsurETH uses distributed ledger technology to allow aeroplane passengers to purchase flight delay insurance. Insurance payments are recorded as a smart contract transaction, with compensation released contingent on the terms of the contract.

“Blockchain has been described as an enabler for a disrupter, distinguishing between what it actually does, which is transmit data already in circulation, and what it can facilitate, which is a radical increase in speed and lowering of costs,” says Miller.

Start-ups
Start-ups are able to access blockchain technology relatively inexpensively by building solutions onto platforms such as Ethereum. Dynamis is a start-up that is building smart contracts on Ethereum for peer-to-peer insurance. The company is working on a supplementary unemployment insurance contract, using the LinkedIn social network as a reputation system. Applicants for a new policy can use LinkedIn to verify their identity and employment status, and claimants can use their LinkedIn connections to validate that they are looking for work. “The exercise of one’s social capital within one’s social network enables participants to obtain a new policy or open a new claim,” the company claims on its website.

“With transformational technologies, early adopters often kick-start major players into action,” says Peeters. “This seems to be the case here, but the sector’s leaders need to continue to invest and innovate in collaboration with the new technology suppliers, which will minimise the risk of new entrants causing wholesale disruption. The next few years will be crucial.”

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Developments

In a world of breathtaking change, keeping abreast of legislative, judicial and other developments is essential for managing risk and business planning. Our guide will ensure you have a concise summary of the key legal events from the last 12 months at your fingertips.
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Automated and Electric Vehicles Bill

The eagerly anticipated Modern Transport Bill announced in the Queen’s Speech in May 2016 finally appeared in February this year, re-badged as the Vehicle Technology and Aviation Bill. That Bill did not make its way through Parliament owing to the snap general election in June. However, the new Government was quick to rekindle the draft legislation insofar as it relates to the development of automated vehicle technologies (AVT) in the guise of the Automated and Electric Vehicles Bill, introduced in the Queen’s Speech in June 2017.

The content of the Bill was informed by a recent consultation issued by the Department for Transport’s Centre for Connected & Autonomous Vehicles, as part of the Government’s ‘Pathway to Driverless Cars’ initiative. This introduced the incremental regulatory changes necessary to enable the development of both Advanced Driver Assistance Systems (ADAS) and AVT in a safe and proportionate manner. The Government is alive to the huge potential gains that the development of AVT can deliver for the UK economy and does not want over-regulation to stifle innovation or entrepreneurialism.

The main purpose of the legislation insofar as it relates to AVT is to provide a suitable insurance framework to cover the liability for vehicles operating in automated mode. For the protection of innocent victims and to provide a swift route to compensation, the Government opted for a ‘single policy’ model, placing an absolute duty on the motor insurer to deal with any claims from the disengaged driver. In turn, there would be statutory provision for motor insurers to pursue a recovery from the original equipment manufacturer or any other party responsible for the vehicle’s automated systems. It is envisaged that the supply chain may be complicated, involving both hardware and software providers. The Government hopes that motor insurers will work closely with vehicle manufacturers to ensure efficient processes are in place to manage recoveries, such as the sharing of post-collision data from the vehicle’s operating system.

Civil Liability Bill

One of the main strands of whiplash reform is the proposed introduction of a tariff for soft tissue injury claims from minor road traffic accidents, in place of general damages assessed by the courts.

Originally set out in Part 5 of the Prisons and Courts Bill (which did not progress through Parliament prior to the general election), the proposals should be expected to have a significant impact on the cost of claims following road traffic accidents and are predicted by the Government to save £35 on the average motor premium. It is certainly to be hoped that the definition of whiplash in the new Bill will be wider and clearer than the original version in the Prisons and Courts Bill, so that it is more in line with the Government’s consultation response. The Bill may also present a vehicle which can be used to reform the basis on which the discount rate is set.

The Bill also includes a ban on pre-med offers in whiplash claims (ie offers to settle personal injury claims before receipt of a medical report), with the intention of reducing the frequency of fraudulent injury claims.

Courts Bill

Announced in the Queen’s Speech on 21 June, this Bill replaces in part the Prisons and Courts Bill, which had failed to progress through Parliament before the general election. Intended to reform the court system, the Bill proposes the introduction of online guilty pleas to less serious criminal offences and the modernisation of civil court procedures and technology as championed by the Briggs Review.

Criminal Finances Act 2017

This Act, which received Royal Assent on 27 April 2017, introduces significant changes to tackle money laundering and corruption, recover the proceeds of crime and counter terrorist financing.

Modelled on the Bribery Act 2010, corporations and partnerships will commit a strict liability offence if they fail to prevent facilitation of UK tax or foreign tax evasion offences by an employee, agent or service provider in the course of their employment or association. These offences will come into force on 30 September 2017.

It is a defence if the corporation can prove that, when the tax evasion offence was committed, it had in place reasonable prevention procedures or alternatively that it was not reasonable for prevention procedures to be in place. Government guidance on ‘reasonable prevention procedures’ is expected shortly.

The Act also introduces Unexplained Wealth Orders (requiring those suspected of serious criminal activity to explain
their wealth), provides legal protection for the sharing of information between regulated companies, extends disclosure orders to include investigations into money laundering and terrorist financing and extends the period granted to law enforcement agencies to investigate suspicious transactions.

These strict liability offences may give rise to liability on the part of directors in the event a company elects to pursue its board for failing to implement adequate procedures and, for example, the company’s reputation is affected by such sanctions. It is also possible that the company might try to recover any fine levied from its directors. Whilst the company would have to distinguish its position from *Safeway v Twigger* (where the company was not allowed to pass on its fine for breach of competition law to its directors), this might be possible with a strict liability fine. Any of these possibilities might lead to exposure for D&O insurers.

**Equality Act 2010 (Gender Pay Gap Information) Regulations 2017**

These Regulations apply to private and voluntary-sector organisations with 250 or more employees and require them to publish data on their gender pay gaps. From 6 April 2017 employers will be required to publish the following four types of figures annually on their own website and upload them to a government website:

- gender pay gap (mean and median averages)
- gender bonus gap (mean and median averages)
- proportion of men and women receiving bonuses
- proportion of men and women in each quartile of the organisation’s pay structure.

The figures must be calculated using a specific reference date, called the ‘snapshot date’. The snapshot date each year is 31 March for public sector organisations and 5 April for businesses and charities. Organisations must publish within a year of the snapshot date. To help employers, the government Equalities Office and ACAS have produced guidance on managing gender pay reporting in the private and voluntary sectors.

**European Union (Withdrawal) Bill**

The aim of this Bill, one of the eight separate Brexit Bills in the Government’s legislative programme (the others being on Customs, Trade, Immigration, Fisheries, Agriculture, Nuclear Safeguards and International Sanctions) is to ensure, wherever possible, that the same laws apply on the day after the UK leaves the EU as before. The Brexit Bills have been described as potentially one of the largest legislative projects ever undertaken in the UK. This Bill is to:

- repeal the European Communities Act 1972, which gives effect in UK law to EU treaties
- replicate the common UK frameworks created by EU law, and maintain the scope of devolved decision-making power immediately after Brexit
- provide a wide (and potentially controversial) power to use secondary legislation to correct the statute book to rectify problems occurring as a consequence of leaving the EU. The Government estimates that 800 to 1,000 statutory instruments will be required.

Apart from EU law being relevant to all businesses, the majority of UK insurance regulation derives from the EU. Andrew Bailey, Chief Executive of the FCA, has previously stated that he does not expect there to be a bonfire of regulation post Brexit.

**Financial Guidance and Claims Bill**

This Bill has two important parts. Part 1 creates a new single body to provide free, impartial financial advice to the public – replacing the Money Advice Service, the Pensions Advisory Service and Pension Wise. The aim is to simplify the services that people can use to assist them with a range of money, pension and debt-related decisions. The objective is that a single body will result in greater use of the service and better decisions by consumers.

Part 2 of the Bill includes proposals to strengthen the regulation of claims management companies (CMCs) by transferring responsibility for such regulation to the Financial Conduct Authority (FCA), an important part of the Government’s measures to reduce the cost of whiplash claims and prevent the presentation of fraudulent claims. This will include the application of the FCA’s Senior Managers regime, which will for the first time impose regulatory control on those who own and run CMCs. The provisions for the transfer of regulatory powers to the FCA also specifically introduce powers to cap CMC charges; the power is available for all types of claim, although the Bill only requires the FCA to do so (at least initially) in claims involving financial products and services. Much of the detail will be set out in secondary legislation, which we expect to be outlined before the Bill has passed through Parliament this autumn.

**General Data Protection Regulation**

The General Data Protection Regulation (GDPR) will apply from 25 May 2018. As an EU Regulation it has direct binding effect in all EU member states. It will be implemented
in the UK with UK-specific derogations in the new Data Protection Bill, which was announced in the Queen’s speech.

As a reminder, the GDPR:
- applies to processing carried out by organisations established within the EU
- applies to organisations outside the EU that offer goods or services to individuals in the EU or monitor behaviour of individuals who are located in the EU, for example online monitoring
- changes the risk profile of data protection compliance as potential fines increase considerably (€20 million or 4% of annual worldwide turnover)
- introduces a new principle of accountability, requiring organisations to be able to demonstrate compliance with the law.

The GDPR intends to make Europe fit for the digital age. Certain provisions are clearly designed with the likes of social media organisations in mind. However, this leads to practical changes for other industries, including the data rich insurance sector. DAC Beachcroft has been working with insurance industry bodies to lobby both the Government and the Information Commissioner’s Office to take account of the specific complexities of the insurance sector when drafting our local law and guidance.

We are also working with the Lloyd’s Market Association and other industry bodies to produce an insurance sector privacy notice which will set out much of the information required by the Regulation. This should help insurance sector businesses comply with the GDPR privacy notice requirements, even when they have no direct contact with the individual. More information about this can be found on the LMA website.

Also due to come into force on 25 May 2018 is the e-Privacy Regulation, which updates the current e-Privacy Directive. If the draft remains as it is, the key change for insurance businesses is that they will no longer be able to use a ‘soft opt in’ for electronic marketing to individuals who have asked for a quote. In addition, e-marketing to individual email addresses and corporate email addresses must be treated the same.

