CLYDE&CO

Financial institutions and D&O

International Review - March 2019

Contents

01. Foreword

02. UK regulatory landscape

04. Emerging exposures

10. Case summaries

14. A global snapshot

Foreword

Financial institutions and directors and officers continue to face increasing exposure with the growing willingness of both the courts and regulators to hold them more accountable. This has led to a corresponding increase in exposures for FI and D&O insurers. This ever-evolving risk landscape sits within a time of great uncertainty for FIs and D&Os in the UK, with the unknown outcome and impact of Brexit placing increased demands on time and resources.

Against this backdrop, we provide an overview of the current regulatory landscape in the UK and the emerging exposures for FIs and D&Os, in addition to summarising the important UK cases from the last year and looking at what to expect in 2019. Finally, we provide a bird's eye view of the key issues we are seeing for the FI/D&O market across our global network.

UK regulatory landscape

Ten years on from the global financial crisis, the regulatory picture has completely changed and continues to evolve. Following a year of significant regulatory and corporate governance reform, 2019 looks set to be the year where the implementation of these changes are keenly assessed by regulators and action taken where necessary.

In terms of the types of financial institutions under the spotlight, the Financial Conduct Authority (FCA) is currently showing an interest in: investment advisors and managers, who are coming under increased scrutiny in relation to complex products; asset management and investment consultancy firms (the latter being subject to a FCA market study which led to a reference to the Competition and Markets Authority (CMA)); the wholesale insurance broker sector (though the FCA closed its market study in February 2019 having not found any evidence of significant competition concerns in the sector); retail lenders; and pensions transfer advisers. The FCA has highlighted retail conduct and unauthorised business (noting, in particular, fraudulent binary options trading as a particular risk area going forward) as priorities, along with its longstanding priority to deal with financial crime and money laundering. The FCA's recent enforcement activity also points to a focus on capital market disclosure issues in terms of their accuracy and timeliness and we expect to see more actions in the future in relation to this.

FCA opening more cases

2017/18 saw the FCA open more enforcement investigations than ever before[1] and this trend looks set to continue into 2018/2019. There are a number of reasons for this increase: the low threshold for the FCA to initiate an investigation, the changing modus operandi of the regulator to diagnose misconduct at an early stage, along with a drive by the regulator to be seen to be strong in the face of criticism in recent years. However, it could also indicate a lack of resources to conclude cases as the open total at the end of the year is the highest since the FCA's inception. Indeed, the FCA announced in its Business Plan 2018/19 that it will be using £14m from its Ongoing Regulatory Activity budget, i.e. its enforcement budget, for Brexit preparations, by "reprioritising, delaying or reducing non-critical activity". Nonetheless, the opening of more investigations invariably presents a risk of subsequent enforcement action and may lead to claims under insurance policies for investigation costs in turn.

Increased use of non-pecuniary measures

During the 2017/18 period, the increase in the number of cases opened has not necessarily translated into more fines, with the number of financial penalties issued remaining fairly even with 2016/17 levels. The total amount of the fines, however, was much lower than in previous years.[2] Whilst the lower level of fines can, in part, be explained by the fact that previous totals have included large fines for FX and LIBOR manipulation, cases which are largely at an end now, it is also a reflection of the FCA's increasing use of its non-pecuniary enforcement measures, which can include limiting, varying, suspending or cancelling the authorisation of a firm or individual. The FCA may also require firms to compensate customers or investors. 2017/18 showed the highest levels of non-pecuniary enforcement since the FCA came into being and mid-year figures obtained by NERA Consulting suggest that this is continuing into 2019. As such, whilst the exposure to fines may have levelled, firms may increasingly find themselves subject to the significant burden of redress schemes, which can not only result in firms paying out huge sums of money but which also require a considerable amount of administration.

[1] FCA's Enforcement Annual Performance Report 2017/18 states the total number of open cases has increased from 410 open as at 1 April 2017 to 504 open at 31 March 2018.

[2] 2017/18 = £69.9m, 2016/17 = £181m

Fines target more individuals

In recent years, in terms of the number of fines, more individuals than firms have been fined, in line with the FCA's priority to investigate and sanction the individuals at the heart of the wrongdoing by an entity. Not only is the FCA continuing to pursue current investigations and litigation relating to individuals' misconduct around benchmarks, but the Senior Managers & Certification Regime (SM&CR), which aims to make individuals more accountable for their conduct and competence, is already heralding a new chapter of accountability for senior executives and key non-executive directors, who risk fines or bans from the industry unless they can show they took all reasonable steps to prevent wrongdoing within their teams. 2018 saw the first actions brought under the SM&CR and we are likely to see many more actions against senior managers over the coming years, especially when the SM&CR comes into full effect (with its extension to solo-regulated firms) in December 2019.

Corporate governance is a priority

Corporate governance is central to maintaining market integrity and promoting a good culture within firms and in 2018, 46 more "culture/governance" investigations were opened by the FCA, bringing the total open as at 31 March 2018 to 61, compared with 15 open at the end of the previous period, reinforcing that this is a priority for the regulator. Set against the backdrop of significant corporate governance reforms, FIs and D&Os can expect to face scrutiny if they do not comply with the new Code and legislation. Particular exposures from the corporate governance reforms include regulatory actions for systems and controls failings and increased shareholder activism. Senior management can also expect more actions due to greater enforcement powers to be given to the regulator to investigate and sanction directors for any failure to discharge their duties to prepare and approve true and fair corporate reports and to deal openly and honestly with auditors - currently, the Financial Reporting Council (FRC), the accounting watchdog, only has the power to sanction directors that it regulates, but the Kingman Review, the results of which were published in December 2018, recommended that a new regulator be set up, the Audit, Reporting and Governance Authority (ARGA), which would be empowered to sanction all directors for such failures, whether or not those directors happen to be accountants.

Increased cooperation between regulators

The LIBOR and FX-fixing investigations witnessed multiple regulators, across different jurisdictions, seeking to simultaneously investigate and fine firms. These investigations bore witness to an unprecedented rise in cooperation between international regulators. In 2017/18 the FCA received 1,064 requests from over 80 different regulatory and law enforcement authorities in 63 countries. Regulators have for some years now been cooperating on a much greater level, particularly those tasked with stamping out bribery and corruption. There is no doubt that the ability to investigate and take appropriate action was made easier by the global sharing of information and resources. This is a trend that is only set to continue amongst all regulators, both in the UK and globally.

Emerging exposures

FIs and their D&Os are subject to an increasing array of exposures. In this article, we pick out some of the key exposures that will likely be impacting the FIDO liability space in the coming years.

Climate change

There is growing concern about the physical, economic, social and political impact climate change will have in the near future. As social and judicial attitudes harden, the perceived contributors to climate change face significant exposures, including liability risks that have major implications for businesses and their D&Os.

Today, many companies are vulnerable to climate-related risks in some way, even if they are not operating in the energy sector or other carbon-intensive parts of the world economy. Their boards have responsibilities to shareholders and other stakeholders to understand, measure, mitigate and report on those risks. It will become increasingly important for D&Os to demonstrate that these risks have been considered, and actions taken to mitigate them where necessary and, crucially, that asset values are represented fairly on their balance sheets and in their other market disclosures. On this issue, the G20 and the Financial Standards Board established the Task Force on Climate-Related Disclosures a few years ago to develop recommendations for voluntary climate-related financial disclosures.

Asset managers could face claims if they have purchased stocks without fully considering the risks of a changing climate to their portfolios or who are deemed to have held onto assets too long, where climate change risks subsequently result in sharp price corrections. Even financial advisers and auditors could be vulnerable to lawsuits, if they are seen to have failed in their duty of care when carrying out due diligence prior to investments being made, or when audits are subsequently conducted.

