Hogan Lovells

Insurance Horizons

2023-2024

Contents

Introduction

The insurance industry continues to face multiple headwinds in 2023, particularly as a consequence of an uncertain economic environment. Over the coming pages we delve into some of those headwinds.

Continuing the trend of the past few years, ESG remains a strategic and compliance focus for insurers. An ever-evolving web of regulation coupled with a sharp rise in anti-ESG sentiment in certain parts of the U.S. is placing pressure on insurers. Meanwhile, the wildfires in Canada and the Mediterranean this summer are reminders that extreme weather conditions are fast becoming the norm, which is of course changing the face of the insurance market as we know it.

Security is also a significant concern for insurers. Ensuring that systems are sufficiently robust to limit the impacts of cyberattacks continues to be a focus. Additionally, increasing geopolitical tensions and the increased frequency of state-endorsed malware attacks have left some insurers reluctant to underwrite war-related risks, and differing approaches will likely have a significant impact on the future shape of the cyber insurance market.

Insurers are also taking advantage of developments in technology to achieve their goals, particularly in relation to the use of AI and blockchain. While these technologies clearly come with risks, it is likely that those insurers that can embed these tools into their businesses effectively will benefit from a significant competitive advantage.

We have kept this brochure as concise as possible by limiting it to high-level summaries for each topic. If you are interested in learning more about a particular topic, you can follow links to the full articles, which are available on our thought leadership platform, Engage. Throughout the brochure, you can find key contacts for each of the topics covered, and we encourage you to get in touch to discuss them further.

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ESG

Key trends in the industry

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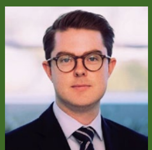

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As ESG issues grow and continue to become ever more important, the legal and regulatory landscape which insurers need to navigate becomes ever more complex.

In Europe, firms are moving to embed ESG principles in their business practices, and there is widespread acceptance of ESG as a critical business consideration. This is often driven by the increasing legislative and regulatory activity taking place in Europe in respect of ESG issues. In particular, this year has seen the introduction by the EU of the Corporate Sustainability Reporting Directive (CSRD), which adds another dimension to efforts by the EU to increase the levels of sustainability information available to interested parties in financial markets, including insurance.

As the focus on ESG issues continues to grow, so too does the risk of litigation for companies as a result of increased regulation and climate activism. As corporates face an increasingly volatile ESG risk landscape this in turn impacts the insurance sector, both as a risk and potentially also as an opportunity. Activist ESG claims formulated as derivative claims against company directors have been a recent focus in the UK and Continental Europe; something that is particularly relevant to the D&O (directors and officers insurance) market. This rapidly evolving ESG risk landscape presents challenges for insurers assessing how such risks align with specific business lines.

The picture in the U.S. is less clear, with ESG practices becoming increasingly politicized and thus subject to partisan actions by state and federal legislatures, state treasurers, governors, state attorneys general, and other government actors. Indeed, Republican state attorneys general have taken credit for the recent departures of a number of members of the Net-Zero Insurance Alliance. The ever-growing division between U.S. states as to how financial institutions, including insurance and reinsurance companies, utilize ESG factors into their business decisions has significant implications for how insurers operate in the U.S. and will make it increasingly difficult to navigate the regulatory landscape that applies not only across international borders, but also across states.

Read the full article on Hogan Lovells Engage here.

Toolkit

ESG Global Vision for Financial Institutions and Insurers

Driven by regulatory change, consumer and investor demand, financial institutions and insurers are making ESG issues central to core strategic decision-making. ESG Global Vision for Financial Institutions and Insurers provides regular, high-quality news analysis from our market-leading team of lawyers, to help you stay abreast of legal and regulatory ESG changes affecting financial institutions and insurers.

You can find out more about this toolkit here.

AI

Navigating the regulatory landscape

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AI and machine learning technology have started to be widely adopted by insurers to embrace new business opportunities. However, a key challenge for insurers is understanding the level of risk they will be exposed to when developing their own AI solutions, partnering with external parties, or providing new AI-related policies to their customers.

Insurers have been thinking about AI strategically, and are either: increasingly embedding AI in their day-to-day operations to increase efficiency, enhance decision-making, reduce costs, gain insights from data and improve customer experience; or are starting to offer new insurance products or policies to their clients to protect them against AI-related claims. For instance, Munich Re has recently launched aiSelf, a coverage for users who implement self-developed AI solutions in their own companies. The goal behind it is to protect companies from potential financial losses resulting from AI underperformance.