General Product Safety Directive
For several years, the Directive’s days have been numbered: the EU Product Safety and Market Surveillance Package reforms were announced to improve traceability and tighten up the existing regime. But the reforms have remained deadlocked. With Brexit looming, do these reforms still matter for the UK?

Currently the new reforms will remove the distinction between consumer and non-consumer products. Traceability along the supply chain will be increased.

There are no guarantees the new reform will be in force come Brexit. So the conversion of EU law into UK law may not include these new reforms. This would leave the UK out of step with the rest of the EU. Pressure from exporters may not be enough to secure limited parliamentary time. Equally there are no guarantees that the EU will finalise these reforms any time soon.

Insurance Act 2015
On 4 May 2017, the Enterprise Act 2016 introduced sections 13A and 16A into the Insurance Act 2015. The provisions introduce into every contract of insurance (including reinsurance) entered into from that date an implied term requiring the insurer to pay sums due within a reasonable time. Failure to do so entitles the insured to remedies including damages.

What amounts to a ‘reasonable time’ to pay a claim will vary depending on the circumstances. The Act expressly recognises the need for a reasonable time to investigate and assess the claim and also includes a non-exhaustive list of matters that may be taken into account, including the type of insurance, size and complexity of the claim and factors outside insurers’ control.

There is also a defence where the insurer can show that there were reasonable grounds for disputing the validity or value of the claim.

The Act permits contracting out in non-consumer insurance contracts (where the breach is not deliberate or reckless), provided that the transparency requirements are satisfied.

A limitation period of one year from the date that insurers pay all sums due on the underlying insurance claim has been added as section 5A of the Limitation Act 1980.

Insurers are likely to face claims for late payment straight away, with policyholders tagging them on to most coverage disputes.
to improve their negotiating strategy. Insurers must therefore ensure that their claims handling procedures are late payment-enabled and know what late payment provisions are in their own policies and those related to them.

As part of the same set of reforms, the draft Insurable Interest Bill remains in consultation. Following consultation papers in 2008, 2011 and 2015, the Law Commission’s subsequent consultation on a draft Bill closed in May 2016. Given that this remains a contentious topic and the difficulties in agreeing a way forward, any future reform is now likely to focus only on life policies, where there remains a clearer appetite for clarification. At the time of writing, a consultation on a further revised Bill is awaited. Such a specific Bill might be suitable to be put before Parliament under the special procedure for uncontroversial Law Commission Bills. However, whether time can be found for such a Bill to be enacted remains to be seen.

Insurance Block Exemption Regulation

The EU block exemption from competition law covering certain forms of co-operation between insurers came to an end on 31 March 2017. As a result, insurers (like any other firms) will need to self-assess agreements and other forms of co-operation between them, to ensure they are compatible with competition law.

The main practical implications are that joint compilations and studies of risks by insurers will need to be considered in light of the general competition law guidance on the permissible exchange of information between competitors (which has been available since 2011 in the Horizontal Guidelines on co-operation between competitors); and co-operation between insurers when insuring risks jointly in co-insurance and co-reinsurance pools will need self-assessment on a case-by-case basis. In some cases, where risks are so large that no insurer could insure them alone outside a pool, insurers would not actually be competitors and so competition law would not apply. In other cases, pools may need more careful assessment: in situations where insurers have combined market shares of less than 20% the 2011 Horizontal Guidelines suggest scenarios where competition concerns are unlikely to arise.

Insurance Distribution Directive

This Directive is to be implemented on 23 February 2018. It is a minimum harmonisation directive, meaning that member states can set higher standards provided there is no conflict with the Directive. Key changes include mandatory pre-contractual disclosure in respect of non-life products in a standardised form using an Insurance Product Information Document (IPID). Distributors will also need to disclose remuneration. For intermediaries this means disclosure of the nature and source of any remuneration and, where a fee is paid, the amount of the fee, in addition to any post contractual payments. For insurers, this means disclosure of the nature of remuneration received by employees.

HM Treasury has published its consultation on changes to the scope of regulation of insurance intermediaries in the UK. It proposes excluding from regulation introducers who do no more than pass details of potential insureds to insurers or other intermediaries. This should reduce the regulatory and contractual burden on insurers and intermediaries who, to date, may have appointed such introducers as introducer appointed representatives.

The Financial Conduct Authority is also consulting on changes to its rules to implement the Directive. Concerns around the changes have focused on the breadth of the new ‘customer’s best interest rule’, and whether an IPID will be needed for commercial as well as retail clients. There are also questions as to whether UK insurers will be able to implement all of the necessary changes by 23 February 2018.

Markets in Financial Instruments Directive II

The revised Markets in Financial Instruments Directive (MiFID II) will take effect from 3 January 2018.

The Markets in Financial Instruments Directive (MiFID I), implemented in 2007, established the current regulatory framework for investment services and activities. In response to the financial crisis and to strengthen investor protection and financial market transparency, MiFID I was reviewed and revised. MiFID II comprises a new Directive and Regulation. Although MiFID II, like its predecessor, does not apply to insurers, the Financial Conduct Authority (FCA) may apply certain conduct of business rules implementing MiFID II to insurance-based investments and personal pensions (on the basis that these products are often substitutable for MiFID investment products). The Financial Services Authority took this approach at the time of MiFID I.
The FCA’s and PRA’s main policy statements on MiFID II were published in March, April and July. At the time of writing, the FCA has also published a sixth consultation paper on some further changes and it intends to publish final rules by November 2017.

**Modern Slavery Act 2015**

This Act came into force on 29 October 2015 and is aimed at tackling the global problem of slavery and human trafficking. In particular, section 54 requires commercial organisations with an annual turnover greater than £36 million to publish a slavery and human trafficking (SHT) statement each year, setting out the steps (if any) they have taken to ensure that slavery and human trafficking is not taking place in their business and supply chain.

The requirement applies to insurers, brokers and many of their insureds. In particular, the increasingly globalised way in which the insurance industry operates means that supply chains are becoming longer and more complex. In particular, the use of outsourced call centres and of claims handling arrangements, often in developing countries, may involve using low-paid and/or temporary workers.

It is not the non-compliance with the Act itself that will cause problems. Indeed, an organisation can meet its obligations by publishing an SHT statement to state that it is taking no steps. It is the risk of adverse publicity and reputational damage that is expected to motivate organisations to comply with not just the letter but the spirit of the Act.

**4th Money Laundering Directive**

This Directive seeks to give effect to the updated standards set by the Financial Action Task Force. It introduces a number of new requirements on relevant businesses and changes to some of the obligations under the 3rd Money Laundering Directive.

In the UK, it has been implemented through the Money Laundering and Transfer of Funds (Information on the Payer) Regulations 2017. These Regulations replace the Money Laundering Regulations 2007 and came into force on 26 June 2017.

As with the Money Laundering Regulations 2007, general insurance is out of scope, but long-term insurance business is included. Life insurance policies for which the premium is low are identified as lower risk, as are certain pension products.

Under the Directive there is a wider definition of politically-exposed persons (no longer limited to persons outside the UK). Simplified due diligence will no longer be automatically available for certain types of customer. Instead, firms must use a risk-based approach.

Following terrorist attacks in the EU, and the leak of the ‘Panama Papers’, member states agreed to revisit some areas of the Directive to further strengthen transparency and counter-terrorist provisions. These amendments have not yet been agreed.

The Government has also announced the establishment of a new body, the Office for Professional Body Anti-Money Laundering Supervision (OPBAS). There are 25 different organisations that supervise sectors at risk of being used to facilitate money laundering and terrorist financing. The aim of OPBAS is to try to improve the overall standards of supervision and ensure supervisors and law enforcement work together more effectively.

**Network and Information Security Directive**

This Directive, commonly known as the Cyber Security Directive, came into force on 8 August 2016 and member states have until 9 May 2018 to transpose it into their national laws.

The first EU-wide legislation on cyber security aims to prepare member states for cyber incidents and boost cyber security and resilience. Member states must adopt domestic laws with effective sanctions for non-compliance. These will apply to ‘essential service operators’ (ie, energy, transport, health, water and financial sectors) and ‘digital service providers’ (ie, cloud computing service providers, online market places and search engines).

Member states are also required to create a computer security incident response team so EU nations can manage cross-border incidents, and set up a unified strategic co-operation group to facilitate cross-border co-operation through the exchange of information.

It will be interesting to see how Brexit impacts the future of this Directive in the UK. The UK’s withdrawal will take at least two
years to complete so relevant UK companies will be subject to the rules for several months. After this, the UK will want to be at the centre of cyber resilience and no doubt it will be encouraged to remain part of this streamlined cyber security co-operation across member states.

Essential service operators and digital service operators are likely to be substantially affected by the Directive and both they and their insurers will need to confirm new procedures are in place to ensure compliance.

**Packaged Retail and Insurance-based Investment Products Regulation**

From 1 January 2018, firms advising on or selling packaged retail and insurance-based investment products must provide a key information document (KID) to retail investors, setting out key facts in a clear and understandable manner. The requirement to provide a KID was initially meant to come in at the end of 2016 but this was delayed by a year.

**Policing and Crime Act 2017**

In effect since 1 April 2017, Part 8 of the Act enhances the UK financial sanctions regime by introducing three major changes:

- It empowers the newly established Office of Financial Sanctions Implementation (OFSI) within HM Treasury to impose civil monetary penalties on companies and company directors and officers for breaking UK, EU and UN financial sanctions. If satisfied on a balance of probabilities that a person acted in breach of sanctions and knew or had reasonable cause to suspect they were in breach, OFSI may impose a penalty up to £1 million or 50% of the estimated value of the funds or resources subject to the breach (whichever is greater).
- It increases the maximum criminal penalty for breaching financial sanctions from two to seven years imprisonment for conviction on indictment.
- It expands the enforcement measures available by including breaches of financial sanctions in the list of offences to which deferred prosecution agreements and serious crime prevention orders apply.