UK regulators are focusing closely on this issue, with the PRA publishing a paper on the impact of climate change on the banking sector in September 2018, and the FCA publishing a discussion paper on climate change and green finance in October 2018.

Against this backdrop, 2019 is likely to see more regulatory and stakeholder scrutiny of disclosure of climate change risk. We have already seen litigation and regulatory action in the United States and Australia and can expect the UK to follow.

More broadly, the increasing D&O and E&O liability exposure will in turn pose a significant challenge for insurers, with traditional products and exclusions stretched and tested by this growing exposure.

Cryptocurrencies

Currently, the transfer, purchase and sale of cryptocurrencies are not regulated in the UK, but firms may find themselves under the FCA's jurisdiction if they sell regulated investments with a cryptocurrency element. In late December 2018, the FCA announced it was investigating 18 companies involved in the sale of cryptocurrencies. This comes amid growing concerns about the consumer and market risk of cryptocurrencies, with the Commons Treasury Select Committee also urging the Government to give more powers to the FCA to regulate this area, describing the market as the "Wild West". The EU's top securities watchdog, ESMA, has also listed cryptocurrencies as one of its top priorities.

2019 will likely therefore be a turning point for cryptocurrencies in which we see a number of consultations launched as the FCA grapples with how to regulate cryptocurrencies in order to protect consumers. Indeed, the first such major consultation paper was issued in January 2019 and will remain open until April. The

consultation focuses on whether cryptoassets would be considered "Specified Investments" under the Regulated Activities Order, "Financial Instruments" under MIFID II, or if they come under the Payment Services Regulations or the E-Money Regulations.

As a priority, the FCA is also contemplating a ban on the sale of derivatives based on cryptocurrencies to retail consumers and transferable securities, which are linked to certain digital assets.

As the cryptocurrency market slowly gains broader acceptance, insurers' views remain divided over the insurability of this industry. Presently, the cryptocurrency market mostly consists of custodians and exchanges. Whilst it may not yet be large enough to provide substantial revenues for insurers, the insurance market is seriously considering whether and how it can support these emerging risks. With over USD 1 billion worth of cryptocurrencies reportedly stolen during 2018, the demand for insurance is on the rise. Crypto-related businesses are typically seeking cover for crime/cyber-related incidents and technological failures, as well as more traditional civil liability and D&O covers.

Cryptocurrencies present unique challenges for insurers; critical historical data to price and assess these risks is absent. Also, the uncertain (and quickly evolving) regulatory position worldwide complicates matters. Whilst regulators are keen not to stifle innovation, the establishment of formal guidelines and standards may greatly assist in the provision of insurance.

Cyber security and resilience

There is no immediate end in sight to the escalation in tech and cyber incidents that are affecting UK financial services. In the year to October 2018, firms reported a 187% increase in technology outages to the FCA, with 18% of all the incidents reported to the FCA being cyber-related. Whilst this can, in part, reflect a more robust attitude to reporting, it still clearly demonstrates the extent of the issue.

The FCA does not expect firms to never be subject to cyber incidents; instead the FCA and Bank of England's joint discussion paper (July 2018) on operational resilience made the point that it is about setting 'impact tolerances' and firms demonstrating that they can 'recover and learn from operational disruptions'. Nonetheless, supervisory assessment of firms' operational resilience is a priority for regulators and enforcement action will be taken as necessary. An example of this was seen in October 2018, when the FCA fined Tesco Personal Finance plc £16.4m for failing to exercise due skill, care and diligence in protecting its personal current account holders against a cyber attack.

In addition to corporate failings, D&Os could also be subject to regulatory action for failing in their supervisory duty to protect data of the organisation and its customers, or for a lack of proper controls to prevent cyber attacks and fraud. D&Os may also be at risk of breach of duty claims (though note that derivative actions generally are hard to establish), and if the company goes into insolvency as a consequence of the cyber incident, directors may also face claims by liquidators. Directors may also be exposed to privacy claims, which we comment on further below.

Cyber – Gaps in cover / "silent" cyber risk

In the event of a cyber breach, FIs and D&Os may find that there are insurance challenges. Surveys repeatedly show that there is mixed understanding of what cyber insurance may or may not cover. Contributing to this lack of understanding is the often held belief amongst organisations that they are covered for cyber risks through a more general indemnity insurance policy. Traditional policies may provide cover (even where this was not intended or expressly included by way of endorsement/ extension) but organisations run the risk that they find themselves without appropriate cover in the event of a cyber incident. Looking at professional indemnity policies (PII), for example, these are designed to cover failures to act with reasonable skill and care and are triggered by acts relating to the provision of professional services. Further, PII covers

professionals for losses incurred by liability to third parties. As such, they would not usually respond to first party losses incurred in dealing with a cyber event, possibly leading to coverage disputes with insurers and gaps in cover.

From an insurer's perspective, although many non-cyber traditional insurers have contemplated cyber exclusions, including ISO exclusions, specific cyber exclusions for the most part have not yet become industry standard in many classes of business. The recent increase in widespread attacks, affecting multiple industries and geographic locations, may lead to an environment where non-cyber insurers increasingly add exclusions to make certain to avoid possible unintended exposures, frequently referenced as "silent/non-affirmative" cyber exposures. Losses resulting from the NotPetya cyberattack, for example, impacted various non-cyber lines of business.

Regulators are keen for insurers to ensure that this risk is acknowledged and managed. In mid-2017, the PRA released a supervisory statement (SS4/17) detailing its expectations of firms regarding cyber insurance underwriting risk – both affirmative and non-affirmative/silent. In short: "the PRA expects firms to be able to identify, quantify and manage cyber insurance underwriting risk." More recently, in January 2019, the PRA published its follow-up survey results, in which the PRA emphasised that the "responsibility is on firms to progress their work and fully align with the expectations set out in SS4/17." This includes insurers developing an action plan by H1 2019 with clear milestones and dates by which action will be taken to reduce the unintended exposure to non-affirmative cyber risk. These plans may be reviewed by the PRA.

Artificial intelligence

To address cyber risk, companies may start to employ artificial intelligence (AI). Technology and the development of AI will transform the way financial services firms and financial institutions deliver services, and dealing with cyber risk is only one way in which AI may be utilised. Traditional concepts of liability will be challenged and adapted to reflect changing service delivery models. Innovation brings new challenges for directors to decide the extent to which AI is used in the business and which platforms should be adopted. New technologies may result in new exposures for directors.

Data protection

Financial institutions and service providers to the financial industry process a vast amount of personal data on a daily basis. Much of the data processed is confidential and sensitive. This means there are increased risks and a focus on this sector by supervisory authorities under the General Data Protection Regulation (GDPR) and the UK's Data Protection Act 2018 (DPA 2018).

Companies and their D&Os are exposed to regulatory action and claims from data subjects and shareholders. For example, they could, in the event of a breach (whether or not caused by a cyber event), be held liable for:

- failing to implement (and constantly review) effective systems and controls to prevent breaches
- the financial impact on the business due to a large fine or reputational damage
- failing to respond effectively to a breach, risking exposure to claims from shareholders and data subjects
- failing to notify in time under the mandatory notification requirements in the GDPR
- vicarious liability for rogue employees who expose data
- breach of the two new criminal offences in the DPA 2018: intentionally or recklessly re-identifying individuals from anonymised data; and altering records with the intention of preventing disclosure of that information following a subject access request. These offences will incur unlimited fines and may be 'reportable' offences (i.e. they may be included on a criminal record check).

Breaches may also result in E&O and D&O claims, calling into question the insurability of such fines. For more information on this, please see our article "Insurability of fines and penalties for breaches of the GDPR: A UK and German perspective".