While AI and machine learning offer new opportunities to insurers and help to transform the financial services sector, it is challenging for insurance companies to understand and measure the actual risk of AI adoption, particularly given the complex nature of legal landscape around evolving AI regulations and existing insurance regulations (and even worse, the intersection of those regulations).

Stakeholders within the insurance industry should conduct a thorough evaluation of their AI use cases, risk tolerance, business requirements, anticipated benefits and evolving regulatory landscape before embracing AI solutions or introducing new AI-related policies. Should insurers opt to embrace new opportunities, they should begin formulating a plan or strategy, which may involve substantial revisions to their current practices, to align AI systems with upcoming AI regulations such as the AI Act as well as existing legal frameworks. Additionally, they should put in place risk-mitigation measures to effectively manage any potential legal, regulatory or financial risks.

Read the full article on Hogan Lovells Engage here.

Toolkit

AI Hub

Our newly launched AI Hub collates all of the firm's AI-related thought leadership, in addition to featuring an interactive map tracking regulatory developments, sourcing recent external AI news, and connecting users with all of our AI market leaders.

You can find our more about this toolkit here. You may also be interested in our recently launched Global AI Trends Guide, which you can find here.

Digital health

What insurers need to know

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A growing number of traditional insurance companies are exploring ways to operate in the digital health space. There are many opportunities – and risks – in this exciting and complex area at the intersection of health care and technology, especially when it comes to managing big data and incorporating AI and machine learning to manage data flows.

A key challenge for insurers operating on a global scale is the myriad of laws that apply in each jurisdiction, with each having unique (and sometimes conflicting) privacy, health, insurance, data regulations with which to contend in the context of digital health offerings. For example, how data is exchanged and access to the right to data are crucial to interoperability within the health ecosystem.

In the U.S., health care privacy regulation in the form of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) applies to much – but not all – of the health ecosystem. Stakeholders must understand whether the data they are seeking to access is inside or outside of HIPAA. In the context of digital tools to assist patients in the health care journey, data flows must work smoothly, and insurers need to have the data flows right – and have any requisite permissions to use the data – in order to unlock value in the ecosystem.

In Europe, one key challenge is that insurers are moving from a traditional view as payor to becoming a partner working with regulated industry players or, in some cases, as a provider of health care solutions. These dual roles can result in regulatory obligations to which a traditional insurer model may not be accustomed, such as considerations of whether a digital tool qualifies as a "medical device". In addition, moving beyond merely acting as a payor/facilitator may result in possible liability exposure in areas to which insurance players are unaccustomed. As these lines continue to blur, producers of drugs and medical devices look to move closer to patients, which might generate opportunities for partnerships with insurers, but could also generate competition with insurers. Moreover, while insurers are accustomed to operating in highly regulated areas, these borderline issues require early strategic decisions on product and service offerings to avoid unexpected regulatory challenges down the line.

Read the full article on Hogan Lovells Engage here.

Service

Digital health capabilities

Our cross-jurisdictional team of more than 50 life sciences lawyers bring a real-world sensibility to your challenges and business opportunities. We take a technology-based approach to counseling on digital health products and services and provide strategic guidance on how to leverage opportunities for growth, minimize legal barriers, comply with rules, protect your data, and realize its value.

You can find our more about this service here.

Sanctions

Response to war in Ukraine

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Since February 2022, an unprecedented raft of sanctions and restrictive measures have been, and continue to be, imposed in a coordinated bid to ramp up the pressure on Russia.

Of particular note in 2023 was the introduction of the oil price cap, agreed between the members of the G7, which essentially operates to provide an exception to the prohibitions on the maritime transportation of certain refined oil products which originate in or are exported from Russia, and on the provision of related services (including insurance).

In addition to the imposition of further asset freeze measures against certain individuals and entities, the EU, UK and the U.S. have each continued to expand the trade sanctions imposed against Russia, banning the import into Russia of goods upon which it relies heavily, and the export from Russia of goods which generate it significant revenue streams. Given the broad nature of the restrictions imposed and the limited nature of the exemptions available, the measures are likely to continue to have a significant effect on participants in the (re)insurance market.

The courts too have been busy grappling with the myriad issues that have arisen from the drastic and unprecedented sanctions that have been imposed; this year has seen a number of judgments which have provided valuable insight into how the courts will approach the interpretation of the sanctions regimes in place.