OFSI guidance suggests that it will actively pursue breaches of financial sanctions. Companies should ensure their systems and controls are sufficient to identify and mitigate any sanctions risks. Penalties may be reduced where there has been voluntary disclosure of the breach and early co-operation.

These new provisions give rise to a number of potential exposures for directors and their insurers. While any fines imposed on directors are unlikely to be covered under D&O policies, cover may be available to defend any investigations or prosecutions, subject always to any conduct exclusion/claw back.

**Riot Compensation Regulations 2017**

These Regulations, together with the Riot Compensation Act 2016, came into force on 6 April 2017. They clarify the operation of the Act, including that where two parties have a legal interest in the same property which could be the subject of a claim under the 2016 Act, they can each bring a claim. However, no one may make more than one claim in respect of the same postal address, except that an insurer can make claims for both contents and buildings insurance.

The Regulations adjust the definition of property to include items used in connection with a business carried on by the claimant and contained in motor vehicles or trailers.

The time limit for bringing a claim is 43 days from the date the riot ends or, for claimants whose insurers have refused their claim, 43 days from the decision of the insurer to refuse to pay the whole or part of the claim. Evidence in support should be received by the relevant authority within 91 days. Stolen property will be deemed lost if it has not been recovered before the date that the first payment of compensation is made. The value of the compensation will be calculated on the basis of the reasonable cost of repair or reinstatement, or the cost of replacement at current market value. Alternative accommodation is limited to a 132-day maximum period from the date on which a home is made uninhabitable.

Claims by insurers may be decreased or refused if the insured participated in the riot, contributed (even indirectly) to damage during the riot, or committed a criminal offence relating to the riot. Also, any degree of fraud in the insured claim may be used as grounds to refuse the insurer compensation.

A riot claims bureau has not been created in these Regulations, but separate regulations will be prepared ready to be laid before Parliament in the event of a riot.
Senior Managers and Certification Regime

The Senior Insurance Managers Regime came into force in 2016, replacing the approved persons regime for certain senior individuals within insurance companies. From 1 January 2016, Solvency II firms and groups have been required to have governance maps in place, setting out clearly the key functions at the firm and the relevant individuals responsible for these functions, along with their lines of accountability and responsibility both within that firm and to any wider group. Further changes came into effect in March and September last year.

A similar regime, the Senior Managers and Certification Regime (SM&CR) was put into place in 2016 for banks and some investment firms. The SM&CR is now being extended to all authorised firms (including insurance brokers). Significant changes are also being proposed for insurers. The new regime is expected to start from 2018.

The Prudential Regulation Authority and the Financial Conduct Authority (FCA) each published consultation papers on extending the regime in July 2017.

The FCA also published a number of policy statements on the extension of the SM&CR in May, including one on how conduct rules will apply to non-executive directors in insurance firms.
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AIG Europe Limited v Woodman and others

Supreme Court – first reported case on aggregation wording in the solicitors’ minimum terms and conditions

The case involved failed holiday developments in Turkey and Morocco in which the solicitors acted as trustees. The insurers sought a declaration that claims totalling over £10 million made against the solicitors by the investors should be considered as a single claim and therefore subject to the limit of £3 million. The aggregation clause provided that claims could be aggregated if they arose from “similar acts or omissions in a series of related matters or transactions”. The key issue was the meaning of “related matters or transactions”.

The Supreme Court rejected the Court of Appeal’s interpretation that the transactions had to have “an intrinsic relationship with each other and not an extrinsic relationship with a third factor”. That formulation was neither necessary nor satisfactory. The Law Society had chosen not to circumscribe the phrase by any particular set of criteria. Determining whether transactions were related was an acutely fact-sensitive exercise. Viewed objectively, the connecting factors drove Lord Toulson to the conclusion that the transactions in each development were related such that the claims would aggregate by reference to the two developments. On the facts presented, although the developments bore a striking resemblance, the insurers could not aggregate the claims further, as the Turkish and Moroccan developments were separate and unconnected. There would therefore be two claims for insurance purposes.

Atlasnavios-Navegacao LDA v Navigators Insurance Co Ltd and others

Court of Appeal – detainment exclusion applied even where the reason for the detainment was an insured peril

A vessel was detained in a Venezuelan port when 132kg of cocaine was found strapped to its hull. The vessel was insured under the Institute War and Strike Clauses 1/10/83. These clauses provide that loss caused by a person acting maliciously is an insured peril (under 1.5). The clauses also exclude cover for “arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations” (under 4.1.5). The judge at first instance held that the concealment of cocaine had been a malicious act for the purposes of 1.5 and implied a limitation on the scope of the exclusion where the customs infringement only came about due to the malicious act.

The Court of Appeal deemed that the clauses had to be considered together to determine the ambit of the policy; neither had primacy over the other. It held that if the malicious act was concealing drugs on the vessel, and concealing drugs was an infringement of customs regulations, then the detention was for a breach of customs regulations. There was no justification to exclude an infringement of customs regulations consisting of a malicious act from 4.1.5; this was not supported by the case law.

Basia Lejonvarn v Peter Burgess (1) Lynn Burgess (2)

Court of Appeal – a professional providing gratuitous services to a friend may still owe a duty of care in tort

At their request, the architect provided project management and design services to Mr and Mrs Burgess, who were long-standing friends. No fee was requested by the architect, but there was an understanding that she would be paid for design work later on in the garden project. The relationship broke down and the Burgesses brought proceedings alleging that the architect was responsible for the defective works.

Although there was no contract between the parties, the Court of Appeal held that the architect had assumed responsibility and a duty of care was owed. The services were provided in a professional context. The architect held herself out as having professional skills and carried out those skills knowing that the Burgesses would be relying on her to perform them properly. The Court of Appeal stressed that it was not imposing any positive obligation to carry out the services. However, if the architect chose to undertake the services, then she was under a duty to do so exercising reasonable skill and care.

The decision is a cautionary tale highlighting the dangers of providing gratuitous advice or services. However, the facts were
quite specific – this was not a case of ‘off the cuff’ advice and there was an expectation of future payment. Nevertheless professionals must take care.

BPE Solicitors and another v Hughes-Holland (in substitution for Gabriel)

Supreme Court – the SAAMCO principle in the context of a solicitors’ negligence action

Mr Gabriel made a loan to a company believing that it was to be used to develop a property and would be secured by a first charge. His solicitors, BPE, became aware that the loan was to be used to purchase the property, but inadvertently confirmed Mr Gabriel’s misunderstanding. Mr Gabriel lost his money and sued BPE.

The Supreme Court confirmed that showing a loss would not have occurred but for the breach was not always sufficient. Lord Sumption restated the distinction between ‘advice’ cases, where the adviser is responsible for guiding the whole decision-making process, and ‘information’ cases, where the adviser contributes only a limited part of the material on which his client will rely in deciding on a transaction. The SAAMCO principle provided that in the latter, the professional was only liable for the financial consequences of the information being wrong even if the information was critical to the decision to enter into the transaction.

BPE did not assume responsibility for Mr Gabriel’s decision to lend. They were only legally responsible for confirming his assumption. Even if used to fund the development, Mr Gabriel would still have lost his money. Accordingly, his loss was not within the scope of BPE’s duty, but arose from his commercial misjudgement.

The Supreme Court’s decision represents a re-statement of the SAAMCO principle, but also a clarification that the ‘information’ distinction will apply to solicitors more frequently than had been previously understood. The decision expressly overruled previous conveyancing-related cases where the SAAMCO cap was held not to apply if the failure was to provide information which would have shown that the transaction was fraudulent or not viable.

Excalibur Ventures LLC v Texas Keystone Inc and others

Court of Appeal – litigation funders to pay costs on the same basis as the funded party

Excalibur, a shell company with no assets, pursued Texas Keystone for a share (valued at US$1.6 billion) in an oil exploration block in Kurdistan. The claim failed dramatically and Excalibur was ordered to pay the defendant indemnity costs following judicial criticism of its conduct in the action.

Various funders had provided £17.5 million as security for the defendant’s costs on commercial terms in return for a share of any litigation proceeds. There was an estimated shortfall of £4.8 million in respect of the defendant’s costs, representing the difference between standard and indemnity costs, and the issue was whether the funders were liable to pay this shortfall given ‘they’ had not acted improperly.

Upholding the lower court’s decision, the Court of Appeal held that the funders were jointly and severally liable to pay costs on the indemnity basis. The derivative nature of litigation funding means funders will ordinarily pay costs on the same basis as the party they choose to fund.

The Court of Appeal also held the costs order could be made against funders’ parent companies and not only those named in the funding agreement. It dismissed the suggestion that this would “pierce the corporate veil”.

Gard Marine & Energy Ltd v China National Chartering Co Ltd

Supreme Court – breach of a safe port warranty and subrogation

The vessel grounded after leaving the port at Kashima, Japan. On leaving the port the vessel encountered long waves and severe northerly gales, leaving it unable to safely navigate the channel out of the port and it ultimately grounded, becoming a total loss.

Gard Marine & Energy Ltd appealed the decision of the Court of Appeal that the time charterer and the sub-charterer had not breached the safe port warranty when the vessel left the port.

The Supreme Court unanimously dismissed the appeal on the basis that there was no breach of the safe port undertaking. It was common ground that the test for breach of the safe port undertaking was whether the damage sustained by the vessel...
was caused by an ‘abnormal occurrence’. The Supreme Court held that ‘abnormal occurrence’ should be given its ordinary meaning: something rare and unexpected that the notional charterer would not have in mind. The test was not whether the events that caused the loss were reasonably foreseeable. The two weather conditions had not occurred together at that port before, and no vessel had previously suffered damage due to the conditions at the port.

The Supreme Court also held by a majority that as the demise charter provided joint insurance no subrogated claim could be brought against the time charterer. The majority decision was that the nature of the underlying contract prevented a recovery between co-insureds, with a minority holding that the indemnity meant that the demise charterer had no loss to recover.