Broadening of corporate criminal liabilities

There has been an increased push to broaden corporate criminal liabilities in the UK in recent years. Following on from the Bribery Act 2010 (BA), the Government recently introduced penalties for enablers of failed tax avoidance schemes in the Finance (No.2) Act 2017 and passed legislation, the Criminal Finances Act 2017 (CFA), rendering companies criminally liable if they fail to prevent the facilitation of domestic or overseas tax evasion whether or not they were aware of or involved in the misconduct. This broadening of criminal liabilities for corporates is set to continue, with more "failure to prevent" offences in discussion.

The CFA is modelled on the BA (which is currently under review by the House of Lords Select Committee to assess whether it is effectively deterring bribery) where the sole defence available to the organisation will be for it to show that it had in place "adequate" (BA) or "reasonable" (CFA) procedures to prevent the criminal act, placing the onus on organisations to ensure that their own procedures (and where necessary those of their associated persons) are adequate/reasonable.

In 2018, in the case of *R v Skansen Interiors Limited*, this defence was considered for the first time by a jury with Skansen pleading that it had "adequate procedures" in place at the time, especially in light of the company's small size and geographical reach, which it argued did not require it to have sophisticated measures in place. The jury was unconvinced and returned a guilty verdict. The case demonstrates that no matter the size of the company, for the defence to succeed, the company needs to be able to demonstrate that it undertook a full risk assessment of the potential for bribery within the company, and implemented policies and procedures commensurate with this risk. The case also highlights that self-reporting does not guarantee that charges will not be brought; it is very fact dependent.

These corporate criminal offences have an inevitable knock on effect for D&Os who may be "hung out to dry" in the pursuit of cooperation by the corporate to facilitate a deal. This can be readily seen in the use of Deferred Prosecution Agreements (DPAs), and the recent Tesco case is a perfect example, though the Serious Fraud Office (SFO) may not have got the ending it wanted.

In the UK, DPAs can only extend to corporations, not individuals, and the Code behind the process spells out that genuine cooperation includes taking action against culpable individuals. Tesco agreed a DPA with the SFO which allowed Tesco to escape criminal prosecution in return for a £129m fine and £85m compensation for investors. The DPA was damning in relation to three former executives, stating that they were aware of and dishonestly perpetuated the misstatement leading up to the trading update on 29 August 2014. Indeed, for Tesco to obtain a DPA in a fraud case, it had to be able to attribute wrongdoing to the senior managers as the controlling will and mind of the company.

The trial of the former executives got under way last year, but subsequently collapsed after the SFO failed to demonstrate that the senior executives knew of the crimes alleged - a significant embarrassment for the SFO (which then had further cause for embarrassment when it announced that it would not be prosecuting any individuals in relation to the SFO's long-running (and very expensive) investigations into Rolls Royce and GlaxoSmithKline). In the wake of their acquittal, the former Tesco executives have raised questions around the fairness of the DPA process, where they are named in a Statement of Facts as having committed wrongdoing before the evidence has been examined at trial.

It is questionable whether the Tesco experience will prompt reform of the DPA, but no doubt lessons will be learned by the SFO and they will likely welcome more "failure to prevent" type-offences with no need to prove a directing mind. It could also make other companies wary of entry into a DPA if it seems unlikely that convictions will be secured.

Spate of corporate insolvencies will put D&Os under scrutiny

The retail sector has suffered significantly in recent times and a number of well-known and long-established retailers collapsed during 2018 (House of Fraser, Toys R Us, Maplin, Poundworld and Orla Kiely to name but a few). Reasons cited for the difficulties experienced in this sector include weakening consumer demand, high rents and occupancy costs for bricks-and-mortar retailers, a move towards online retailing and heightened price competition. The UK insolvency regime requires insolvency professionals to consider the conduct of all of the insolvent company's directors. The reason for this is two-fold.

Firstly, they must consider whether there are grounds to take action against any of the directors on behalf of the company (for example, for wrongful trading, fraudulent trading, misfeasance or breach of fiduciary duty). Secondly, they must submit reports to the Secretary of State on the conduct of every director (including shadow directors) who acted in that capacity in the three years prior to insolvency regardless of their conduct. These reports are then considered by the Insolvency Service and, where the conduct suggests that they may be unfit to be concerned in the management of a company, investigation, enforcement and disqualification may follow.

For these reasons, an increase in corporate insolvencies invariably means closer scrutiny of director conduct and additional exposures for D&O insurers. In addition to the retail sector, and following the collapse of Carillion in early 2018, the outsourcing sector is under increasing pressure and scrutiny.

The effect of insolvency on pensions is also a growing area of regulatory and governmental scrutiny. Following the release of its white paper (Protecting Defined Benefit Pension Schemes, March 2018), the Government, in February 2019, published its response in which it confirms that the Government will introduce two new criminal offences to prevent and penalise mismanagement of pension schemes:

- The first targets individuals who wilfully or recklessly mishandle pension schemes, endangering workers' pensions by such things as: chronically mismanaging a business, allowing huge unsustainable deficits to build up, taking huge investment risks, or a combination thereof. Those liable will face a custodial sentence of up to seven years' imprisonment or an unlimited fine for this offence. This brings the punishment in line with similar offences in financial services.
- The second, which will attract an unlimited fine, will target individuals who fail to comply with a Contribution Notice, which is issued by The Pensions Regulator (TPR) requiring a specified amount of money to be paid into the pension scheme by that individual. The Government will also introduce a new civil penalty of up to £1 million for this offence.

TPR will also be granted enhanced investigative and information-gathering powers. Given TPR's recent more aggressive stance, boards should be prioritising pension scheme arrangements to limit exposures as far as possible.

Sexual misconduct claims

With rising numbers of sexual misconduct allegations and increased awareness of gender pay inequality across all areas of business, media and political life, insurers can expect increased exposure linked to sexual discrimination and harassment claims and class actions in 2019.

Claims of this nature may give rise to a wide range of exposures for D&Os. Sexual misconduct by a company executive or employee can result in legal claims not only against the accused but also against the company itself, for example, civil claims from victims, criminal proceedings, claims by the shareholders acting on behalf of the company (if the alleged misconduct has negatively impacted on the value of the shareholders' investment). Other senior executives may also find themselves facing similar claims if they have turned a blind eye or if they have failed to follow procedures or act on warnings or complaints or, in the event of an insolvency, liquidators could look to bring claims

against the former board members in connection with their failings to adequately handle complaints/allegations over sexual misconduct. Companies and D&Os may also face external investigations by regulators into a firm's internal processes and handling of complaints.

The extent to which insurers will be liable to indemnify insured organisations and/or their D&Os in respect of these claims will depend upon the breadth of the cover purchased by the company. D&O liability insurance may cover some sexual misconduct-related claims, in particular linked to employment practices liability (EPL) against D&Os, which fall under broad management liability cover or, under a specific EPL extension (often sub-limited). Such an extension would typically cover EPL claims (subject to any relevant exclusions, e.g. for bodily injury or conduct) based on acts, errors or omissions occurring in the course and scope of the insured person's employment. However, this clause presents obstacles if the alleged misconduct occurs outside of working hours.

There may be reputational issues and insurers may receive requests to indemnify public relations costs to minimise this kind of reputation damage, if a company has purchased entity "crisis management" cover. In addition, side C cover (cover for the entity) might respond to a US securities claim alleging a fall in share price as a result of negative publicity following a sexual misconduct scandal involving a D&O. However, "insured vs insured" exclusions might preclude cover for claims made by employees against a D&O and/or the entity.

Case summaries

There has been a number of interesting decisions in the FIDO liability space over the last 12 months. Below we examine some of the key decisions from 2018 and take a look at what we can expect in 2019.

