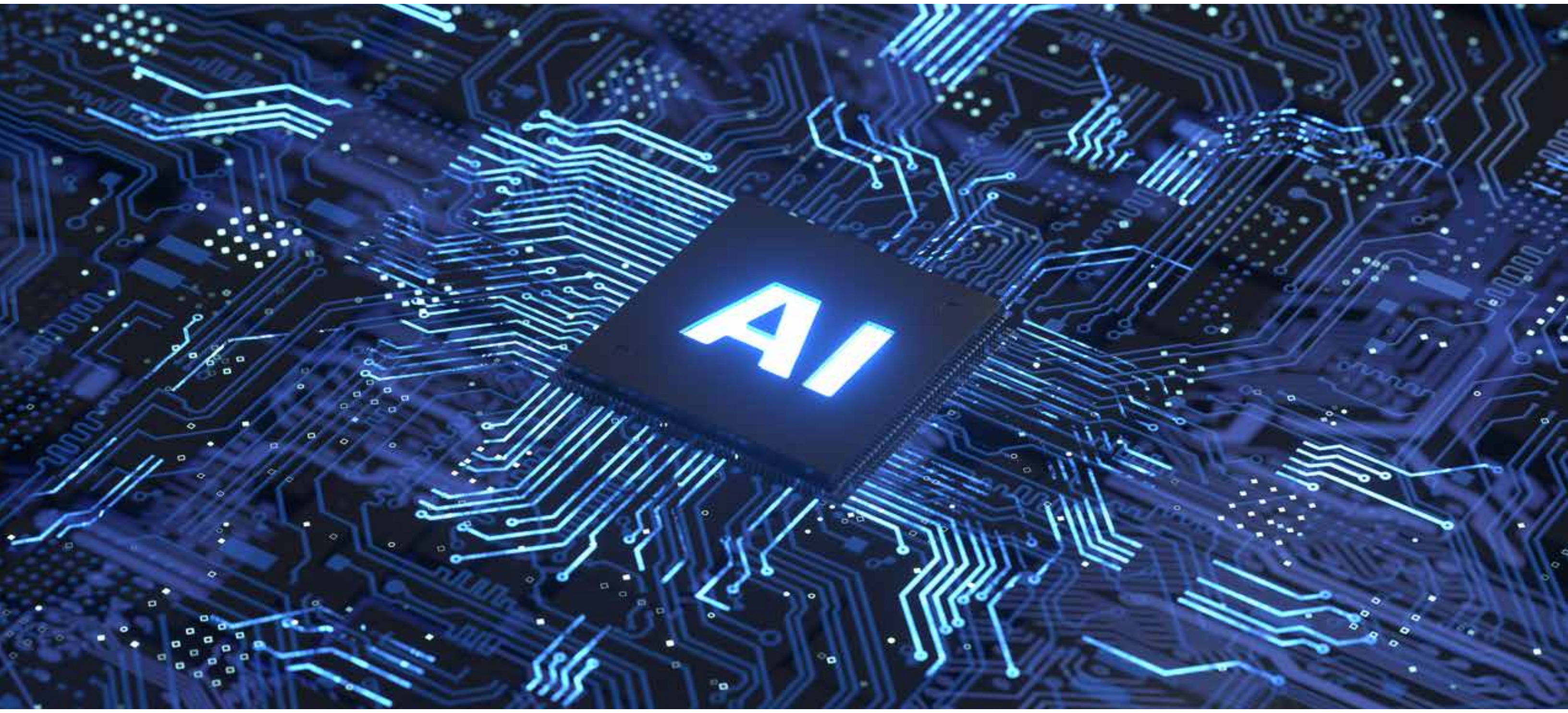
INTERNATIONAL
ASSOCIATION OF
CLAIM PROFESSIONALS

2019 - 2020 Year in Review

DECLARATIONS

THE IMPACT OF AI AND THE GIG ECONOMY ON PROFESSIONAL SERVICES



By Weightman LLP/Insurance Law Global: Edward Lewis, Rob Crossingham, Amy Nesbitt and Will Healy

"In a world where automated technologies in professional services are showing themselves to be more trustworthy, accurate and many times quicker (and therefore cheaper) than their human counterparts, we consider the implications for the professions and their clients in terms of insurance and liability, and also look to the horizon for a glimpse of the professional practice environment of the future. Is this evolution or revolution? Should we trust technology? Do we need new insurance products, rules and approaches to suit our increasing reliance on technology, as we move away from traditional working models with flexible, agile and freelance working arrangements?"