**Howmet Ltd v Economy Devices Ltd and others**

*Court of Appeal – manufacturer not liable for defective product*

Factory owners claimed damages against a thermolevel manufacturer. The device was installed in heated industrial tanks to detect if the liquid level was too low and a fire hazard. Following two earlier failures of which engineering and facilities managers were aware, there was a change in procedure and float switches ordered. Before they were installed, there was a catastrophic fire when an empty tank’s heater was switched on. The thermolevel failed and no one was around to extinguish the fire. The High Court found that the thermolevels were unreliable and unacceptable as a critical safety device and that the factory personnel’s knowledge of this was attributable to Howmet. As Howmet had no longer relied on the thermolevel to prevent fires, the chain of causation was broken.

Howmet’s appeal failed. The Court of Appeal confirmed that the collective knowledge of operators and mid-level managers should be attributed to the company. The Court of Appeal considered that the manufacturer of a product with a hidden defect that causes damage should be liable for that damage. If the defect is discovered before damage is caused the manufacturer is not generally liable. Where an end user is aware of the defect and continues using the product, resulting in damage, the manufacturer no longer has a continuing duty to the end user. However, if the end user has no alternative, the position may be different.

This decision highlights the responsibility of those who knowingly use defective goods and, depending on the facts, offers a shield for manufacturers and insurers facing subsequent negligence claims.

**Impact Funding Solutions Ltd v AIG Europe Insurance Ltd / Wood v Capita Insurance Services Ltd**

*Supreme Court – speaks twice on contract construction*

Guidance has been given on the application of policy exclusions in *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd.* In this solicitors’ professional indemnity case, the issue was whether a liability owed by solicitors to Impact Funding, who had provided loans to the solicitors’ clients pursuant to a litigation disbursement funding agreement with the solicitors, fell within the ‘trading debts’ exclusion to the wide indemnity cover provided by the policy or whether the liabilities were professionally incurred. The majority in the Supreme Court held that it was a trading liability that the minimum terms were not intended to cover.

Expressing a provision as an exception did not mean that there should be a pre-disposition for narrow construction; contra proferentem had no role in this case. In an illustrative explanation, the Supreme Court referred to a contract to paint housing woodwork ‘except the garage doors’. The words were simply a convenient way of defining the obligation. In the CAR insurance context, this decision suggests certain exemption clauses might not be construed narrowly against the insurer. The words of exception may simply be seen as a way of delineating the scope of the operative ‘All Risks’ cover in respect of the Works. This may particularly affect the correct approach to the exclusion of corrosion, wear and tear and gradual deterioration to the Works (which may be regarded as ‘the garage doors’).

In *Wood v Capita Insurance Services Ltd,* the Supreme Court considered the tension between the literal and contextual approaches to contract interpretation. The case involved the interpretation of an indemnity in a share purchase agreement relating to an insurance broker. Was the indemnity triggered only by a customer’s claim or complaint or did it include compensation paid following self-reporting of potential mis-selling? The Supreme Court held that the indemnity was restricted to a loss arising from a customer complaint.
The objective meaning of the contractual language had to be ascertained. A court had to look both at the literal meaning of the words and also the contract as a whole. Depending on the nature, formality and quality of its drafting, more or less weight should be given to elements of the wider context. Where there were rival meanings, a court could reach a view about which construction was more consistent with business common sense. A court must also be alive to the possibility that a party has made a bad bargain. It did not matter whether the analysis commenced with the factual background and the implications of rival constructions (the business common sense approach) or a close examination of the relevant language in the contract, so long as the court balanced the indications given by each. In a professionally drafted contract, more weight is likely to be given to the literal meaning (of both the clause and contract as whole). Although this clarification is helpful, applying the approach to an individual clause is likely to remain difficult.

**Leeds Beckett University v Travelers Insurance Co Ltd**

*Inevitable damage is not accidental*

Following construction in 1996, large cracks appeared in the university’s student accommodation block in December 2011. The cause was sulphate attack and leaching to below ground concrete blockwork over a period of ten years due to flowing ground water. While it was unknown at the time the policy incepted, contemporaneous construction records revealed a history of significant water problems during construction. The building was deemed to be structurally unsafe and was demolished.

In August 2011, the university had taken out an all risks insurance policy with Travelers which covered various properties including the accommodation block. The university’s claim, estimated at £10 million, was declined.

Mr Justice Coulson dismissed the university’s claim under its all risks policy. The building had not suffered ‘accidental damage’. He held that ‘accidental’ means an event that occurs by chance, which is non-deliberate and provided eight guiding principles. As the blockwork had been subject to mobile ground water since completion of the building in 1996, the damage was already inevitable when the policy was taken out in August 2011.

The court went on to offer a non-binding view as to how the various exclusions to the policy would have applied if the damage had been accidental. Both the gradual deterioration and faulty/defective design exclusions applied on the facts. Gradual deterioration should not be restricted to situations where the property insured deteriorates without any external interaction with the environment. Insurers were also not required to prove negligence in order to rely on the faulty/defective design exclusion.

The various exclusions reintroduced into the cover ‘subsequent damage’ brought about by causes which were not otherwise excluded. The court indicated that ‘subsequent damage’ has to be damage that is different and distinguishable from the original damage and must result from a new or different cause, in order to be brought back within the cover.

DAC Beachcroft successfully acted for Travelers.

**Lowick Rose LLP (in liquidation) v Swynson Ltd and another**

*Supreme Court – legal effect of the extinguishment of a loss in an accountants’ negligence claim*

Relying on a due diligence report prepared by the accountants, Swynson made a loan to EMSL. For tax reasons, Mr Hunt, who owned and controlled Swynson, subsequently took over the loan, providing funds to EMSL to enable it to repay the loan to Swynson. Experiencing financial difficulties, EMSL was later wound up.

Mr Hunt and Swynson sued the accountants. The accountants conceded negligence but argued that Swynson had suffered no loss as it had been repaid by EMSL. The trial judge, pointing to the letter of engagement between Swynson and the accountants, ruled that no duty of care was owed to Mr Hunt. He, and the Court of Appeal, allowed the claim, however, on the basis that the repayment of the Swynson loan should be ignored as it amounted to a ‘collateral benefit’, sufficiently unconnected with the investment made on the back of the accountants’ negligence.

The Supreme Court disagreed and held that the repayment of the Swynson loan could not be regarded as collateral and could not be ignored. Swynson therefore suffered no loss. The Court also held that this was not a case of ‘transferred loss’ (ie, Swynson’s loss could not be treated as having been ‘transferred’ to Mr Hunt) and that there was no claim for unjust enrichment (ie, the accountants had not been unjustly enriched through the extinguishment of Swynson’s loss). In
doing so, the Supreme Court has given important guidance on the legal concepts of unjust enrichment, transferred loss and collateral benefits. Key to those findings was the fact the repayment of Swynson’s loans discharged the very liability which represented Swynson’s loss and the finding that Mr Hunt’s loan to EMSL was a legitimate, entirely independent, transaction for valuable consideration.

This Supreme Court decision confirms the importance the courts place on separate legal personalities, the corporate veil and a strict interpretation of legal rights and principles. Lord Sumption stressed the need for precedence and legal certainty. ‘Armchair justice’ found no sympathy in this commercial context. It is also a salutary reminder of the crucial part played by letters of engagement in restricting a professional’s duty of care to its client.

Mic Simmonds v AJ Gammell

Court upholds arbitrators’ decision on meaning of ‘one event’

The reinsured insured the Port of New York, owners of the land on which the World Trade Center stood, during the period of the 9/11 attacks. Following 9/11, the Port received around 10,000 claims from employees involved in the rescue and clean-up operation alleging that the Port had negligently failed to provide adequate protective equipment or proper training and they suffered personal injury (mainly respiratory injuries) as a result. These claims were accepted by the reinsured.

The reinsurance contract defined ‘Loss’ as ‘loss, damage, liability or expense or a series thereof arising from one event’. The reinsurer disputed that the claims and the 9/11 attacks arose from ‘one event’ and argued the claims could not be aggregated.

The dispute was referred to arbitration and by a 2:1 majority the arbitrators concluded that the claims arose from one event, namely the 9/11 attacks. The reinsurers appealed to the court arguing that the arbitrators had made an error of law.

Although the general facts of the case were fairly fact-specific, it does reiterate that there is a discretion to use a broad-brush approach if evidence is not perfect. In addition, the Court of Appeal again used this as an opportunity to endorse stand-alone excess waiver products. They confirmed that whether the Claimant had heard of such products was irrelevant, and that the admission and acceptance of the stand-alone products should be the norm.

Another judgment, flagged up in last year’s report, provides further endorsement of the ‘lowest reasonable rate’ being applied when assessing basic hire rates. They also provide useful guidance on the applicability of rates evidence where zero excesses cannot be found, as well as the relevance of stand-alone excess waiver products.

In McBride, the Court of Appeal held that Stevens v Equity was consistent with previous decisions and that it had brought the area of basic hire rates into the modern era by focusing on internet searches. It also held that the inability to obtain a nil excess from a mainstream supplier should not as a matter of principle lead to the credit hire company recovering the credit hire rate in full. The guidance is that we should treat the nil excess separately from the comparison exercise between the default credit hire rate and the basic hire rate with an excess. The Court of Appeal did accept it will normally be reasonable for the claimant to seek a nil excess, and that the question would then be how much should be recoverable as the cost of purchasing the nil excess. In McBride, the Defendant had failed to demonstrate that a stand-alone product would have been available to waive the excess. Instead, the £10 extra charged by Accident Exchange was allowed. However, the Court of Appeal has held that a court may well decide to allow the cost of a stand-alone product.

In Clayton, the judge at first instance used a novel approach to arrive at his award. Critical of both sides’ evidence, he awarded a basic hire rate with a 10% uplift notionally to deal with the fact the rates evidence did not come with a zero excess. He also awarded a 15% uplift on the basis the rates obtained by the Defendant were for 28 days rather than seven.