Financial Institutions

Mis-selling

Property Alliance Group Limited v Royal Bank of Scotland [March 2018]

Following regulatory investigations into the manipulation of LIBOR, a number of claimants bringing mis-selling claims have applied to amend their statements of case to include allegations in respect of LIBOR manipulation. In the first cases to come before the English courts, claimants focused on implied representations they allege were made by the respective banks as to the integrity of LIBOR, claiming misrepresentation and negligent misstatement (although contractual claims have also been made).

In *PAG v RBS*, the Court of Appeal accepted that there could be an implied term that the bank was not manipulating LIBOR but said that, in this case, the relevant term was not proven to be breached. In relation to the LIBOR claims advanced, whilst the Court of Appeal agreed with PAG that there was sufficient conduct on RBS' part for representations to be implied (holding the implied representation to be to the effect that RBS "was not itself seeking to manipulate LIBOR and did not intend to do so in future"), the scope of such representation was said to be limited to the currency of the relevant swap, in this case GBP. As PAG failed to make out its case that RBS had manipulated GBP LIBOR, the claim was dismissed.

As such, if a claimant can show that a financial institution manipulated LIBOR for the particular currency that a swap is referenced to (e.g. through regulatory findings), then there may be grounds to rescind the derivatives contract. The finding in this case that a narrow implied representation could exist is therefore important.

Parmar v Barclays Bank PLC / Abdullah v Credit Suisse [May 2018 & Nov 2017]

In *Parmar* a bank successfully defended a swap mis-selling case made by individuals, the first case involving a section 138D Financial Services and Markets Act 2000 (FSMA) claim by a private person for alleged breaches of the FCA's Conduct of Business Sourcebook Rules (COBS) to come to trial. The court dismissed the claims, finding, in line with previous decisions in banks' favour, that there was no "advice" and, here, that there was no duty on the bank to disclose its calculations as to the risk the bank faced should the Parmars have defaulted on the swaps.

That is not to say that there has been no success for claimants in this area. In *Abdullah v Credit Suisse* (an earlier case from November 2017), the claimants partially succeeded in their claim. The claimants, a wealthy Kuwaiti family, had entered into various structured capital-at-risk products at the bank's recommendation. Following a restructuring of their portfolio recommended by the bank, they subsequently decided not to meet a margin call, which resulted in them losing their investment. It was claimed that the bank had breached various aspects of the COBS Rules. The court concluded in relation to the suitability point that the claimants willingness to invest in the structured products was predicated on the bank's assessment that it was unlikely that there would be a margin call. The Bank's assessment was misleading and the products did not match their "conservative risk appetite" so it followed that the claimants were entitled to damages.

Unauthorised collective investment schemes

Financial Conduct Authority v Capital Alternatives Ltd & 15 Ors [March 2018]

As reported in our May 2018 Review, in a warning to all who are tempted to operate an unlawful collective investment scheme, the Court in *Financial Conduct Authority v Capital Alternatives* made restitution orders under section 382 FSMA 2000 and ordered the directors to pay a total of £16.9m. In October 2018, the Court of Appeal refused the defendants' leave to appeal, meaning that the FCA is now free to proceed to obtain the money from the defendants to pay compensation to the affected consumers.

Quincecare duty

Singularis v Daiwa [February 2018]

The Court of Appeal dismissed the appeal by the bank that it was liable in negligence after making payments to third parties from a designated account held on behalf of the respondent company. Daiwa had made payments to third parties from a designated account held on behalf of the company, Singularis, and was liable in negligence after the company went into liquidation. Although the company's director had acted fraudulently in directing the payments to be made, the stockbroker was in breach of the duty of care described in *Barclays Bank Plc v Quincecare Ltd [1992]* 4 All E.R. 363, namely to refrain from making the payments whilst the circumstances put it on inquiry. The case marked the first time that the "Quincecare duty" (established more than 25 years ago) has been applied. However, despite this finding, the case is unlikely to open the floodgates to similar claims. It is rare that the circumstances would put a bank on inquiry, but where a client is known to be in serious financial difficulty, financial institutions will want to consider carefully any unusual payment instructions received from a single director (even if accustomed to dealing with that individual) and ensure that those on the front line of their operations are alert to the need for caution.

This case is currently under appeal, with the hearing due to take place before July 2019.

The "Quincecare duty" will again be considered in the case of *The Federal Republic of Nigeria v JP Morgan Chase Bank, NA* when it comes to trial later this year. In February 2019 the claimant survived a strike-out application after the court concluded that the bank had failed to establish that the claimant's claim had no realistic prospect of success.

Briefly, in this case, the bank had agreed to act as a depository in respect of settlement monies. Having received instructions from authorised signatories of the claimant entity, the bank made transfers totalling USD 875m. These funds were allegedly used to pay bribes rather than pay beneficiaries of the settlement monies. The claimant argues, relying on the Quincecare duty, that the bank was "put on inquiry" and should not have made the payments if it had reasonable grounds that the claimant customer would be defrauded.

We will report further on this case in due course.

Banks: tortious duty of care

Playboy Club London Ltd & Ors v Banca Nazionale del Lavoro Spa [July 2018]

The Supreme Court has confirmed, upholding the Court of Appeal's decision, that where a bank negligently supplied to an agent a favourable credit reference in respect of a customer who subsequently defaulted, the bank was not liable to the agent's undisclosed principal. The relationship between the bank and the undisclosed principal was not sufficiently proximate to give rise to a duty of care. In order to recover a purely economic loss in negligence, it is fundamental that the defendant assumes responsibility to an identifiable (not necessarily identified) person or persons, not the world at large or a wholly indeterminate group.

Banks: contractual duty of care

Elite Property Holdings Ltd and another v Barclays Bank Plc [July 2018]

The Court of Appeal has, for the first time, considered whether a bank owes a contractual duty to its customer relating to its conduct of the review of the sale of interest rate hedging products (IRHPs). It was held that no such contractual relationship arose between a bank and its customer in these circumstances; the bank had undertaken the review pursuant to its obligation to the FCA and did not come under any contractual obligation to its customers in relation to its conduct of the review when it made an offer of redress in relation to the mis-selling of structured interest rate collars.

R (on the application of Holmcroft Properties Ltd (Appellant) v KPMG LLP (Respondent) & (1) Financial Conduct Authority (2) Barclays Bank plc (interested parties) [September 2018]

In another case regarding IRHP redress schemes, the Court of Appeal upheld the lower court's finding that the decision of a skilled person (KPMG) tasked with determining the appropriateness of a bank's offer of redress following the mis-selling of financial products was not amenable to judicial review.

Briefly, Holmcroft Properties, a nursing home operator, was sold an IRHP by Barclays and was included in the redress scheme. Holmcroft received redress by way of compensation for overpayments it had made and then made a consequential loss claim under the scheme against Barclays for further losses, which failed. Holmcroft was concerned that KPMG, the Independent Reviewer appointed by Barclays, appeared to have little or no involvement or engagement with Holmcroft and did not appear to have properly fulfilled the role required by the FCA in the redress scheme.

The Court of Appeal held that KPMG was not exercising a public function that was amenable to judicial review. This was largely on the basis that KPMG was essentially offering assistance in relation to a dispute about private law rights in a private law context; there were no grounds in public law for a complaint.

These cases demonstrate the difficulty customers face if they feel they have been treated unfairly or are unhappy with their outcome under a redress scheme.