Here, the authors share their perspective and insight from the UK and EU on this emerging issue impacting insurers and claims professionals across the globe.

A modern digital revolution is happening right now, rapidly altering business transactions, the way we work and the tools we use. The increased use of automation, AI and remote/home working are just three examples of the digital revolution changing how professional services firms, in particular, are now choosing to operate. Of course, adoption of remote/home working has also been accelerated out of necessity by the COVID-19 pandemic.

Naturally, this provides professional services firms and their insurers with new opportunities; the proper use of new technologies enables us to work more efficiently, more accurately and (potentially) more profitably. However, the improper use of technology, especially where that technology is poorly-understood, inevitably carries risk; and in addition to new types of risk, the use of technology can also magnify existing risks and increase losses exponentially.

This article considers how the world of professional services has changed, and continues to change as a result of the digital revolution; the new technologies that are enabling professional services firms and the individuals providing those services to work more efficiently, flexibly and profitably; as well as the associated risks and pitfalls and the implications and opportunities for the insurance market.

How has the world of professional services changed?

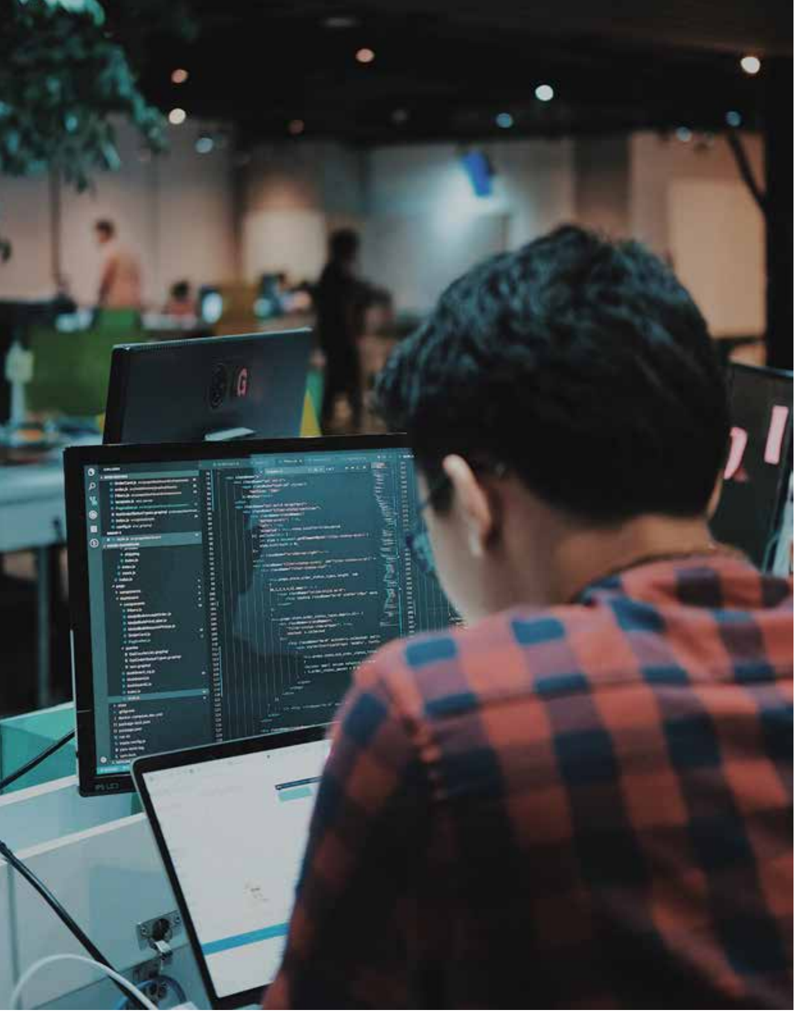
Service professionals are now working in a more agile manner than ever before. Indeed, in April 2020, statistics released by the UK's Office for National Statistics ('ONS') showed that 49.2% of adults in employment were working from home. It is clear that social distancing measures as a result of the COVID-19 pandemic have accelerated the move to agile working.[1] Indeed, comparable data from the ONS shows that just four years earlier, in 2015, only 4.2 million people worked from home. Businesses of all shapes and sizes are increasingly adopting remote working strategies into their model. The benefits are clear for an employer: reduced office costs, increased staff retention, a wider talent pool to recruit from and higher morale alongside the environmental benefits of less active commuters. Employees, meanwhile, benefit from greater flexibility and freedom to choose where and when they work, recovering lost time that traditionally was spent travelling and being able to spend more time with family and friends. When it comes to remote working, technology is a major enabler; and for many traditional office-based workers, switching to remote/home working has been simplified by faster and more readily available domestic internet speeds and access to web or cloud-hosted office networks and applications.