The matter was appealed by Accident Exchange on five grounds. In short, they accused the District Judge of being biased and that he was not entitled to add arbitrary figures just because the Defendant had not obtained adequate evidence. However, the appeal was dismissed in full on the basis the District Judge was entitled to draw upon his considerable experience of dealing with credit hire cases. These were reasonable adjustments.
Dismissing the appeal, the court concluded that the arbitrators applied the correct legal test, having considered the relevant case law on aggregation wording. They were entitled to find that there was a significant causal link between the respiratory claims and the 9/11 attacks to constitute ‘one event’, even though they may not be the proximate cause of the claims. The arbitrators’ decision was not unreasonable and therefore the court would not interfere.

Motor Insurers’ Bureau v Moreno
Supreme Court – compensation is calculated according to the law of the state where the accident occurred

Ms Moreno, a UK resident, suffered life-changing injuries whilst on holiday in Greece, when she was run over by an uninsured driver. Liability for the accident was not in dispute. The appeal to the Supreme Court brought by the Motor Insurers’ Bureau (MIB) related to whether the quantum of Ms Moreno’s damages was to be determined in accordance with Greek or English law, the former being compatible with Rome II as “the law of the country in which the damage occurred” but the latter following the interpretation in Jacobs v Motor Insurers’ Bureau.

The confusion arises in respect of Article 7 of the Fourth Motor Directive, which confirms that the injured party may apply for compensation from the compensation body in the member state where he resides, whereas reg 13(2) of the enabling domestic legislation, the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 states: “The compensation body shall compensate … as if it were the body authorised … and the accident had occurred in Great Britain”.

The Supreme Court looked at the holistic development of the Motor Directives and concluded that Jacobs was construed too narrowly. Reg 13(2) must be read as having a purely mechanical or functional operation. Once it is concluded that the scheme of the Directives is to provide a consistent measure of compensation, there is no need to regard reg 13(2)(b) as having any purpose or effect. As such, Ms Moreno’s entitlement to compensation should be measured on a consistent basis by reference to Greek law, that being the law of state in which the accident occurred.

R&S Pilling (t/a Phoenix Engineering) v UK Insurance Ltd
Court of Appeal – ‘use’ of a vehicle

Thomas Holden was a mechanical fitter employed by R&S Pilling t/a Phoenix Engineering. Mr Holden undertook some repairs to his own vehicle in Phoenix’s workshop. During this work, sparks from welding equipment ignited flammable material inside the car. The fire took hold very quickly and soon spread to adjoining premises causing substantial damage. As a result of the fire, Phoenix’s property and public liability insurers paid out sums in excess of £2 million.

Phoenix sought a full recovery from Mr Holden’s motor insurers, UK Insurance Limited (UKI), on the basis that the motor policy covered the losses suffered by Phoenix. UKI disagreed and commenced proceedings against Mr Holden, seeking a declaration that its policy did not cover such losses.

Phoenix was joined as a second Defendant and, in turn, they brought a claim against Mr Holden for an indemnity in respect of the sums paid out by their insurers.

At first instance, the court found that the repairs being undertaken did not constitute ‘use’ of a vehicle on the basis that the car was not being operated in any way.

Phoenix appealed the decision. Delivering the leading judgment in Phoenix’s favour, the Master of the Rolls found that the express wording of the UKI policy and the cover provided by it should not be restricted by reference to the provisions of the Road Traffic Act. Therefore, Mr Holden’s liability to Phoenix in respect of damage caused by the fire was covered by his policy of motor insurance. Applying the reasoning in Vnuk v Triglav that ‘use of the vehicle’ in section 145(3) of the Road Traffic Act must include any use of the vehicle consistent with its normal function, the repair of the vehicle by Mr Holden in these circumstances was ‘use’ of a vehicle and so the policy should respond.

RBS Rights Issue Litigation
Legal advice privilege: the importance of knowing ‘the client’

In this high-profile group action, numerous disgruntled shareholders brought claims against RBS and its directors to recover investment losses following the RBS rights issue just prior to the 2008 financial crisis. The shareholders sought damages under the Financial Services Markets Act alleging that the prospectus issued by RBS in April 2008 was misleading and inaccurate.
During the litigation, the shareholders sought disclosure and inspection of interview notes, transcripts and other records relating to internal investigations involving interviews by or on behalf of RBS with current and former employees. RBS resisted disclosure on the basis that the documents attracted legal advice privilege or alternatively they were lawyers’ privileged working papers.

The High Court followed the Court of Appeal decision in Three Rivers No 5 and held that interviews between the employees and RBS’s lawyers in the course of an internal investigation were not covered by legal advice privilege because the employees were not ‘the client’ for privilege purposes. It also confirmed that legal advice privilege did not extend to information provided by employees (current or former) to, or for the purpose of being placed before, a lawyer.

The narrow scope of legal advice privilege requires careful consideration of who the client is at the outset of the investigative process. How information is gathered, the manner in which that information is recorded and by whom should be determined by the answer.

 Liability was admitted by the Home Department, so the case turned on the issue of compensation. The judge followed Vidal-Hall v Google, finding that compensation for distress arising from the breach was available. He then considered the threshold for compensation for distress and found that the Claimants must prove a de minimis level of distress to justify an award.

The judge also ruled that compensation may also be available for the family of the individuals named in the spreadsheet provided they too reached the de minimis level of distress required, because their identity and the general area in which they lived could be inferred from the lead asylum applicant named in the spreadsheet.

The Claimants were awarded between £2,500 and £12,500 compensation each. If all 1,600 individuals on the spreadsheet had claimed compensation and received similar awards, the total compensation payable by the Home Department could have been between £4 million and £20 million. If the families had also sought compensation, this figure may have been even higher.

On appeal, however, the Court of Appeal affirmed that Bolam was not to apply to issues of consent and that the Claimant’s mother would have placed significance on the increased risks of delaying labour, with the result that an earlier delivery would have taken place and the Claimant would have avoided a hypoxic ischaemic brain injury. In reaching this decision, emphasis was placed upon factors such as the mother’s education, her conduct throughout the treatment and evidence during the litigation (even though this arguably applies hindsight). Further litigation will be required as parties grapple with how these factors are applied to other cases, and explore their limits.

In this case, the Court of Appeal has laid out further guidance on whether the particular patient would have attached significance to a risk of treatment. The Court of Appeal had to consider what would have happened had further ultrasound scanning taken place (as it should have done) in the lead up to the Claimant’s birth. At first instance, applying the Bolam test, the court accepted that the consultant obstetrician’s management plan would not have changed, even if he had performed further ultrasound scans, and the Claimant’s outcome would have been the same – with the case being dismissed accordingly.

On appeal, however, the Court of Appeal affirmed that Bolam was not to apply to issues of consent and that the Claimant’s mother would have placed significance on the increased risks of delaying labour, with the result that an earlier delivery would have taken place and the Claimant would have avoided a hypoxic ischaemic brain injury. In reaching this decision, emphasis was placed upon factors such as the mother’s education, her conduct throughout the treatment and evidence during the litigation (even though this arguably applies hindsight). Further litigation will be required as parties grapple with how these factors are applied to other cases, and explore their limits.

In January 2007, the Claimant underwent a surgical procedure to insert an artificial left hip comprising metal components manufactured by the Defendant. One of these components was a steel femoral shaft called a ‘C-Stem’. In January 2010, that stem fractured, necessitating further surgery.

TLT and others v Secretary of State for the Home Department (1) The Home Office (2)
‘De minimis’ level of distress justifies award for misuse of personal data

A spreadsheet containing the personal data of almost 1,600 asylum seekers was accidentally published on the internet. Six of those named brought claims for misuse of private information and breach of the Data Protection Act 1998.

Webster v Burton Hospitals NHS Foundation Trust
Court of Appeal – consent in medical malpractice

In 2015, the ground-breaking decision in Montgomery v Lanarkshire Health Board established that a doctor’s duty, when obtaining a patient’s consent to treatment, was to ensure that the patient had been told of the ‘material’ risks of the treatment. This was to be determined by reference to both an objective reasonable person and the particular patient.

Wilkes v DePuy International Ltd
Artificial hip component not defective

In January 2007, the Claimant underwent a surgical procedure to insert an artificial left hip comprising metal components manufactured by the Defendant. One of these components was a steel femoral shaft called a ‘C-Stem’. In January 2010, that stem fractured, necessitating further surgery.
The court explained that whether a product was acceptably safe involved some balancing of risks and benefits. No medicine or medical device was free from risk and safety was necessarily a relative concept.

The need for such a risk-benefit analysis has long been a matter for debate when applying the Product Liability Directive. The court considered that the failure of the hip was unfortunate, but no evidence was found of any manufacturing or design defect. The fact that a safer design could be envisaged did not mean that the current product was defective. The Defendant manufacturer was therefore not liable. It is anticipated that this first instance decision will be widely welcomed by manufacturers and producers.

**Zurich Insurance Plc v Maccaferri Ltd**

**Court of Appeal – interpretation of notification provisions**

In September 2011 an incident occurred involving an industrial staple gun hired from the Defendant. The Defendant was required to notify Zurich “as soon as possible after the occurrence of any event likely to give rise to a claim”.

Less than a week later, the Defendant was made aware of the incident and that the gun was being kept for investigation, but little more was known. By January 2012, it was aware that someone had been injured and asked for copies of any HSE investigation reports. By June 2012, it knew solicitors had been instructed to bring a claim and that the gun was being forensically tested. It did not receive a letter of claim until July 2013, at which point it was forwarded straight to the insurers. The insurers declined indemnity on the basis that the Defendant had breached the notification condition precedent.

An ‘event likely to give rise to a claim’ is one that objectively presents at least a 50% chance of a claim being made against the policyholder. The Court of Appeal held here that at the time of the event in September 2011 a claim was not likely, as there was not at least a 50% chance a claim would be made. Further, the wording did not impose on the Defendant an ongoing obligation to re-assess the chances of a claim as the Defendant’s knowledge of the event became more detailed. There was therefore no obligation to notify the insurers of the event when the Defendant had accumulated sufficient information that it knew, or ought to have known, that the accident was likely to give rise to a claim.