Cases to watch

In addition to the appeals we have already noted, 2019 will also see the long awaited judgment in the *Russell Adams v Carey Pensions*, which alleges negligence and breach of the FCA's COBs rules against a SIPP administrator in relation to the suitability of storepod investments held within the SIPP wrapper. Linked to this is the pending appeal by Berkeley Burke of its judicial review of the Financial Ombudsman Service in relation to its determination in a case on similar facts. Both of these cases are expected to have significant wider implications for the industry.

Another long-awaited decision is the Lloyds shareholder action relating to the acquisition of HBOS at the height of the financial crisis, which they say they were misled into approving. The Tesco shareholder group action is progressing through the UK courts and recent press reports suggest that litigation funders are looking to support shareholder group actions against Metro Bank and Petrofac.

Also on the class action front will be the appeal against the refusal to grant class certification in the record-breaking £14bn MasterCard claim for losses consumers allege occurred as a result of interchange fees charged by MasterCard during the period 1992 to 2008, which will be closely watched (the Court of Appeal having recently found in favour of the claimants that a right of appeal against the CAT's decision existed).

A global snapshot

In this article, our global FIDO team, using their experience and local on-the-ground knowledge, provide an overview of the key FIDO issues in their jurisdictions.

Australia

The headlines in Australia have been dominated in the past year by the Royal Commission on Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

On 4 February 2019 the final report prepared by the Honourable Kenneth Hayne AC QC was released to the public. In summary:

- 76 recommendations have been made by Commissioner Hayne
- 19 instances of possible misconduct have been identified, covering 24 different civil or criminal offences across 22 entities
- There is an urging to change the enforcement culture of the corporate watchdog, the Australian Securities and Investment Commission (ASIC), to litigate more. It has been asked to consider whether criminal or other legal proceedings should be instituted for certain conduct (although specific entities or individuals are not named), and to take a tougher stance on enforcing the law through having matters judicially determined rather than resolved by agreement
- Fees-for-no-service scandal will see at least AUD 850 million paid in compensation
- Establishment of a new oversight body for ASIC and the prudential regulator, the Australian Prudential Regulation Authority (APRA)

There is little doubt that the Commissioner's findings, recommendations and comments will give rise to further claims against financial services entities, in addition to those already on foot, as well as an increase in the enforcement activities of APRA and ASIC.

In terms of impact on insurers, a number of changes are expected to be implemented under the Insurance Contracts Act 1984 (Cth) (ICA) including the replacement of the duty of disclosure under the ICA with a duty to take reasonable care not to make a misrepresentation to an insurer in consumer insurance contracts. At the front end, insurers will likely be affected in the way in which insurance products are drafted, marketed, and sold. Unsolicited selling of insurance to those who are vulnerable will be banned. Depending on how reforms are implemented, it is possible that wholesale amendments to insurance policies will be necessary to incorporate the terms of industry codes to particular contracts. Either way, through a process of further consultation the deadline is 30 June 2021 to have provisions of the various codes made enforceable at law.

Whilst more regulatory litigation is expected following the Financial Services Royal Commission, a key concern for financial institutions and directors in Australia continues to be class actions, and in particular securities class actions, which continue to be the focus of higher value litigation across Australia.

In late January 2019 the Australian Law Reform Commission (ALRC) released its final report on 'Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders'.

The ALRC's inquiry focused on two overarching issues in the class action regime: the integrity of third party funded class actions and the efficacy of the existing class action system. The recommendations of the ALRC are expressed to be directed at promoting fairness and efficiency, protecting litigants and assuring the integrity of the justice system. Critically the ALRC has concluded, amongst other things, that:

- Litigation funding should remain within the purview of the Courts rather than regulation by ASIC;
- There should be a Parliamentary review of the continuous disclosure laws in Australia, an area where there has been significant claims activity with securities class actions;
- Certain mechanisms should be introduced to prevent competing class actions and confer exclusive jurisdiction on the Federal Court of Australia for causes of action arising under specific commonwealth legislation; and
- Contingency fees (currently banned in Australia) should be permitted in class actions.

Just how much of an impact the ALRC recommendations will have on the class-action litigation landscape in Australia will inevitably depend on the appetite of the government to transform recommendations into reality. However, with both the ALRC report and the Financial Services Royal Commission releasing their findings a week apart in early 2019, the political climate is certainly ripe for legislative change.

Canada

The low price of resources and commodities has hurt the Canadian economy, increasing the risk of insolvency-related claims.

Simultaneously, regulatory activity is both increasing and evolving. The Ontario Securities Commission (OSC) Office of the Whistleblower is now accepting tips on potential non-compliance with securities legislation and offering financial incentives to tippers. “No-contest” settlements with the OSC are also gaining popularity, notably with financial institutions where self-reporting allows quick and flexible enforcement actions that can minimise the exposure to civil actions. The regulators have also issued corporate governance and reporting guidance on cutting edge sectors, including Fintech, cyber security, and crypto currencies. This will inform the standards to which companies and their executives are held.

The OSC is becoming increasingly more adversarial in its investigations, whilst the Alberta Securities Commission has proven very inflexible regarding the settlement costs portion of settlements with directors. A significant uptick in claims by trustees/litigation trusts, particularly for mismanagement of company affairs where certain directors were appointed by a significant shareholder or lender, is increasingly a concern for directors.

Securities class actions remain stable in number, and the environment is still more benign for listed companies than in the US. However cross-border companies face increased exposure. An increase in securities class actions in Quebec also raises important issues based on that jurisdiction’s unique civil law and procedure.

Litigation funding continues to expand and evolve, although funding remains closely scrutinised by the courts to avoid abuse. Novel types of claims target financial services firms and public companies, such as breach of privacy rights, cyber breaches, anti-competitive conduct, and employment standards.

China

In general, the take-up of D&O insurance still is not as high as that in the western world and the ratio of listed companies covered by D&O insurance to uncovered listed companies is still low (purportedly less than 1:10).

However, the need for D&O insurance may likely increase in the near future given the regulatory authorities in China are far more active than before and directors and/or officers may also be sued based on mis-representation or mis-conduct. In 2018, the China Securities Regulatory Commission (CSRC) made a total of 310 administrative penalties (an increase of 38%), and it seems that the CSRC will continue to focus on mis-representation and mis-conduct in the near future. There are about 109 listed companies that are being publicly solicited by lawyers for alleged mis-representation. The CSRC also held 13 service providers (i.e. security trading agencies, accounting firms etc.) liable due to a failure to perform due diligence obligations and mis-representations in relevant financial reports.

This being the case, and with the rapid development of the internet in China, more and more small shareholders are devoting their efforts to safeguarding their own rights by starting legal proceedings after becoming aware of administrative punishment decisions made by the CSRC. As principally allowed by the PRC Security Law, investors are inclined to list all the possible recovery targets (including companies, brokers, accounting firms, trading agencies and directors and/or senior officers that are punished by the CSRC or in any event being responsible for the losses sustained by the investors) as co-defendants.

England & Wales

2018 marked the arrival of a multitude of new regulatory regimes that seek to improve market transparency and strengthen consumer protection.

These include MIFID II, the extension of the Senior Managers & Certification Regime (SM&CR) to insurers and the General Data Protections Regulation (GDPR). These new regimes place a heavy burden on FIs and their D&Os to implement them effectively into their organisations, at a time where they are facing uncertainty and already dealing with ensuring their business can withstand the impact of Brexit. The Financial Conduct Authority (FCA), also striving to deal with Brexit issues which has necessitated the diversion of resources from its enforcement budget, nonetheless continues to open more and more investigations, though this has not necessarily translated into more fines. The UK regulatory position and the broadening of corporate and individual responsibility is explained in more detail in the article “UK regulatory landscape” above.