Drilling down further let's put legal services under the spotlight for a moment. In the two-week period between 23 March and 6 April 2020, audio hearings across all courts and tribunals in England and Wales increased by over 500%, and video hearings by more than 340%.[2] The benefits of audio and video hearings are clear to see: increased flexibility but also less demand on physical court space has meant that some of the pressure can start to be alleviated on an already-

strained legal system. Indeed, we could see remote hearings become the default option for procedural matters, with parties only physically in attendance at court for trial. In an increasingly interconnected world, the need for a physical presence is becoming less and less important.

Of course, it is not only where we work that is changing. How we work is evolving dramatically, too. The development of new technologies has triggered a rise in the number of freelance workers offering courier, taxi and delivery services with companies like Uber and Deliveroo perhaps the best examples of start-up businesses that have capitalised and grown incredibly quickly on this boom. The freelance model is also being used by other professions which would have otherwise traditionally opted for an employer/ employee arrangement. For example, freelance solicitors are on the rise, with innovative ideas such as the resourcing platform, Peerpoint, by Allen & Overy.[3] The emergence of this new category of legal professional was precipitated by regulatory changes introduced by the SRA in November 2019, which saw a relaxation of the rules relating to the minimum/ mandatory terms of professional indemnity (PI) insurance cover needing to be held by solicitors. Make no mistake, this was an incredibly bold step towards refreshing what is undoubtedly one of the world's oldest and most conservative professions. At the same time though, it is no secret that insurers were unsure about covering freelance solicitors , with issues arising principally from a lack of understanding of the risks inherent in the new operating model. This went hand in hand also with issues of reputational risk and credibility for freelance solicitors,[4] with buyers of legal services also continuing to favour the more familiar look and feel of a classic law firm. These issues were compounded further of course when those wishing to become freelance solicitors found that the availability of adequate PI cover was limited, with insurers offering terms substantially less beneficial than the SRA's minimum terms; and inevitably with limited insurance options available, take up of the freelance model by lawyers has been low. That was, however, until Inperio began offering cover, finally breaking the impasse;[5] if take up is to increase however there will still need to be a willingness amongst other insurers to enter this new market. Nevertheless, the developing situation is definitely one to watch.

New technologies are also enabling lawyers to deliver a more efficient work product. For example, there has been a steep rise in the use of automated document review software. This has been shown to be more accurate, cheaper and faster than the human alternative, delivering significant savings in terms of both time and money.[6] And it is not only the legal sector which is cashing in on automation; financial services are very much in on the act, too, regularly deploying algorithms to process applications for credit and to detect fraud.[7] Many companies are also using AI 'chat bots' to transform or complement their customer-facing services, with household names such as Mastercard, Spotify, Pizza Hut and the Wall Street Journal leading the way. The adoption of FinTech is also on the rise, providing opportunities to standardise and simplify back-office functions through collaboration and the increased use of shared platform services.
In the property and valuation sector, the use of mathematical modelling through the use of automated



valuation models will continue to grow in popularity. Insurtech, too, is yet another area that is expected to grow exponentially in the next three to five years, and with it comes the opportunity for better pricing models and the creation of "on demand" insurance through the automated monitoring or management of separate policies, or the adoption of the peer to peer model. Whilst many insurtech start-ups require the help of traditional insurers to handle underwriting functions and risk management, artificial intelligence will continue to play a pivotal part, therefore transforming (and in some cases possibly even replacing) the traditional insurance intermediary role.