If insurers wish to impose an ongoing obligation on policyholders to notify them as soon as it becomes apparent that a previous event might be likely to give rise to a claim, policy conditions will need to be drafted to that effect. Insurers may want to review and revise their notification provisions in light of this decision.

**X v Kuoni Travel Ltd**

**Vicarious liability and the responsibility of tour operators**

Following the Supreme Court’s decisions in *Mohamud v Wm Morrison Supermarkets Plc* and *Cox v Ministry of Justice* in 2016, the High Court considered whether a tour operator should be vicariously liable for the criminal assault of a holidaymaker by an employee of a hotel.

The action of the employee, an electrician who sexually assaulted a guest when he offered to show her a short-cut to reception, was not part of his contractual duties, and the tour operator’s duties did not include its warranting the safety of the guests at all times. The Defendant was not in breach of its duties under the Package Travel, Package Holiday and Package Tour Regulations 1992 and the absence of close connection between the employee’s duties and the attack saw neither the hotel nor tour operator vicariously liable for the actions of the employee.
Other developments

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Corporate liability for economic crime consultation

In early 2017, the Ministry of Justice called for evidence on the need for reform of corporate liability, holding corporations to account if they fail to prevent economic crimes such as fraud, false accounting and money laundering carried out by their employees, agents and representatives. Under the current law, prosecutors must show that individuals who are the directing mind and will of the company had the necessary knowledge of the criminal activity. Critics argue that this identification doctrine makes it difficult to successfully prosecute large multinational corporations.

Corporations are criminally liable if they fail to prevent bribery (s7 Bribery Act 2010) and, from autumn 2017, if they fail to prevent the facilitation of tax evasion (Criminal Finances Act 2017). These are strict liability offences and do not require proof of the directing mind of the company. It is anticipated that, if introduced, a failure to prevent economic crime offence would follow this model.

Given the Government’s commitment to stamp out corporate abuse and economic crime, companies should review their internal procedures and controls now to ensure that they are ready for the expected reforms in this area.

Discount rate changes

The discount rate, the assessment of the net return on investment from which multipliers for future loss are set, was the subject of dramatic change from 20 March 2017. The reduction of the rate from 2.5% to -0.75% saw multipliers increase dramatically.

This was, however, followed by a consultation paper, which closed on 11 May 2017, reviewing the legal framework for setting the discount rate and raising such questions as the level of investment return realised by claimants in practice, how the rate should be set in the future, who should set it and the use of Periodical Payment Orders rather than lump sum settlements. The Civil Liability Bill may present a vehicle which can be used to review the basis on which the discount rate is set.

Farmer Review of the UK Construction Labour Model

The title to the report by Mark Farmer published in October 2016 makes its findings clear – ‘Modernise or Die – Time to decide the industry’s future’. The report was commissioned in 2015 by a government concerned about the construction industry’s structural vulnerability to skills shortage. Following the vote for Brexit, those concerns have grown with the Royal Institution of Chartered Surveyors predicting that the UK construction industry could lose 8% of its workforce post Brexit.

The report finds that “workforce attrition exacerbated by an ageing workforce” means that we could see as much as a 25% decline in the available labour force within a decade. Low productivity, poor predictability, low margins and fragmentation are also identified as critical features of the industry.

The report concludes that the construction industry is at a “critical crossroads”. It is a damning verdict on the state of the industry, but also recommends ten wide-ranging reforms to make it more efficient and to recruit more people.

A key recommendation is that the industry, clients (private and public) and government should work together to improve relationships and increase levels of investment in research and development and innovation in construction by changing commissioning trends from traditional to pre-manufactured approaches. The report suggests that the housing sector (spanning all tenures) should be used as a scalable pilot programme for this more integrated approach. To help promote innovation, the report recommends an increased use of project bank accounts and new methods of project level insurance to “re-aggregate the natural fragmentation that may exist around transactional and legal liability interfaces that often stand in the way of innovative procurement and product assembly models”.

None of the problems identified are new. However, if Farmer is right, action is required now.

Fixed Recoverable Costs Review

Lord Justice Jackson’s Review of Civil Litigation Costs, published in January 2010, saw him recommend a number of reforms; many of these were implemented in 2013, including the introduction of costs budgeting and fixed recoverable costs in many low value personal injury claims within the fast track.

In his latest review, Jackson LJ has considered the extension of fixed recoverable costs to the rest of the fast track and to lower-value multi-track claims. His report, delivered to the Master of the Rolls on 31 July 2017, sets out his proposals to extend fixed costs to the whole of the fast track and to create a new intermediate track for certain cases up to
a value of £100,000 to which fixed recoverable costs will apply. Further details of his proposals are set out in our Procedure, costs and funding section.

The proposals on the scope of fixed costs and the basis on which they are calculated will be the subject of consultation by the Ministry of Justice. Further extension of fixed costs seems inevitable in light of the recommendations made.

**Insurance-linked securities regime planned for UK**

The Government is pressing ahead with plans to introduce a regime for insurance-linked securities (ILS) in the UK. ILS offer insurance and reinsurance companies a means of transferring risks to the capital markets, typically in the form of debt securities. These are usually associated with catastrophe risks, but may also include mortality and other risks. Globally, ILS and other forms of alternative reinsurance capital are valued at around $70 billion, about 12% of overall reinsurance capital, but currently there is no framework for ILS vehicles in the UK.

In essence, the model follows that adopted in other jurisdictions, and recognised under Solvency II. An insurer or reinsurer enters into a risk transfer agreement with an Insurance Special Purpose Vehicle (ISPV), which then raises capital from investors through the issue of ILS (generally in the form of debt instruments or preference shares).

The novelty from a legal perspective in the UK is the creation of a regime of protected cell companies, which allow separate ‘cells’ of ring-fenced assets and liabilities to operate under a single limited company. Regulatory oversight is provided by creating a new regulated activity of insurance risk transformation, with dual regulation of ISPVs by the Prudential Regulation Authority and the Financial Conduct Authority.

**Payment Protection Insurance**

Payment Protection Insurance (PPI), intended to cover loan repayments in cases of redundancy, illness, disability or death, has been one of the financial industry’s largest mis-selling scandals. Since early 2007, the Financial Conduct Authority (FCA) has fined major providers for their selling practices and more recently for failing to disclose the high commissions earned.

The FCA has now set a final deadline of 29 August 2019 for bringing PPI claims. It is running a two-year public awareness campaign from August 2017 and fresh waves of new claims are anticipated. Alongside this, there will be waves of calls by claims companies eager to handle these remaining PPI claims.

In May 2017, the Information Commissioner’s Office (ICO) issued a record fine of £400,000 to Keurboom Communications Ltd for breaching the Privacy and Electronic Communications Regulations. Keurboom had made almost 100 million nuisance calls relating to the recovery of PPI compensation (and road accident claims), concealed its identity to avoid complaints and failed to co-operate with the ICO’s investigation.

Keurboom is now insolvent and the ICO is working with the insolvent practitioners to try to recover the fine. This is not the first nuisance call company to declare insolvency after being fined, and the Government is seeking to address this problem by empowering the ICO with sanctions to hold company directors personally accountable for nuisance calls and to levy fines of up to £500,000 for breach of the Regulations. At the time of writing, it is anticipated that the Unsolicited Marketing Communications Company Directors Bill, which will give the ICO these enhanced powers, will be passed shortly.

Additional PPI claims will not be welcomed by the banking industry or their insurers, but it is hoped that the FCA’s deadline will bring some finality to this scandal. Claims companies, their directors and their D&O insurers should ensure their employees abide by the relevant data protection laws. Fines issued by the ICO will not be covered by a D&O policy, but D&O insurers may have to advance defence costs to directors involved in any ICO investigation.

**Sentencing guidelines – counting the cost of HSE prosecutions**

The impact of the Sentencing Council’s guidelines for health and safety, corporate manslaughter, food safety and hygiene offences, effective from 1 February 2016, can be seen clearly in the level of sentences imposed.

Calculated taking into account the organisation’s turnover and culpability, together with the level of harm or potential harm, fines imposed have included:

- £280,000 on a small company (turnover £2-£10 million) for its failure to manage the risk of exposure to vibration
• £1,600,000 on a medium-sized company (£10-£50 million) following an accident in which Harrison Ford suffered a fractured leg whilst filming Star Wars
• £5,400,000 on a very large company (turnover significantly in excess of £50 million) whose employee was killed when a trench in which he was laying ducting collapsed
• £5,000,000 on Merlin Attractions (turnover £400 million) following the Alton Towers rollercoaster accident.

The sanctions imposed for failing to protect the health of employees and the public will continue to be significant, and business of all sizes will be penalised at a level at which the fine is clearly felt.

Solicitors’ professional indemnity insurance
Significant changes to the minimum terms and conditions (MTCs) of solicitors’ professional indemnity (PI) insurance have been on the cards for many years. In 2014, the Solicitors Regulation Authority (SRA) proposed major changes including a reduction in the level of mandatory PI cover and a shorter period of run-off cover. Met with strong opposition, the proposals were put on hold. There was concern about the erosion of the gold standard of protection provided to clients with no evidence of a corresponding reduction in premiums for the insured solicitor.

In preparation for the next consultation this autumn, the SRA has published its analysis of PI insurance trends based on ten years of claims data. This reveals that the cost of PI insurance particularly affects small firms, with sole practitioners facing the highest premium as a percentage of turnover (7%). The SRA’s stated aim is a proportionate approach to setting MTCs, making sure that adequate and appropriate cover is provided.

A minimum level of cover is likely to be retained although the SRA may again try to reduce it, possibly to £500,000. Proposals to restrict compulsory cover to certain types of clients could also be resurrected. The cost of run-off cover will need to be addressed, particularly with the closure of the Solicitors Indemnity Fund in three years’ time, but there are no easy answers. Aggregation may be considered, and the recent Supreme Court’s decision in AIG v Woodman may have brought some stability.

Previous opposition suggested that the amendments were unlikely to achieve the SRAs objectives and had not been fully thought through. Would the proposals actually reduce the cost of PI cover? Would solicitors’ clients accept a reduction in the minimum level of cover? The Council of Mortgage Lenders has already expressed concerns and will be monitoring the situation closely and the Law Society has raised concerns as to how the data was obtained, collated, evaluated and interpreted.