Collective actions against both financial and commercial entities remain in the spotlight. Whilst the number of claimants partaking in Group Litigation Orders (GLOs) has been modest, a number of GLOs have been issued in various sectors including product liability, personal injury, tax and insurance and in the last couple of years several of the biggest cases before the English High Court were collective actions brought by large groups of claimants against listed companies and financial institutions. The stage has been set for the first judicial consideration of Section 90 FSMA when the Lloyds/HBOS judgment is handed down and whilst a number of retail and institutional Tesco shareholders secured redress under the FCA scheme, legal action against Tesco remains on foot for those who opted out and those who fell within a wider class of claimants than those covered by the redress scheme. The appeal against the refusal to grant class certification in the record-breaking £14bn Mastercard claim for losses consumers

allege occurred as a result of interchange fees charged by MasterCard during the period 1992 to 2008 will be closely watched (the Court of Appeal having recently found in favour of the claimants that a right of appeal against the CAT's decision existed). Mastercard is the second claim to have been brought under the new collective action mechanism for competition cases brought in by the Consumer Rights Act 2015 which has been widely discussed as a potential route for claims relating to Forex manipulation.

Going forward, cyber risk and data protection will remain at the forefront of the risk landscape for both financial institutions and directors, especially so now that the GDPR is in force, and a number of emerging issues look set to create exposures in the coming years: climate change reporting, cryptocurrencies, sexual misconduct claims, pensions failures to name but a few.

France

In the wake of several well-publicised investigations and fines of French multinationals by foreign regulators, France is undergoing a progressive evolution towards international standards on bribery and corruption with the Parquet National Financier (PNF) being the investigating and prosecuting agency tasked with bringing bribery and overseas corruption prosecutions.

Perhaps the most revolutionary aspect of this evolution is the enactment of Sapin II. With it comes the creation of the French Anticorruption Agency (AFA), protection for whistleblowers and new bribery offence definitions. Deferred prosecution agreements ("Convention Judiciaire d'intérêt public") have been introduced for entities, and, given that criminal proceedings can include civil claims in France, there is the potential for these to be integrated into the DPA procedure. The availability of DPAs raises a number of issues, including whether they involve an admission of wrongdoing, how the indemnification of "victims" will work, and whether the consequences of the DPA are indemnifiable. There have been five DPAs entered into so far, the latest, in May 2018, with a French bank to settle suspicions of past bribery. 2019 will likely see an increase in cross-border cooperation with international regulators. French FIs are also likely to be impacted by the German CumEx scandal according to press reports.

The French system has been, in practice, protective of D&Os, and cases where D&Os have been prosecuted are few and far between. The position may evolve towards making D&Os more accountable but the system is such, for economic and political reasons, that this has not taken place so far.

Germany

The ongoing Dieselgate scandal has had a fundamental impact on the German litigation landscape, particularly in relation to collective redress.

Fuelled by the Dieselgate development and in light of the disadvantageous position of German car owners as compared to those in other countries, the German Bundestag passed the “Law on Introduction of a Class Action for Civil Declaratory Judgment” (Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage) to enforce consumer rights. The law came into effect on 1 November 2018. It allows qualified bodies, such as consumer associations, to request a declaratory judgment to ascertain the presence or absence of central claim-relevant conditions for the benefit of at least ten affected consumers. The class action for declaratory judgment is litigated exclusively between the association and the responding party. However, any consumer has the opportunity to register their claims with the Federal Office of Justice (Bundesamt für Justiz) without the need for an attorney, with the effect of suspending the limitation period. Any decision in the class action for declaratory judgment then creates a binding effect for the registered consumers for any subsequent actions brought by the consumer. In the notes on the draft legislation, the federal government assumes that roughly 450 class actions for declaratory judgment will be submitted annually, and it forecasts a success rate of about 50 percent. To date, two model proceedings have been commenced, one against Volkswagen AG and one against Mercedes Benz AG.

Similarly, following the European Commission’s recommendation in 2013 that the member states introduce efficient procedural tools for mass litigation, the European Commission in April 2018 announced a “New Deal for Consumers.” The proposal includes introducing a directive concerning legal actions by associations to protect the collective interests of consumers. Based on this directive, associations shall have the opportunity to enforce consumer interests. The draft proposal goes further than the class action for declaratory judgment in Germany since, subject to certain circumstances, the associations may also be able to sue for concrete damages and not just for a model declaratory ruling. Qualified entities generally are entitled to bring representative actions seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate. By derogation EU Member States may, however, also establish a declaratory decision regarding the liability of the trader towards the consumers instead of a redress order in duly justified cases where, due to the characteristics of the individual harm to the consumers concerned, the quantification of individual redress is complex. This derogation, in turn, is not available in cases where consumers concerned by the infringement are identifiable and suffered comparable harm caused by the same practice in relation to a period of time or a purchase. In such cases the mandate of the individual consumers concerned may not constitute a condition to initiate the action. The collected redress in these cases must be directed to the concerned consumers. The derogation is also not available if consumers have suffered only a small amount of loss and it would be disproportionate to distribute the recovered redress to them. In such cases, Member States may also not require individual mandates by the consumers. The recovered redress in these cases must then be directed to a public purpose serving the collective interests of consumers.

Another change has been significantly shaping the litigation landscape in Germany. In the wake of the Dieselgate scandal, plaintiff firms have geared up, and new firms (particularly from the US) have entered the market together with litigation funders which show an increasingly broad interest in FI and D&O matters generally. The platform myright.de has reportedly already attracted around 30,000 plaintiffs who have assigned their claims against Volkswagen, with myright.de taking a share of the potential wins; thereby introducing a kind of contingency fee arrangement formerly unknown and widely prohibited in Germany. The platform cooperates with a local German law firm and has initiated two collective actions against Volkswagen so far.

Whilst Volkswagen was the start, Dieselgate has become much broader with allegations against other domestic and foreign automobile manufacturers and their suppliers alike. In particular, allegations of a cartel, involving Volkswagen, Daimler and had potentially others, has shaken the market. Infact, infringements of competition law and other compliance breaches have generally become a major source of investigation activity and D&O claims.

Another major development has been stirring discussions in Europe. Since 25 May 2018 the General Data Protection Regulation (GDPR) and the new German Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) have been in effect. The new data protection law presents new risks for cyber insurance and D&O insurance because of far-reaching possibilities for liability and sanctions. Through the mechanism of liability for damages, GDPR Art. 83 and BDSG Sections 41ff. contain a far-reaching tool for imposing fines as a sanction. While the old BDSG only permitted fines up to a maximum of EUR 300,000, in the future fines of up to EUR 20 million or 4 percent of total worldwide annual sales from a company's prior fiscal year will be possible. Here, too, GDPR Art. 83 and BDSG Sections 41ff. are primarily directed at companies that are to be held directly liable for data protection violations. In Germany, 41 fines have been imposed in the period up to January 2019, the highest fine reaching EUR 80,000. However, the regulators have so far rather tended to provide guidance and assistance in adapting to the new data protection regime.

In the context of fines in general, one of the current major issues is the insurability of such fines. While there is no clarity on this point either from legislation or a decision by the highest court, and while it is also largely assumed that corresponding insurance coverage might be regarded as contrary to public policy, there are certainly good reasons for nuanced solutions.

Directly connected to this issue is the question, whether and to what extent companies will be permitted to claim recourse for fines against their directors. Respective claims are pending with the courts, with the market waiting for directions by the Federal Courts. This will be of major significance since, in a continuously weak market, liability for company fines is typically insured under standard D&O policies.

Hong Kong

The new Insurance Ordinance came into effect in June 2017, revamping the way the insurance industry is regulated in Hong Kong.