It is likely that future sanctions packages may in large part focus on limiting circumvention of the sanctions currently in place. By way of example, the EU has introduced a legislative mechanism which will enable it to restrict the sale, supply, transfer or export (and the provision of related services) of certain 'sensitive' dual-use goods and technology to third countries. The purpose of this restriction is to counteract systemic circumvention in relation to goods which present a high and continuous risk of being sold, supplied, transferred or exported from third countries to Russia after first having been sold, supplied, transferred or exported from the EU. The UK has so far only issued guidance in this area, but similar legislative measures cannot be ruled out in the future.

Read our round up of recent UK judgements on Hogan Lovells Engage here.

Toolkit

Sanctions Navigator

Sanctions Navigator provides a practical and straightforward overview of the key international sanctions regimes. It allows you to assess key sanctions risks at a glance, evaluate the impact of sanctions on your business, and keep abreast of the latest developments by receiving insight and analysis from the Hogan Lovells International Trade team.

You can find out more about this toolkit here.

Cyber-war exclusions

Prudent provisions or suffocating disincentive?

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Against the backdrop of the war in Ukraine and the recent appeal in the key U.S. case *Merck & Co v Ace American Insurance Company*, insurers are considering how to implement cyber-war exclusions in their policies, but are divided as to whether such exclusions should be broad or narrow. Differing approaches will have a significant impact on the future shape of the cyber insurance market.

"Cyber-war" refers to state-backed attacks that are systemic in nature, extending across organizations and targeting all component parts of a system. In 2017, NotPetya malware was used to target numerous companies including Merck: its all-risk insurers alleged that the cyber-attack arose from "hostile or warlike action," and were thus excluded by the policy's war exclusion. The New Jersey Superior Court disagreed, judging that if insurers wished to exclude cyber-war (as opposed to "physical" acts of war) from their policies, they should have done so explicitly. Cue much excitement in the market about implementing appropriate cyber-war exclusions in cyber policies (which itself follows historic attempts to include broad cyber exclusions in non-cyber policies). Lloyd's of London, for instance, mandates the use of cyber-war exclusions in cyber policies (see Market Bulletin Y538).

Different insurers have adopted alternative solutions to the cyber-war issue, with varying forms of exclusion being implemented in the market. Moreover, some insurers are offering standalone cyber-war policies and buyback options to their customers.

Navigating different approaches taken by insurers on this subject can be difficult, and the future of cyber-war coverage (or the lack thereof) remains uncertain. Increasing geopolitical tensions – epitomised by the war in Ukraine – and the increased frequency of state-endorsed malware attacks have left certain insurers reluctant to underwrite war-related risks. While there are widespread concerns that cyber-war might entail immense risk for insurers, this fear has yet to materialise at scale.

Read the full article on Hogan Lovells Engage here.

Service

Cyber risk capabilities

The cyber threat landscape is evolving daily. To stay in front of it, you need comprehensive, timely advice and solutions to your organization's unique challenges. Working side by side with our market-leading Cyber lawyers, our technical and risk professionals ensure that clients receive tightly integrated and complementary legal, technical, and management counsel, creating a seamless experience appropriately protected by attorney-client privilege.

You can find out more about this service here.

Blockchain

Why and how blockchain based protocols may participate in insurance linked securities

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Recently, blockchain-based digital organizations have begun investing in non-blockchain based assets, such as treasuries and asset-backed securities. As more and more 'real-world assets' are brought on-chain, it may be inevitable that insurance-linked securities will be issued to digital organizations.

Just as traditional private investors benefit from the uncorrelated return of insurance-linked securities (relative to traditional debt and equity investments), digital organizations can benefit from a return uncorrelated with the digital assets that comprise the vast majority of their holdings. Given that unique benefit, traditional insurers may be able to offer a lower return (via a higher ceding commission or other mechanism) on insurance-linked securities issued to digital organizations.

But how can insurers issue insurance-linked securities on-chain? From the insurer's perspective, the transaction may look very similar to a traditional transaction where the insurer cedes the risk to a special purpose vehicle in return for capital contributed by investors in the vehicle. Instead of each investor receiving a promissory note or preferred share for its capital, however, any digital organization investor would receive a digital token that would function similarly to a traditional debt or equity interest. For its part, if the digital organization investor was not associated with a legal entity, a legal entity would be created that would take instruction from the digital organization and allow it to manage its investment.

Participants in on-chain insurance-linked securities transactions must, of course, consider a variety of legal questions. These range from the traditional (the applicable of 'know-your-customer' and anti-money laundering laws, for example) to the novel (what rights does a digital organization have against an associated legal entity). Such considerations can be particularly challenging as the regulatory frameworks relevant to digital assets continue to evolve and mature in different jurisdictions.