Some changes to the MTCs seem inevitable, but it remains to be seen whether the next consultation will result in radical change to the MTCs or simply further tinkering around the edges.

Vnuk – consultation on changes to domestic road traffic legislation
The Department for Transport’s (DfT) consultation on options to address the unintended consequences of Vnuk closed on 13 April 2017. The Government is only consulting on the two most likely options:

• Comprehensive option – this would allow Vnuk to stand and lead to a huge extension of the number and type of vehicles that require compulsory motor insurance, as cover would be required for all motorised vehicles being used for their normal function – for example, ride-on lawnmowers and dodgems.

• Amended Directive option – the Motor Insurance Directive (MID) would be narrowed to require insurance only for vehicles used in traffic situations. This would still be wider than the definition in the Road Traffic Act 1988.

Pending its response and proposed way forward, the DfT has recently published a summary of responses to its consultation, which overwhelmingly supports the Amended Directive option over the Comprehensive one. Meanwhile, the European Commission (EC) has extended its Inception Impact Assessment of June 2016 to include a wholesale review of the MID under its REFIT programme. If the EC follows the Comprehensive option, it is unlikely that the UK will follow suit post Brexit as it is disproportionate, will result in increased fraud and uninsured/untraced driving, and will put a strain on the Motor Insurers’ Bureau’s levy.
Whiplash – consultation reforming the claims process

Set against a backdrop of rising living costs, the previous Government sought to tackle the long-standing problem of whiplash claims frequency in November 2016 by announcing a long-anticipated programme of radical reforms.

While the consultation paper ‘Reforming the soft tissue injury (whiplash) claims process’ sought industry stakeholder engagement on points of detail, the Ministry of Justice made it clear that removal or reduction of the entitlement to claim general damages for pain, suffering and loss of amenity and increasing the small claims track for this type of injury claim were decided government policy and not subject to debate.

As a result of the consultation findings, the Government decided to opt for a tariff of damages for minor whiplash claims (up to 24 months in duration) rather than legislating to remove the entitlement to general damages altogether, albeit that the proposed compensation awards are significantly reduced from Judicial College Guideline figures.

The new Government has already indicated that it intends to press on with these reforms in the stand-alone Civil Liability Bill, which had not been published at the time of going to press. The proposed definition of whiplash contained within the previous draft legislation will require amendment as the reference to ‘upper torso’ arguably excludes claims involving lower back and/or shoulder injuries, which account for around half of all soft tissue injuries from road traffic accidents.

In addition, the Government still intends to increase the small claims track limit for road traffic accident related personal injury claims to £5,000. The limit for all other types of personal injury claims is also to be increased, but to £2,000 for at least the time being. The new limit will apply in theory to all types of injury claim including claims for industrial disease and clinical negligence, although in practice such cases would routinely be allocated to the fast track or even multi-track once litigated.

The Government also took the decision to ban the making or receiving of ‘pre-med’ offers in minor whiplash injury claims.

The proposed reforms were quickly incorporated within the Prisons and Courts Bill, which subsequently fell away on the announcement of the snap general election, owing to a lack of time before the dissolution of Parliament.
The stand-out development in the last 12 months has been the Lord Chancellor’s announcement in September 2016 that the fixed recoverable costs regime will be extended to “as many civil cases as possible”. This will clearly have a significant effect on all those involved in litigation.

In this section, we explore what is proposed for fixed recoverable costs and also look at how the current measures are working in practice before providing a brief update on other key developments and cases over the last year affecting civil procedure, costs and funding.

**Fixed recoverable costs**

**Horizontal and vertical extensions**

In November 2016, Lord Justice Jackson was commissioned to carry out a review of fixed recoverable costs. He was asked to consider the areas of litigation into which such costs should be extended and the value of claims to which such a regime should apply (horizontal and vertical extensions). On 31 July 2017 he published his findings in his report ‘Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs’.

Jackson LJ had previously proposed (in a lecture to the Insolvency Practitioners’ Association in January 2016) a single fixed costs grid for all multi-track cases up to £250,000 rather than separate grids for different areas of work. At that time he also proposed appropriate staged fees, based on his experience and various sources, which ranged from £18,750 for claims up to £50,000 to £70,250 for claims up to £250,000. Certain factors would then be added to those base figures to reflect the complexity either of a certain type of case or in an individual case.

In his latest report, Jackson LJ has recommended that all claims in the fast track should now be subject to a fixed recoverable costs regime and he has proposed a fixed costs grid for all fast track cases, divided into four bands based on the complexity of the case. However, he has been persuaded that costs management is now working effectively and saw no need for a “great leap forward” as regards extending fixed costs outside the fast track. He has therefore limited his proposals for vertical extension to claims up to £100,000 that would sit within a new intermediate track. He has set out proposals for the types of case that will fall into the track and a new streamlined procedure that should be applied. The Government will now need to consider the report and consult on any of the proposals that it decides to take forward.

A pilot is to be introduced to test the use of a capped costs scheme for High Court claims up to £250,000 in a limited number of courts. It will run for two years. The procedure will be similar to that for the shorter trials scheme. The pilot is based on summary assessment with costs capping rather than recoverable fixed amounts. Capped amounts have been set for each stage of the action with an overall maximum cap of £80,000. Participation will be voluntary with both parties having to agree to enter the scheme; they will not, however, have an unfettered right to leave the pilot.

Unsurprisingly, there have remained questions over the costs payable, and 2016 saw the Court of Appeal rule in Bird v Acorn Group Limited (2016), that the listing of a disposal hearing on the giving of directions sees the costs move from the ‘pre-allocation’ to ‘post-listing’ stage, missing the intermediate ‘post-allocation pre-listing stage’. In Qader and others v Esure Services Limited (2016), the Court of Appeal confirmed that fixed recoverable costs do not apply to cases allocated to the multi-track following the commencement of proceedings, no matter the claim's value, and in Sharp v Leeds City Council (2017) it ruled that fixed costs apply to applications for pre-action disclosure on claims to which fixed recoverable costs apply. Jackson LJ did not address these issues in his latest report, stating that it was outside his remit and an issue for the Civil Procedure Rule Committee to address.
The impact of Part 36 of the Civil Procedure Rules (CPR) on fixed recoverable costs was clarified in the Court of Appeal’s judgment in Broadhurst and Taylor v Tan and Smith (2016) and the first instance decision in Car Craft Test Centre v Trotman & Advantage Insurance Co (2017); claimants who beat their own Part 36 offer should recover fixed recoverable costs up to the expiry of the offer, and costs assessed on the indemnity basis thereafter, whether the offer is accepted late or beaten at trial. Jackson LJ made it clear in his report that a policy decision was needed to address this issue. He did, however, express his view that indemnity costs should be replaced with a percentage uplift of say 30-40%. This allows for claimants who make effective Part 36 offers to be rewarded but maintains certainty for litigants.

Other areas of reform

Online Solutions Court – pilot
A pilot of the Online Solutions Court, proposed by Briggs LJ in his Final Report on the Civil Courts Structure Review in July 2016, was scheduled to be launched on 31 July 2017. This is the first of a series of pilots that will take place over the next couple of years. The main aim of the pilot is to test the software. Cases invited into the pilot will be limited to specified claims under £10,000 involving a single unrepresented user against another single unrepresented user. Users will be informed that they are entering a pilot as a controlled group from the outset and will be able to leave the pilot at any time. The pilot has been drafted within the confines of the CPR. In contrast, the Online Court’s rules will not be included within the CPR but will be drafted in simpler language that is more user-friendly.

Other pilot schemes
The shorter trials pilot scheme (STS) and flexible trials pilot scheme (FTS) have both been extended by a further year; they are now due to end on 30 September 2018. The aim of the STS is that trial will be reached within ten months of the issue of proceedings. In November 2016, this was achieved in the first case to reach trial under the scheme. The one-day hearing took place just seven months after issue.

Although it has not yet been used, the Financial Markets Test scheme that was introduced in October 2015 is to be extended for a further three years with a widened scope. The availability of such a facility is considered to be important and useful by users of the Financial List.

CE-File
The pilot for electronic working continues in the courts based in the Rolls Building. Since 25 April 2017, use of CE-File, the new electronic filing and case management system, has become mandatory for professional users (but not litigants in person) for issuing and filing, forcing professional users to adopt a new style of working. The system seems to be working and we can expect it to be extended to other courts in the future.

The Business and Property Courts
From 2 October 2017, the specialist civil courts and the lists of the Chancery Division will become known as the Business and Property Courts of England and Wales, acting as a single umbrella for the specialist courts across England and Wales and allowing for more flexible cross-deployment of judges with suitable expertise to sit on appropriate business and property cases. Initially there will also be Business and Property Courts in Birmingham, Manchester, Leeds, Bristol and Cardiff, with plans to expand to Newcastle and Liverpool. There is a clear intention for a greater number of cases to be handled in the regions. Again, it is being said that “no case should be deemed too big to be tried outside London”.

This new structure, together with the Financial List and the STS and FTS, is intended to enhance the UK’s reputation for international dispute resolution.

Litigation funding
Damages-based agreements (DBAs), a form of ‘no win, no fee’ agreement where recoverable fees are calculated as a percentage of any damages recovered by the client, have remained unpopular amid uncertainty over the legality of hybrid-DBAs, which would allow lawyers to charge some fees on a traditional basis with the balance falling under a DBA. Despite the Civil Justice Council suggesting recommendations to the Government in September 2015 to improve DBA take-up, this has not progressed further and their use remains almost non-existent.

Meanwhile, the funding market has seized on the difficulties with the DBA model by developing innovative products which achieve the same result as hybrid-DBAs and give law firms some financial certainty. ‘WIP funding’ is one such concept. Here, funders and law firms agree a funding arrangement which allows the firm to drawdown at various intervals to cover its costs and disbursements and, in return, the funder
takes a significant return under the DBA entered between the firm and the client. Another concept is ‘DBA insurance’, which enables law firms to insure a portion of the fee risk under the DBA. If unsuccessful or the claim cannot be enforced, the firm is reimbursed the insured portion of its fees. If successful, the firm recovers its share of the contingency fee less the insurance premium. Policies typically cover around 50% of fees to ensure there is alignment of risk between the firm and insurer.