It has also created a new regulator – the Independent Insurance Authority (IIA). The industry is expending substantial effort modifying their existing structures to comply with the new legislation. The IIA is vested with extensive investigation and disciplinary powers. Insurers and insurance brokers may therefore experience increased regulatory scrutiny, and the IIA may adopt a more robust approach to enforcement. One of the main challenges is relationship management between insurance agents and insurers due to the conduct requirements under the new legislation. Insurance intermediaries will be required to act in the best interests of the policyholder whilst engaged by the insurers for whom they sell policies. This may give rise to potential issues of conflict of interest and duty.

India

India is rapidly digitising its economy to root out corruption and red-tapism by bringing about significant legislative changes and to attract foreign investment.

The amended Companies Act 2013 and the newly enacted Insolvency & Bankruptcy Code 2016 provided the much needed impetus for the growth of the D&O market in India.

The Companies Act 2013 overhauled company legislation. It was designed to enhance corporate governance standards. The Act codifies the right of companies to purchase D&O insurance and directors' duties are set out for the first time, as is the role and liabilities of a non-executive director. The Act also imposes heavy penalties for fraud. A further key change allows class action suits to be filed under company law for mismanagement/prejudicial conduct of the company's affairs. Partly to give confidence to investors and to enhance domestic standards, several other measures have been implemented in the last few years. There are often significant levels of cover purchased, especially where the company has a US exposure or attracts the remit of listing authorities/ regulators.

Banks pursuing resolution of non-performing assets under the new Insolvency & Bankruptcy Code 2016, expansion of Indian businesses abroad, listing of Indian companies in foreign stock exchanges, foreign joint ventures, shareholder activism, claims relating to harassment in the workplace, increasing legal fees and litigious environment, and an increased focus on corporate governance have all led to growth of the D&O insurance market. As awareness increases, this is expected to continue.

Owing to the rising levels of bad loans in the financial sector, the Reserve Bank of India has gone ahead and intervened in the management of private sector banks wherein promoters and individuals from senior level management have been asked to step down. Notable examples include Axis Bank, Yes Bank, ICICI Bank and Punjab National Bank. Moreover, following the recent irregularities by major financial institutions, private bankers are now being investigated by the Serious Fraud Investigation Office under the Ministry of Corporate Affairs.

These cases have reinforced the need for directors to have adequate cover in place. Further, with effect from 1 October 2018, the top 500 listed entities by market capitalisation calculated as on 31 March of the preceding financial year, have been advised to seek D&O insurance for all their independent directors of such quantum and for such risks as may be determined by its board of directors.

Further, since cyber fraud has become a major concern for financial institutions in India, the Reserve Bank of India is considering setting up a compliance and tracking system portal to tackle the proliferation of cyber fraud and to establish a better redress mechanism for consumers. The Central Government is also seeking input from stakeholders on its draft Personal Data Protection Bill which offers protections against misuse of personal data. The focus by regulators on good corporate governance is a global trend. In light of this, we expect that claims and regulatory action against Indian companies and their directors/officers, both in India and internationally are likely to continue to increase.

Middle East

We have seen a significant number of high value D&O claims across the region, which often arise from accounting scandals across different sectors.

These scandals have resulted in regulatory and shareholder actions against directors, as well as negligence claims against audit firms. D&Os of listed companies in Saudi Arabia and Kuwait face particular scrutiny as the listing authorities and regulators in those jurisdictions are becoming more active.

There has a been a sharp rise in claims under BBB and electronic crime arising from social engineering and “fake Presidents” fraud in the region, which pose particular coverage challenges as the wordings struggle to keep up with the speed of change in the sophisticated methods being used to perpetrate these frauds.

In October 2018, new anti-money laundering and terrorist financing rules were enacted in Dubai. The UAE and Qatar are facing FATF reviews of their AML and CTF regimes and it is likely that this will result in more active enforcement of AML rules by central banks and other regulators).

Notable developments are also taking place in KSA with regards to corporate governance and the management of listed companies as the KSA government continues to open up the domestic market to foreign direct investment and capital. The KSA listing authority (the CMA) has introduced a class action regime for shareholder claims in KSA. This is a first for the region.

Regulators in the financial free zones (such as the DIFC and QFC) are increasingly looking to hold individual directors and senior managers to account for regulatory failings of financial institutions, relying on concepts of being “knowingly concerned” in, or having “ultimate responsibility” for, institutional failings.

Singapore

The Monetary Authority of Singapore (MAS) has been increasingly focused on anti-money laundering enforcement in the aftermath of revelations of 1MDB funds being channelled through the Singapore banking system.

Singapore's open economy makes it particularly susceptible to risks of money laundering. Over the past 2-3 years, the MAS has imposed nearly SGD 30 million in fines on eight banks in relation to the scandal-hit Malaysian state investment fund 1MDB. Increasingly, the MAS' approach is to place responsibility on the individual responsible for the lapses and their supervisor. For example, MAS has to date issued 8 prohibition orders against individuals (ranging from three years to lifetime bans) for 1MDB-related breaches. In April last year, MAS issued a consultation paper on proposed Guidelines on Individual Accountability and Conduct. We expect MAS to issue its Guidelines on Individual Accountability and Conduct shortly.

Corporate governance of listed companies is also under the spotlight. The MAS issued a Revised Code of Corporate Governance which will take effect in annual reports of listed companies from the financial year commencing 1 January 2019. SGX's regulatory arm has been active in taking compliance action against listed companies.

The Personal Data Protection Act (PDPA) is likely to be amended to make reporting of data breaches mandatory. Although financial institutions already currently have to notify MAS of cyber incidents within one hour, the proposed amendments to the PDPA will also require entities to notify affected individuals as soon as practicable. In September last year, MAS also issued for consultation proposed requirements for FIs to implement essential cyber security measures to protect their IT systems. In March last year, legislation was passed introducing deferred prosecution agreements in Singapore, which could result in more financial penalties being imposed on financial institutions.

South Africa

South Africa has seen increased FI and D&O claim activity over the last few years, particularly in claims against directors and officers of state-owned entities.

This reflects into the private sector too, with heightened scrutiny of directors of companies doing business with the state and of professional advisors. This is due to widespread exposure of corrupt activity in state-owned entities and allegations of impropriety against directors of these entities, resulting in litigation by civil society organisations and action by regulators. There is also an increasing risk of personal liability for directors in environmental claims, with several well-publicised examples of directors facing criminal and civil claims for corporate environmental transgressions.

The South African FI and D&O risk environment is undoubtedly becoming more complex and litigious, which may trigger changes in pricing and underwriting considerations.

There has been an increase in the use of "class actions" when making claims against directors. An example of this is the class action brought by shareholders in Steinhoff against its directors for losses suffered by them when the share price fell after allegations of large scale misstatement of the financial reports of entities within the group. Ongoing litigation is winding its way through the courts that will bring clarity on the question of whether directors owe common law and/or statutory duties to shareholders for so-called reflective loss of value of their shares as a result of conduct by directors.

Spain

In Spain it is not uncommon for a claimant to file a criminal complaint, which the authorities then investigate, and for the claimant to bring the civil claim in the same proceedings.

A key issue for insurers is that the court can impose a bond in the criminal proceedings, including a "civil bond" to secure the payment of damages which may arise from the commission of the crime in circumstances where the accused persons are found guilty. In practice, bonds can be provided in cash, by means of a real guarantee, a bank guarantee or an insurer guarantee. These civil bonds can be in the millions, and the court may order an insurer to post the bond. This issue is compounded by the fact that often in bribery and corruption investigations there are huge difficulties in getting access to the necessary information. This is likely to continue to be an issue, as it is anticipated that there will be more anti-bribery prosecutions in 2019.