Read the full articles on Hogan Lovells Engage here.

Toolkit

Digital Assets and Blockchain Hub

Blockchain and distributed ledger technology could revolutionize supply chains, agreements, contracts, currencies and more.

Our Digital Assets and Blockchain Hub brings together our key digital assets knowledge, helping you take advantage of the technology's huge potential and disruptive impact, while avoiding falling foul of ever-developing legal and regulatory requirements.

You can find out more about this toolkit here.

Spotlight on Mexico

Key insurance trends

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There has been a recent paradigm shift in the criteria governing insurance matters in Mexico due to an alleged asymmetrical relationship between insurance companies and the insured. Federal Courts, including the Mexican Supreme Court of Justice, have issued new criteria in response to this shift. The recent criteria can be categorized into two main topics: regulating the procedural relationship between insurers and the insured in commercial proceedings; and addressing discrimination in the insurance sector.

The Federal Courts' criteria attempt to close the gap between insurers and the insured, but these measures are seen as detrimental to insurers. Key aspects include burden of proof being shifted from the insured to the insurer, Court's powers to amend the insured's deficient claim and rules to award punitive damages against insurance companies.

Regarding discrimination in the insurance sector, the Mexican Supreme Court ruled that insurance companies can be designated as responsible authorities in amparo proceedings if they violate the human rights of the insured, including the right to non-discrimination. The Senate approved a bill to reform insurance laws to protect the rights of people with disabilities, preventing insurance companies from denying coverage based on factors like ethnicity, gender, age, and disability, and there are other similar bills in the Congress pipeline. To that end, the insurance legal framework in Mexico is experiencing significant changes with the Courts seeking to level the playing field between insurers and the insured and combat discrimination. Insurers must adapt to these new requirements by providing complete policy information and upholding human rights.

Moreover, other trends in this sophisticated and specialized market will tend to follow an irremediable shift to digitalization in the insurance services, a greater focus on cybersecurity, an expansion of mandatory insurance in vulnerable or historically unfavored targets, an enhanced tendency for consumer protection accentuation, and an increased regulatory oversight. These are the key trends that are likely to shape the insurance legal framework in Mexico for years to come.

Read the full article on Hogan Lovells Engage here.

Service

Latin American capabilities

As one of the most dynamic regions in the world, Latin America presents a wealth of new business prospects and markets for growth. To navigate these opportunities and the challenges that come along with them, you need a law firm and legal counsel that understands the region and its nuances, and we're here to help.

You can find out more about our services in Latin America here.

About Hogan Lovells

Our vision is to be a bold and distinctive law firm creating valuable solutions for clients. Our expertise is well-balanced across practices and jurisdictions allowing us to deliver high-quality, holistic advice, helping clients navigate a changing social, economic and political landscape.

Helping you harness change

Whether you're expanding into new markets, considering capital from new sources, or dealing with increasingly complex regulation or disputes, we can help.

Whether change brings opportunity, risk, or disruption, be ready by working with Hogan Lovells.

We work with our clients and other partners, using the law to build a better world for all.

A fresh thinking approach

Our experience in cross-border and emerging economies gives us the market perspective to be your global partner. We believe that when knowledge travels, opportunities arise.

We're intent on building a better tomorrow. That starts with being a responsible business today.

We are committed to playing a leadership role in driving inclusive and sustainable development in which people and planet prosper.