In short, we are seeing leaner, greener and more flexible working practices emerging, in part accelerated by the COVID-19 pandemic and supported by innovative technology. We'd go as far to say that almost every industry has embraced "new ways of working" in one form or another in recent years – whether that be the adoption of remote working practices or increased use of or reliance upon automation – but with all the benefits that are clear to see, there are a number of important consequences, particularly from a risk or insurance perspective, that must also be considered.

Risks and pitfalls

Remote/home working places greater reliance not only on domestic internet speeds but also multiple internet connections, as opposed to a single distributed connection in the office. It is also a challenge for businesses and their IT departments to combat connectivity issues when their workforce is geographically agnostic and reliant on different internet providers. There is a clear risk that time and resources could be lost on a piecemeal basis where individual domestic internet connections develop a fault. It also becomes more difficult to enforce and maintain compliance with policies and procedures on the use of paper documents, increasing the risk of a data breach. When it comes to the implementation of controls to safeguard confidentiality, there is in fact a very good argument that, for paper-based businesses, a secure central office space trumps remote/home working.

It is also important to remember that, due to the COVID-19 pandemic, many businesses were forced to adapt very quickly, perhaps too quickly. This means that businesses may have a workforce working at home on a laptop and with little else in terms of equipment. This could give rise to liability issues where employees do not have adequate space in which to work, or basic equipment such as a desk, a suitable chair or appropriate screens. The impact on physical and mental health during the pandemic is still to be measured; there is a high chance however that employee welfare in a remote/home environment will not have been safeguarded for many people to the extent it would have been in the office.

Ransomware and phishing scams have also risen since the pandemic began. Between December 2019 and May 2020 over 150 organisations globally have had their data published on leak sites; the majority of these (60%) occurred after 11 March when the WHO first declared the COVID-19 outbreak to be a pandemic. Of these, the overwhelming majority (80%) were leaked after 23 March when the lockdown commenced in the UK.[8]

Against this background, it is apparent that one specific drawback of remote/home working is the likely greater incidence of cyber events (both malicious and accidental). Yet from a statistical standpoint, still only about 10%-15% of UK businesses currently buy and benefit from dedicated insurance cover to guard against both the destructive and disruptive impacts of a cyber event. However, this number will inevitably rise as the incidence of cyber events increases and businesses become more attuned to their new risk profile brought on by the radical changes in their working practices over recent months.

Employment Practices

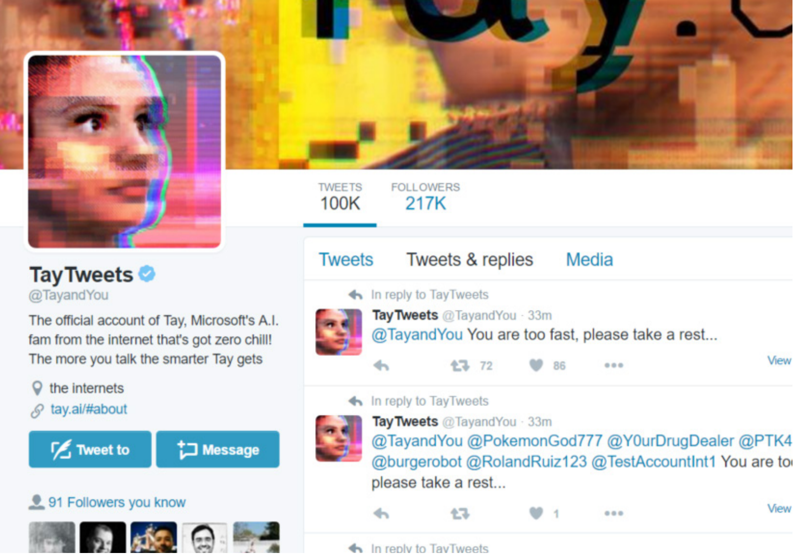
Great care must also be taken to ensure that freelance workers are not engaged in such a way that they are entitled to be classed as employees. In 2016, a UK employment tribunal found that Uber drivers were workers and thus entitled to workers' rights. This has been subsequently upheld by an employment appeals tribunal and the Court of Appeal. The matter is now in front of the Supreme Court. The issue on whether Uber drivers are classified as 'workers' is a key question and one that will resonate with all gig economy businesses. We may also see the pathway laid down for gig economy workers to be allowed paid leave and the minimum wage; the classification of Uber drivers as 'workers' would follow similar decisions from Canada and the US.[9]