The civil bond is only executed if there is found to have been a crime. Even if the policy contains reimbursement provisions, in practice the insurer may have huge difficulties in recovering the money. A further complicating factor is that direct actions are permitted in Spain and there can therefore be a direct claim by a party against an insurer which can be joined to the criminal proceedings as a liable party, as insurers are jointly and severally liable with insured persons. Although the loss may arise from a fraudulent act of the insured (and would therefore be excluded), the courts have said that the insurer must pay the claimant and then recover the payment from the insured.

Meanwhile, claims against banks continue in relation to offerings of shares and preferred shares and now also in relation to mortgage-related matters following court decisions which have ruled that certain minimum interest rates applied by the banks are null and void. There are ongoing criminal proceedings against the directors of Bankia arising out of its 2011 IPO, and there are also ongoing criminal and civil proceedings in relation to the failure of Banco Popular in June 2017, both of which highlight the joint criminal and civil claims that can be brought in Spain.

United States

Securities class actions are being filed in record numbers.

For a second year in a row, there were more than 400 new U.S. federal securities class actions, fuelled by a high number of M&A actions, event-driven actions filed by emerging-law firms and, possibly, the increased use of litigation funding. Market capitalization losses in the new filings totalled over USD 1.3 trillion, the third highest on record. The litigation rate, or the likelihood that a public company will be named in a U.S. securities class action, remained at 8.4% for the second year in a row, compared to an average of 2.9% for the period 1997-2017.

Following the U.S. Supreme Court's March 2018 ruling in *Cyan*, securities class actions are also being filed in state courts in increasing numbers, meaning that companies and their directors and officers may face simultaneous battles in both state and federal courts. At least 33 securities class actions alleging claims under the Securities Act of 1933 were filed in state courts in 2018, compared to only 13 in 2017. Plaintiffs are forum shopping and defendants will face additional costs and increased exposure from state court filings, as protections available in federal court will not be available, including the safe harbour for forward-looking statements and the automatic stay of discovery while a motion to dismiss is pending, and state court actions are generally more difficult to dismiss at the pleading stage. However, despite more suits being filed, these new cases appear to be weaker as they are being dismissed at higher rates. In addition, foreign companies continue to be targeted in U.S. securities class actions and we are now also seeing much larger derivative settlements than in the past, often funded by Side-A coverage D&O policies.

Plaintiffs have continued to explore new areas for litigation:

- **Cyber/data protection:** Most derivative actions against companies suffering data breaches have been dismissed due to the high procedural hurdles and substantive defences, and securities class actions failed to materialise after cyber events as they had limited impact on the

market and stock prices recovered quickly. In 2018, however, a derivative action against Yahoo settled for USD 29m and claims against Wendy's and Home Depot settled for payments towards plaintiffs' attorneys' fees of USD 950,000 and USD 1.123m respectively. Also, plaintiffs filed an increasing number of securities class actions following data breaches. A securities class action against Yahoo settled for USD 80m, which was apparently funded by D&O insurance, and cyber securities class actions have been filed against Paypal, Equifax, Qudian, Marriott, Chegg, Huazhu and Alphabet. Plaintiffs are also expanding their cyber offering to include privacy issues relating to how a company utilises data, versus how it protects its data. Two securities class actions filed in 2018 allege that Facebook and Nielsen failed to disclose or made misrepresentations regarding the impact of the GDPR on their business. A third action, filed in March 2018, contends that Facebook misled investors about its privacy policies and transfer of data to Cambridge Analytics.

- **Sexual misconduct:** There has been an increase in derivative and securities class actions fuelled by the #MeToo movement, with cases filed against big names such as CBS, Papa John's, Wynn Resort, and Nike.
- **Cryptocurrencies/ICOs:** At least nine new securities class actions relating to ICOs or cryptocurrencies were filed in 2018.
- **Climate change:** The threat of climate change poses an increased risk of shareholder litigation, with a particular interest in the adequacy of climate change disclosures. Suits have been filed against ExxonMobil alleging misrepresentations regarding climate change's impact on its business. Actions were also filed against Edison International and PG&E following the wildfires in California in 2018. Other adverse environmental events brought about by climate change, such as flooding, drought, supply chain disruption and political unrest, could lead to future shareholder actions.

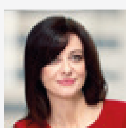
The regulatory picture in 2018 was somewhat mixed. The Trump Administration continued with its deregulation efforts and it was reported that it presided over a sharp decline in financial penalties assessed against banks and large companies, reflecting these efforts. That having been said, U.S. regulatory investigations and actions continue to be a major area of exposure for FIs and D&Os. The SEC increased the number of new cases brought in 2018 in several areas, including securities offerings, investment advisors and investment companies, broker dealer misconduct, insider trading and public companies. Individual accountability continues to be a focus for the SEC and DOJ.

The SEC's new Cyber unit has focussed on cyber-related misconduct and, increasingly, is looking at misconduct relating to ICOs of cryptocurrencies. By the end of FY2018, the SEC had brought over 12 enforcement actions involving ICOs.

Money laundering continues to be a priority for U.S. regulators, with enforcement increasing in areas of personal liability, obstruction by financial institutions during anti-money laundering examinations, and coordination among different agencies.

Contributors

Australia



Janette McLennan

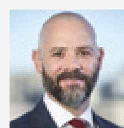
Partner, Sydney
+61 2 9210 4456
janette.mclennan@clydeco.com

Canada

Roderic McLauchlan

Partner, Toronto
+1 647 789 4849
roderic.mclauchlan@clydeco.com

Canada



Trevor McCann

Partner, Montreal
+1 514 764 3682
trevor.mccann@clydeco.ca

China

Victor Yang

Legal Director, Shanghai
+86 21 6035 6108
victor.yang@clydeco.com

England & Wales

James Cooper

Partner, London
+44 (0) 20 7876 6388
james.cooper@clydeco.com

England & Wales

Laura Cooke

Partner, London
+44 20 7876 6387
laura.cooke@clydeco.com

England & Wales

Mark Sutton

Partner, London
+44 20 7876 6256
mark.sutton@clydeco.com

England & Wales

Karen Boto

Legal Director, London
+44 20 7876 4211
karen.boto@clydeco.com

France

David Méheut
Partner, Paris
+33 1 44 43 8985
david.meheut@clydeco.fr

Germany

Dr. Henning Schaloske
Partner, Düsseldorf
+49 (0) 211 8822 8801
henning.schaloske@clydeco.com

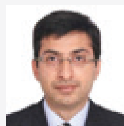
Hong Kong

Simon McConnell
Managing Partner in Hong Kong
+852 2287 2723
simon.mcconnell@clydeco.com

Hong Kong

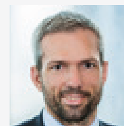
Mun Yeow
Partner, Hong Kong
+852 2287 2722
mun.yeow@clydeco.com

India



Sumeet Lall
Partner, CSL Chambers
+91 98109 44677
sumeet.lall@cslchambers.com

Middle East



Mark Beswetherick
Partner, Dubai
+971 4 384 4650
mark.beswetherick@clydeco.ae

Singapore

Ian Roberts

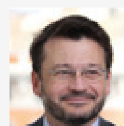
Partner, Singapore
+65 6544 6516
ian.roberts@clydeco.com

South Africa

Daniel Le Roux

Partner, Johannesburg
+27 10 286 0357
daniel.leroux@clydeco.com

Spain



Ignacio Figuerol

Partner, Madrid
+34 91 793 4501
ignacio.figuerol@clydeco.com

United States

Edward Kirk

Partner, New York
+1 212 710 3960
edward.kirk@clydeco.us

50+

Offices worldwide*

3,800

Total staff

415

Partners

1,800

Lawyers

www.clydeco.com

*includes associated offices

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority.

© Clyde & Co LLP 2019

J457537 - March 2019