

La Suprema Corte del Reino Unido sienta importante precedente respecto a la cobertura de seguros por interrupción de negocios derivados de la pandemia de COVID-19

Category: Insurance and Reinsurance, Legal Alerts

written by Nader, Hayaux & Goebel | febrero 25, 2021

Una de las consecuencias de la pandemia de COVID-19 fue la suspensión de actividades comerciales en diversos sectores e industrias. Las reclamaciones masivas de pólizas que contaban con la cobertura de interrupción de negocio no se hicieron esperar y en términos generales, las aseguradoras negaron cobertura a sus asegurados.

En vista del gran número de desavenencias entre asegurados y aseguradoras, la autoridad reguladora de seguros del Reino Unido (Financial Conduct Authority (“FCA”)) hizo uso de su facultad para llevar a cabo un “test case” con la intención de sentar un precedente judicial respecto a la cobertura de interrupción de negocio por daños sufridos derivado de la pandemia de COVID-19 y, de esa forma, dar certidumbre jurídica a los asegurados y una guía al sector asegurador en la gestión de dichas reclamaciones.

El 9 de junio de 2020, la FCA, en representación de los asegurados, interpuso una demanda en contra de ocho aseguradoras respecto a 21 tipos distintos de pólizas con cobertura de interrupción de negocio.

En septiembre del 2020, la corte de primera instancia dictó sentencia, la cual fue apelada por ambas partes.

La Suprema Corte del Reino Unido (“Corte”) utilizó su facultad de atracción para

tomar el caso y dictar una sentencia definitiva.

El pasado viernes 15 de enero, la Suprema Corte del Reino Unido resolvió los recursos de apelación en favor de los asegurados.

En términos generales, la Corte clasificó las diversas cláusulas de interrupción de negocio en dos tipos: (i) aquellas cuya cobertura se basa en la existencia de una enfermedad infecciosa en cierto perímetro geográfico respecto del negocio del asegurado ("**Cláusulas de Enfermedad Infecciosa**") y (ii) las que se basan en la imposición de una restricción que impide el acceso al negocio ("**Cláusulas de Impedimento de Acceso**").

Respecto a las **Cláusulas de Enfermedad Infecciosa**, la Corte resolvió que cada uno de los casos de COVID-19 (con o sin síntomas) existente dentro del perímetro geográfico establecido en la póliza, debe considerarse como una sola causa por lo que respecta a hechos que derivaron en la interrupción del negocio y, por lo tanto, como un detonante de cobertura bajo la póliza.

Respecto a las **Cláusulas de Impedimento de Acceso**, la Corte determinó que las medidas impuestas por el Gobierno del Reino Unido, aun y cuando no fuesen coercitivas o con rango de ley, activan la cobertura de interrupción de negocio.

La Corte también resolvió que no es necesario el impedimento total de la actividad comercial para que exista cobertura, sino que hay cobertura incluso cuando el impedimento sea parcial.

La Corte estableció que los términos "manifestación de una enfermedad infecciosa (notifiable disease)", "incidente" y "ocurrencia de una enfermedad infecciosa" deben interpretarse con la misma amplitud para efectos de la cobertura, rechazando argumentos de tipo sintáctico presentados por las aseguradoras.

Asimismo, la Corte sentó un precedente sumamente importante al interpretar que existe cobertura por interrupción de negocio cuando el siniestro ocurre por dos causas concurrentes e independientes que se originan por el mismo evento fortuito (i.e. la pandemia), siempre y cuando ninguna de las causas concurrentes esté expresamente excluida en la póliza. Bajo dicha premisa:

(A) En las **Cláusulas de Enfermedades Infecciones**, las causas del siniestro sean (i) la existencia de casos de COVID-19 dentro del radio geográfico establecido en la póliza y (ii) fuera de dicho radio (provocando que el público deje de concurrir a locales comerciales); y

(B) En el caso de las **Cláusulas de Impedimento de Acceso**, las causas del siniestro sean: (i) las restricciones impuestas por el gobierno para que el asegurado acceda a su negocio y (ii) las restricciones de movimiento impuestas a terceros por instrucciones del gobierno a causa de una pandemia, que tenga como efecto la suspensión de la afluencia de clientes al negocio.

Esta interpretación sobre la causa raíz se sobreponen al precedente sentado en el caso *Orient-Express Hotels Limited v Assicurazioni Generali Spa*; el cual era utilizado por las aseguradoras para fundamentar el rechazo de reclamaciones por interrupción de negocios.