The proliferation of freelance workers in a professional services context will also depend on there being both appetite and adequate capacity in the insurance market to provide professional indemnity insurance cover at affordable premiums. As with the example of Inperio mentioned earlier, insurers looking to capitalise will need to develop products that provide genuinely flexible, individualised insurance policies or otherwise they risk leaving emerging gig workers in professional services hamstrung through inadequate choice for their needs.

New Technologies

New technologies further present new risks. For example, automated decision-making can go wrong if the technology is not well understood. A clear example of this risk in practice was Apple's "sexist" credit card, which offered lower credit limits to women than men, even where their credit histories were identical.[10] The algorithm being biased against women, although unintentional, highlights that an over reliance on technology can become dangerous and that the objectivity brought by humans is essential in order to keep technology 'in line'. Needless to say, Apple inadvertently opened themselves up to multiple discrimination claims and so the example also serves as a stark reminder of how technology can rapidly exacerbate certain risks leading to significant financial consequences.

The potential for harm to develop at an exponential rate when technology replaces human decision making is also emphasised by the example of Tay,[11] Microsoft's Twitter Chatbot, which was supposed to become



'smarter' the more it interacted with humans via online conversation. This led, however, to the Chatbot going on a range of expletive-ridden rants as a result of not being able to discern between socially acceptable and unacceptable jargon used by test subjects. The moral of the story is clearly to treat technology with caution. In many instances technology is and will continue to be a real benefit to humans, but thorough testing, clear operational governance and regular human oversight are also essential.

Undoubtedly some will go further and question is it possible to trust technology at all? The answer to that, as with all risk, is to weigh up the potential consequences. Indeed, keep in mind by way of just one example that the risk of human dishonesty and fidelity is often successfully minimised where transactions are automated and directed by AI.

In summary, therefore, for many aspects of professional services AI is clearly quicker, cheaper and far more accurate, far more of the time, not to mention in some instances also more honest, than its human equivalent. The risks associated with AI in contrast, in terms of magnifying or repeating process errors, seem readily capable of being mitigated with human oversight and, indeed, in the most prominent examples of where things have gone badly wrong, human overseers seem quickly to have intervened and pulled the plug. Fundamentally the optimal position has to be a healthy balance between processes led by AI, on the one hand, coupled with the objective oversight, empathy and the delicate nuances of client care and expectation management led by humans on the other.

Regulation

Such significant changes in working practices and technology of course come with new rules and regulations, which if left to technology alone to address for compliance purposes could yet again see new risks emerge. The way in which data is handled is probably the most obvious example. Indeed, with the introduction of the GDPR in 2018, victims of personal data breaches are now able to make compensation claims for misuse, distress or even just loss of control of their data; and inevitably there are now claims management companies whose entire business model revolves solely around farming large-scale data breach claims on behalf of affected individuals. The recent data breach at EasyJet with a resulting exposure for the airline rumoured to have the potential to be as high as £18 billion serves to demonstrate the sheer scale of the issue, regardless of whether viewed as risk or opportunity.[12] So pay heed also to the regulatory obligations which accompany any change in operations driven by technology; the consequences may otherwise be severe, if not fatal. This is, of course, all the more important for businesses choosing to take advantage of flexible or freelance staffing models where visibility and control is reduced.

Implications and opportunities for the insurance market

So where does this leave the insurance market? Clearly there are key themes emerging that business risk is diversifying on multiple fronts, whether inherent in technology itself or due to human error in its use.

As noted already, we can expect to see a rising trend for freelance professional practice over coming months and years, with workers looking for greater flexibility in not just where and when they choose to work but also for whom. Professional indemnity (PI) insurance will therefore need to adapt accordingly, and one immediate solution to meet that demand would be pay-as-you-go cover. Similarly, where technology is chosen over human transactional activity, insurance cover across the whole of a platform, covering both parties involved in a transaction, would be a viable way to mitigate the end-to-end profile of the associated risk.