Advocates of opportunity

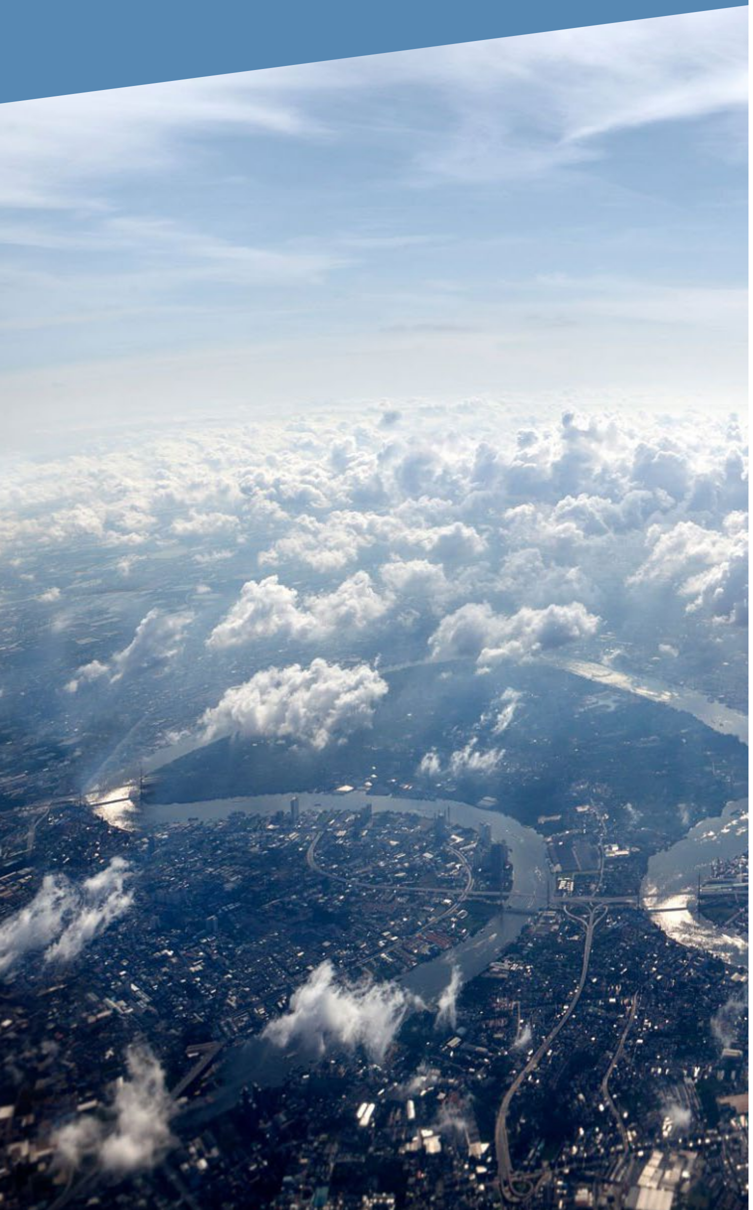
Inspiring. Investing. Including. Engaging difference to elevate everyone. We know that diversity matters as much to you as it does for us. Diverse teams deliver better results for clients. We know this both instinctively and through our day-to-day experience of working with each other and our clients.

Hogan Lovells as a responsible business

We are committed to playing a leadership role in driving inclusive and sustainable development in which both people and planet prosper. We contribute to the achievement of the UN Sustainable Development Goals (SDGs) in our own business and we support our clients to do the same through the work of our ESG taskforce. Working collaboratively within our firm, within our communities and society, and with our clients, we use the law to build a better world for all.

You can find out more about our approach to responsible business here.

Value-added services



Client seminars, webinars and bespoke training

We offer regular seminars and webinars on a range of topics. We also regularly visit the offices of our clients to provide bespoke training on topics relevant to their particular needs and requirements, including digital, compliance and cybersecurity training.

Engage

Engage is the Hogan Lovells online thought leadership platform available exclusively for our clients. Engage brings together our latest legal, market and regulatory news, industry insights and analysis from across our global network. We also offer a range of cutting-edge digital tools that are available by subscription on Engage Premium.

You can sign up to Engage here.

Solvency II Divergence Hub

This free-to-use Hub brings together recent developments, insights and webinars from our Corporate Insurance team to help you keep track of the proposed changes to Solvency UK and Solvency II as they progress through the legislative and regulatory processes.

Click here to access the Hub.

Project resourcing

We can deliver the services we offer to you in a number of different ways to achieve the right balance of expertise and cost effectiveness. These resources include lawyers and paralegals from:

- Our Legal Delivery Centers
- Our partner flexible resource providers, such as Elevate
- Our alumni network

These different resources allow us to provide appropriate and cost-effective support across a range of different types of matters, including detailed document reviews for business reorganizations, product reviews and litigation.

Legal project management

Our extensive experience of working with our clients and executing projects gives us considerable expertise in legal project management (LPM), which we use to improve efficiency and assist our clients with the management of their projects. We have also developed a dedicated internal LPM team in order to identify and share best practice across our different client teams and to provide practical support to fee earners. This helps ensure even the most complex projects can be delivered efficiently and to plan.

ELTEMATE

A Hogan Lovells Legal Tech Brand

Legal technology

ELTEMATE – a recently launched Hogan Lovells legal tech brand – seeks to make clients' lives easier by delivering practical solutions to everyday problems. We combine a deep understanding of our clients' legal needs with the speed and innovation of a legal tech start-up.

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