Respecto a la cuantificación de los daños, el fallo de la Corte estableció que deben de tomarse en cuenta los montos que se obtuvieron durante la interrupción del negocio por el asegurado y comparar dichos montos con la cantidad que habría recibido de no haber existido la pandemia.

La resolución de la Corte proporciona implícitamente valiosos elementos para interpretar aspectos de la pandemia de COVID-19 que no fueron parte de la litis. Por ejemplo, en ningún momento se cuestiona la naturaleza catastrófica de la pandemia de COVID-19, no obstante el análisis que la Corte hace del caso *Orient-Express* hace patente las similitudes entre los efectos catastróficos del huracán Katrina del 2005 y la pandemia de COVID-19; en palabras de Lord Briggs, el caso *Orient-Express* es “el único caso de hechos comparables del que se tiene registro” (párrafo 319).

Si bien la resolución de la Suprema Corte del Reino Unido no es obligatoria para los tribunales en otras jurisdicciones, en virtud del alto grado de especialización que tienen los jueces ingleses en materia de seguros y reaseguro, consideramos que ésta sienta una opinión persuasiva que debe ser tomada en cuenta en las decisiones de aseguradoras, jueces, árbitros y asesores legales en otros países, en temas tales como:

- **La similitud entre los efectos de la pandemia de COVID-19 y de otras**

catástrofes naturales como huracanes.

- **La posibilidad de que a pesar de que existan diversas causas concurrentes e independientes para la ocurrencia del siniestro, las epidemias y pandemias por sí mismas, detonan la cobertura.**
- **Los criterios para determinar las causas que dan lugar a cobertura por epidemias y pandemias.**
- **La forma de cuantificar las pérdidas causadas por siniestros derivados de interrupción de negocio o pérdida de rentas ocasionados por la pandemia.**

Para cualquier aclaración o pregunta en relación con lo anterior, le agradeceremos ponerse en contacto con el socio de Nader, Hayaux & Goebel con quien trabajan o contactar a cualesquiera de [Yves Hayaux du Tilly \(yhayaux@nhg.com.mx\)](mailto:yhayaux@nhg.com.mx) o [Luciano Pérez Gómez \(lperez@nhg.com.mx\)](mailto:lperez@nhg.com.mx).

The 8th edition of The Insurance and Reinsurance Law Review

Category: Insurance and Reinsurance, Publications
written by Nader, Hayaux & Goebel | febrero 25, 2021

We are delighted to announce that the 8th edition of *The Insurance and Reinsurance Law Review* was recently published. With the contribution of our Partner Yves Hayaux-du-Tilly.

Up until June of this year, the insurance market M&A market was active. After a brief pause, we start to see activity resuming and expect to continue seeing further consolidation, growth or a combination of both in the current market players in Mexico. In particular, we expect health insurance to be a key driver of growth in the

insurance industry in the years to come.

We have been leading the Mexican market working with reinsurance and insurance companies as well as brokers in developing parametric insurance products for catastrophic risks...

We are pleased that the regulators have taken a flexible approach to parametric products. It is a matter of time for parametric insurance to replace traditional P&C in catastrophic risks. The pace for this change will be determined by the education of both, consumers and regulators on these type of products.

“While it is a priority for regulators to protect customers and expand insurance protection to the general population, there will be also more intervention of the state in the development of insurance solutions and risk management mechanisms to ensure protection of vulnerable groups, and proper management of catastrophic risks by federal and state governments and state-owned companies.”

“Insurance can be a key instrument for social development. In this sense, innovation and customer protection must be a priority for regulators and the market as a whole.”

“The regulators are aware of the potential of insurtech to give access to vulnerable groups to the benefits of insurance products. Unfortunately, the regulatory regime in effect has become a hurdle rather than an incentive for the development of insurtech products and projects...”

Regulation must not be immune to certain degree of reasonable risk in order to allow new and innovative technology to flourish. For the continuing development of the insurance sector, the regulator must acknowledge and embrace new technologies and understand the uncertain nature of start-ups. In times characterized by overregulation, broad-mindedness is a challenge.