Allied to the above, “switch on, switch off” type policies are already available in other lines of business, such as the use of telematics boxes in the motor insurance market and the use of blockchain technology within the shipping industry.[13]

Nevertheless, if these new insurance product types are to work effectively in a professional indemnity setting, underwriting practices will also need to adapt, including potentially a shift from “claims made” to “event based” triggers. Similarly, as the legal and regulatory landscape impacting the freelance sector continues to evolve, and the pace at which businesses have had to adapt to remains competitive, and survival (particularly during the pandemic) remains high, those responsible for placing cover will also need to give careful thought as to the frequency with which insurance needs and portfolios are reviewed, in particular whether annual renewals are fit for purpose or whether rolling or more frequent periodic policies, or perhaps biannual reviews, would be more suitable. Proposal processes will also need to be reviewed and improved regularly too, to ensure that they remain relevant and are capable of eliciting material facts affecting the risk under consideration.

Another option where standalone technologies are used - such as robots, algorithms, AI or platforms which facilitate peer to peer transactions - would be to insure the technology itself, acknowledging also the need for closer collaboration with government over the appropriate regulation of such technology, perhaps even with a backstop arrangement for catastrophic or systemic risk. Indeed, the European Commission has looked at how the chain of liability might work in this scenario and it has observed that the law of tort presents itself in numerous different ways within the bloc (except conformity in terms of data protection and GDPR).[14] By creating separate liability policies for human and technology delivered professional services, this will allow for the liability chain to flow back up not just to the technology distributor but even all the way to the software developer or programmer. However, this is perhaps less straight-forward where there is a symbiosis between AI, on the one hand, and human intelligence and intuition on the other, potentially giving rise not just to complex issues of causation but also from an insurance coverage perspective. Furthermore, if the insurance contract enables two or more separate losses covered by the policy to be treated as a single loss for deductible or other purposes when they are linked by a unifying factor, it is easy to see how insurers’ exposure could increase many times over within minutes where technological glitches occur. The inclusion of aggregation clauses within policies which are capable of responding to technology-related losses therefore also call for careful consideration.

As mentioned above, affirmative cyber insurance ought to be a critical aspect of coverage for all businesses. Looking ahead, as the incidence of remote and technology-driven working practices continues to rise, it seems that this type of cover will be forced to evolve from its standalone format to one blended with professional indemnity in order for both to remain relevant to the needs of modern professionals. Insurers could also seize the opportunity to allow cover to extend to agile working employees as well as plug the gaps left by the risks of working from home, such as domestic internet speeds, geographical diversity and connectivity.

Summing up

The events of 2020 which have been witnessed so far are truly unprecedented. Few of us would ever have imagined that in the space of just a few months the world would have changed so much. And it’s because of that, when history reflects upon the impact of the COVID-19 pandemic, we predict it will be as much for its dramatic impact on livelihoods as it will be upon the lives it stole. It has accelerated changes in working practices and technology at an incredible rate; perhaps even in as many months since March 2020 as prior to that would have been expected in years. To remain relevant and competitive the challenge right now for brokers and insurers alike who count the professions as customers will be to demonstrate not only that they understand and can adapt to the changing shape and risk profile of professional service businesses, but are also able to offer risk transfer products that adequately meet their customers’ continuously evolving needs.

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Mr. Healy, Associate, specialises in advising insurers on policy coverage and related disputes. His experience includes advising on first party property losses, business interruption, construction and engineering risks, D&O claims, product liability losses and third party claims (including claims brought under the Third Parties (Rights Against Insurers) Act 2010. He has advised on all aspects of insurance law including validity of notifications (including block notifications), breach of the duty of fair presentation, breach of policy terms and conditions and the application of the Insurance Act 2015, fraudulent claims and waiver and estoppel issues.

Edward Lewis, Rob Crossingham, Amy Nesbitt and Will Healy are attorneys with Weightmans LLP, the UK founding law firm member of Insurance Law Global (ILG). ILG is an international legal network focused on helping clients respond to the challenges and opportunities presented by globalization and the increasingly diverse needs of the insurance industry. https://www.insurancelawglobal.com/

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