Third-party funding (TPF), where funders pay the legal fees and expenses involved in pursuing litigation or arbitration in exchange for a stake in the claim, continues to be a good solution for many claimants, particularly given many law firms’ reluctance to use DBAs. Now a booming industry in the UK and globally, growth has been fuelled by hedge funders entering the market and funding groups of cases on a portfolio basis, rather than individual claims as previously.

Criticism over the absence of statutory regulation of the TPF market remains, with only seven of the 20 funders in the UK subscribing to the Association of Litigation Funders’ voluntary code of conduct. Since most funds come from highly sophisticated investors looking to maximise their profits, some commentators are concerned that disproportionate sums are flowing back to the funders’ pockets.

Given the growth of TPF, some satellite litigation regarding the role of funders in claims was inevitable and over the last year the courts have decided the following salient points:
- Funders should not expect to remain anonymous in proceedings. In two recent decisions, the court held that the identity of funders should be revealed so that defendants can apply for security of costs against the funders (Wall v RBS and the RBS Rights Issue Litigation).
- The court will order security for costs against a funder where the funder is effectively the ‘real party’ to the litigation because of its financial interest in the outcome and there is a risk that an adverse costs order would not be satisfied.
- Funders should ordinarily expect to pay costs on the same basis as the party they are funding, which will include paying costs on an indemnity basis if so ordered (Excalibur Ventures LLC v Texas Keystone and others).

While the TPF market has grown ever larger, The Law Society, Bar Council and Chartered Institute of Legal Executives set up a joint working group in July 2016 to examine the viability of Lord Justice Jackson’s recommendation to create a contingent legal aid fund (CLAF) as an alternative funding option for claimants. The group’s early investigations suggested mixed views as to the use and viability of CLAF with concerns over prohibitive administrative costs, the need for rigorous merit testing and problems over funding low value claims. The group invited feedback via a survey which closed in January 2017 but no formal recommendations have since followed.

Costs and costs management

Costs management orders
A body of case law is being developed in relation to costs management and budgets. One particular area the courts have had to grapple with, when considering making a costs management order, is the issue of incurred costs. By the time of the case and costs management conference, substantial legal costs may well have been incurred. The Court of Appeal decision in Sarpd Oil v Addax Energy SA (2016) suggested that if a party did not contest the incurred costs when the costs management order was made then they would lose the opportunity to do so at a detailed assessment. This has since been clarified by a rule change in the CPR which confirms that the court’s power to approve or manage a budget relates only to costs yet to be incurred. The court can, however, record comments about the incurred costs which will be taken into account in subsequent assessment hearings. In his recent report reviewing civil litigation costs, Jackson LJ noted that there have been significant improvements in costs management in the multi-track. He made no immediate proposals but recommended a further review, once his latest recommendations were bedded in, to consider developing a grid of fixed recoverable costs for incurred costs in different categories of case.

Another issue has been what weight should be given to a costs budget at a detailed assessment. In Merrix v Heart of England NHS Foundation Trust (2017), the judge held that the court cannot depart from the receiving party’s last approved or agreed budget unless it was satisfied that there was ‘good reason’ to do so. This decision was endorsed by the Court of Appeal in Harrison v University Hospitals Coventry & Warwickshire NHS Trust (2017). The Court confirmed that a costs judge would require ‘good reason’ to depart from an approved costs budget, irrespective of whether the paying party wishes to pay less or the receiving party wishes to recover more than the budgeted amount. The Court
also held that incurred costs were never approved by a costs management order and should be subject to detailed assessment in the usual way, without any added requirement of ‘good reason’ to depart from the budget. The obiter comments in Sarpd had gone too far. Finally, the Court confirmed that when assessing the incurred costs and considering the budgeted costs, the costs judge would still have to consider whether the resulting aggregate figure was proportionate. This was described as a potential safeguard for the paying party.

What will be considered to be ‘proportionate’ remains a difficult issue and further cases will be needed to provide clarity.

**Mediation**

The Court of Appeal has again sent out a message that the courts expect parties to engage fully with the mediation process. In Thakkar v Pattel (2017), where the Defendants were found to have “dragged their feet to the point where mediation was abandoned”, the Court of Appeal held that the judge was entitled to reflect the fact that the Defendants were primarily to blame for the failure to mediate in his costs order. A softer approach was taken by the Court of Appeal in Gore v Naheed & Another (2017) in which it was held that a failure to engage in mediation, even if unreasonable, did not automatically result in a costs penalty. Nevertheless it is a factor to be taken into account by a judge when exercising his costs discretion and is likely to be given significant weight. It will be a high-risk strategy to refuse an offer to mediate.

**Insurers’ liability for costs**

A non-party costs order has been made against product liability insurers in XYZ v Travelers Insurance Company Ltd (2017). Here, some of the claims made in the group litigation against the insured were uninsured as they fell outside the period of insurance cover. The court held that the insurers’ continued involvement in the defence of those uninsured claims justified the non-party costs order in favour of the successful claimants of the uninsured claims.

**Costs assessment — electronic bills**

A new electronic format for a bill of costs looks likely to be introduced in April 2018 for detailed assessments in the Senior Courts Costs Office and the County Court for costs incurred after that date. The current pilot has attracted very limited uptake with only three bills in electronic format filed to date. For some firms of solicitors this will require a change in practice when recording time. Those insurers who currently require panel solicitors to bill using task-based systems should consider aligning their requirements with those of the new bill.

**Other key developments**

**Court of Appeal**

In an attempt to reduce the Court of Appeal’s backlog of cases, changes were made to the CPR in October 2016. A key change was the removal of the automatic right to an oral hearing if an application for permission to appeal was refused. The application is now determined on the papers unless the Court considers an oral hearing appropriate. The suggestion of raising the threshold test for permission to “a substantial prospect of success” was dropped and it currently looks like it will stay that way. Changes have also been made to the destinations of appeals so that, subject to some exceptions, appeals from both interim and final decisions in the County Court will lie to the High Court instead of to the Court of Appeal.

**Hot-tubbing**

A sub-committee of the Civil Procedure Rule Committee (CPRC) is continuing to look at the hot-tubbing of experts, where evidence is given concurrently. The sub-committee has concluded that it is not feasible or desirable to identify classes of case that are suitable for hot-tubbing. Whilst accepting that hot-tubbing should not be imposed, the CPRC agreed in principle that it should be promoted where possible and appropriate.

**Court fees**

A dramatic increase in probate fees which would have meant an increase from the current flat fee of £155 or £215 to up to £20,000 for some estates in England and Wales had been proposed. The controversial proposals were dropped in April 2017 as there was not enough time for the legislation to go through Parliament. The Ministry of Justice had admitted that the income currently raised through probate fees fully covered the cost of the probate service, but said that it needed to go further to reduce the £1.1 billion burden on taxpayers to cover the cost of funding the courts and tribunals system. The legality of the rise was questioned and the change dubbed a new death tax. Whether the proposal will be revised remains to be seen, but it is clear, following on from the substantial rises in issue fees last year which resulted in an issue fee of £10,000 for claims valued at £200,000 or more, that court fees generally are seen as an attractive route to raise revenue.
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Acknowledgements and further enquiries

As Helen Faulkner mentioned in her Welcome, an overarching theme of this year’s report has been InsurTech and special thanks should go to our InsurTech team for their assistance. Please contact Mathew Rutter for further details.

For further information on any of the other topics raised, please contact our individual service line heads.

This year, we are also delighted to have received such insightful comments from our clients and market leaders. It is by working together that we can obtain the best overview of where the industry is at the moment and what action needs to be taken. If you would like to get involved in our thought leadership projects and events in the future, please let me know.

This report is only possible due to the contributions and assistance of so many individuals across the firm and Legalalign Global and our thanks go to all of them. The information in this report is correct as at the end of June 2017.
INSURTECH
- THE USE OF DRONES WILL MOVE BEYOND VISUAL LINE OF SIGHT
- ROBOT RISKS - SILENT CYBER INCREASES INSURERS' EXPOSURE TO EVER CHANGING TECHNOLOGY RISKS - INNOVATIVE UNDERWRITING MUST UNDERPIN SMART CONSTRUCTION - DIGITISED SUPPLY CHAINS IMMINENT - INCREASED SOPHISTICATION IN M&A
- CYBER PRODUCTS - BIG DATA - BIG RISK - DIRECTORS BEWARE INCREASED CYBER RISK - PRIVACY AND CYBER SECURITY ISSUES WILL COMBINE IN THE BUILD UP TO THE GDPR - CYBER THREATS WILL MANIFEST AS AN INCREASING RISK OF CYBER TERRORISM - AND AN INCREASING FREQUENCY OF SYSTEMIC IT OUTAGES, EITHER MALICIOUSLY OR BY OPERATOR ERROR - AWARDS OF COMPENSATION FOR PRIVACY AND SECURITY BREACHES INCREASING - PENSIONS - REVOLUTIONARY TECHNOLOGICAL INNOVATION - REINSURERS WILL FACE INCREASED EXPOSURE TO RISK ACCUMULATION DUE TO AUTOMATION - INCREASE IN PERSONALISED AND DIGITISED HEALTHCARE - INSURTECH: CHANGE IS INEVITABLE, BUT MORE BY EVOLUTION THAN REVOLUTION - IS THE SMALL CLAIMS TRACK THE APPROPRIATE VENUE FOR INJURY CLAIMS? - LIMITED HANDS-OFF DRIVING TO BE PILOTED ON MOTORWAYS BY 2019 - SUBROGATION CLAIMS PORTALS SET TO REDUCE LIFE CYCLES AND CLAIMS COSTS - THE ROBOTS ARE COMING - AUTONOMOUS VEHICLES - AI - BLOCKCHAIN: THE FUTURE