Please download the complete document here: [The Insurance and Reinsurance Law Review - 8th Edition](#)

Instituciones de Seguros - Régimen de Excepción Temporal en Obligaciones PLD

Category: Firm news, Insurance and Reinsurance

written by Nader, Hayaux & Goebel | febrero 25, 2021

El 3 de julio de 2020, la Secretaría de Hacienda y Crédito Público publicó en el Diario Oficial de la Federación un acuerdo por el que se adiciona la Disposición Décima Segunda Transitoria a las Disposiciones de carácter general a que se refiere el artículo 140 de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, con el objeto de establecer temporalmente ciertas excepciones a la obligación a cargo de las Instituciones de Seguros de completar los expedientes de sus clientes al momento en que ocurra un siniestro bajo las pólizas de seguro contratadas.

El régimen de excepción es una respuesta por parte de la autoridad a un problema práctico ocasionado por la crisis derivada del COVID-19, en virtud de que los clientes o beneficiarios, al momento de ocurrir un siniestro, no han podido proporcionar la información requerida por las Instituciones de Seguros para completar su expediente de identificación. Esto ha generado retrasos en la atención a los asegurados o beneficiarios o una imposibilidad por parte de las Instituciones de Seguros de cumplir con las Disposiciones.

Es por esto que la nueva Disposición Transitoria permite, por un plazo de seis meses (del 4 de julio de 2020 y al 3 de enero de 2021), que las Instituciones de Seguros puedan pagar el siniestro sin que tengan que recabar la información adicional de sus clientes o beneficiarios que exige dichas Disposiciones (en particular las Disposiciones Cuarta, Sexta y Séptima), siempre y cuando, la Institución de Seguros pague la indemnización mediante transferencia bancaria o por cheque nominativo al cliente o beneficiario.

En caso de requerir más información en relación a este tema, comuníquese con sus contactos habituales en Nader, Hayaux & Goebel, o con [Yves Hayaux-du-Tilly Laborde](mailto:yhayaux@nhg.com.mx) +52 (55) 4170 3078 yhayaux@nhg.com.mx o [Luciano Pérez Gómez](mailto:lperez@nhg.com.mx) +52 (55) 4170 3035 lperez@nhg.com.mx.

An overview to insurance & reinsurance laws and regulations that may occur in Mexico

Category: Insurance and Reinsurance, Partners, Publications
written by Nader, Hayaux & Goebel | febrero 25, 2021

The Legal 500, Mexico: Insurance & Reinsurance - by Partners Yves Hayaux du Tilly and Luciano Pérez

Mexican insurance contracts are governed by the Insurance Contract Law (“LCS”) published in the Official Gazette of the Federation (Diario Oficial de la Federación (“DOF”) on 31 August 1935. The LCS applies to all insurance contracts, except for maritime insurance governed by the Navigation and Maritime Commerce Law published in the DOF on 1 June 2006.

The insurance contract is formed by the consent of the parties. Pursuant to Article 21.1 of the LCS the insurance contract comes into effect when the insured receives a confirmation that the insurance company accepted his request for insurance coverage, regardless of whether any written evidence, such as an insurance policy or certificate, is issued. The effectiveness of an insurance contract cannot be subject to the condition that the respective insurance policy or any other document evidencing its acceptance is issued nor to the condition that the respective premium is paid.

Other topics of analysis that we break down in the article are

- Insurance and co-insurance regulations depending on the jurisdiction
- License approval times
- Owner controls (including foreign ownership)
- Insurance or reinsurance risks in your jurisdiction without a license or authorization
- Sanctions depending on the jurisdiction
- Supervision of the solvency of insurers and reinsurers
- Minimum capital requirements
- Policyholder protection plans in your jurisdiction
- Compliance with suitability requirements and/or approvals
- Restrictions on outsourcing business-related services
- Restrictions on the types of assets insurers or reinsurers can invest in
- Supervision and control of insurance sales
- Distance or online selling regulations
- Rules pertaining to distance selling or online sales
- Consumer policy restrictions
- Responsible for handling complex commercial claims
- Legal transfer mechanism available for sales or transfers of books
- Main challenges for new market entrants and what role does the digital innovation plays
- Existing regulations for insurers when using customer data

The companies that will take the market leadership in the coming years.

There is tremendous gap and hence, potential as well as an urgency to develop an efficient health insurance market and we are seeing important developments from key players towards developing such health insurance market. Despite the challenges posed by a complex and burdensome regulatory landscape and lack of a level playing field due to a lack of proper supervision from the regulator of certain players offering insurance products without an insurance license, based on the new projects being developed in Mexico, we expect that health insurance will be a key driver of growth in the Mexican insurance industry in the years to come. Provided that the financial stability is maintained, we also expect life-saving products continue growing among the middle class population. We are seeing growth in cyber insurance related products, including insurance to protect new risks such as privacy

and data protection.

We will continue seeing growth in financial lines, D&O insurance, professional liability, reps, warranties and tax insurance products, as well as products oriented in preventing fraud as well as surety products. Insurance for natural catastrophes will keep developing with a major trend for a healthy development of parametric products using new technologies to measure risks coupled with the development of parametric indexes.

Automobile insurance will also continue growing fueled by a mandatory automobile liability insurance schemes that is still not fully nor duly enforced with a potential of growing at least threefold if it were to be implemented. Despite the numerous reforms to the financial laws, the opening of the market to foreign investment and the easiness of doing business in Mexico, the large gap in insurance coverage has not receded and Mexico continues to be an underinsured market continuing to make it as attractive as ever. There is expectation that new technologies and insurtech will help reduce the gaps in underinsurance and contribute to improve financial inclusion among the Mexican population. The current administration is looking to maintain the regulatory and financial strength of the Mexican insurance industry, while also improving the penetration with a particular aim in building resilience and improving financial inclusion.

[To read the complete article, please click here](#)

Cyber Risk: The Pandemic Effects on the Insurance Sector

Category: Events, Firm news, Insurance and Reinsurance
written by Nader, Hayaux & Goebel | febrero 25, 2021

Together with other Cyber and Insurance Experts, partner Yves Hayaux-du-Tilly will discuss the impact of the pandemic in the insurance sector, the implications on the market, businesses and technology.

The banner features a background of white, interconnected, rounded rectangular shapes. On the left, there are three blue curved lines. The main title is in a dark blue font. A light blue rounded rectangle on the left contains event details. On the right, a list of presenters is provided. At the bottom, a row of logos for various organizations is displayed.

Cyber Risk: The pandemic effects on the insurance/reinsurance contract and market Insurtech

Presenters:
Carlos Estebenet, Bullo Abogados, Argentina
Daniel Seoane, Beccar Varela, Argentina
Yves Hayaux du Tilly, Nader, Hayaux and Goebel, UK
Toby Clowes, Price Forbes, UK
Anu Khurmi, Templar Executives, UK

Online Event
April 16th 3pm UK Time
Registration and Agenda

Logos at the bottom include: NADER, BACC BECCAR VARELA, MEXICAN CHAMBER OF COMMERCE - GB, SOBAL, BULLO, Tarjetas Extranjeras, PRICE FORBES, and THE CARIBBEAN COUNCIL.

Cyber Risk webinar

More information and registration is available [here](#).

Log in details will be sent separately closer to the date.

Agenda

15hs Welcome

15.05 hs **Carlos Estebenet**, Bullo Abogados

The Argentine Perspective of Covid 19 and Insurance

15.25 hs **Yves Hayaux-du-Tilly**, Nader, Hayaux & Goebel

The Mexican Perspective on the impact of COVID 19 in the Insurance Market, Cyber

Risk and Insurtech

15.50 hs **Daniel Seoane**, Beccar Varela

The Argentine Perspective on Insurtech and Cyber Risk

16.10 hs **Anu Khurmi**, Templar Executives

TBC

16.30 hs **Toby Clowes**, Price Forbes

- London market status and evolution
- Claims trends
- Buying patterns

16.50 hs **Q&A and general discussion**

17.15 hs End of Event

#

Please note all proceeds from this event will be donated to organizations fighting #COVID19. We ask participants to let us know of an organization they are supporting and want us to consider.

Insurance update: CNSF dividend recommendations

Category: Insurance and Reinsurance, Legal Alerts
written by Nader, Hayaux & Goebel | febrero 25, 2021

Yesterday, 31 March 2020, the Insurance and Bonding National Commission ("**CNSF**") issued a statement recommending insurance and bonding companies to refrain from paying any dividend to its shareholders and from enacting any mechanism or action that involves the transfer of patrimonial benefits to its shareholders, including the agreement to make any payment corresponding to the years 2019 and 2020, or any share buyback or any other mechanism to compensate their shareholders, as measures to maintain the solvency and capital requirements of insurance and bonding companies, as a response to the extraordinary situation caused by the COVID-19 Pandemic.

The CNSF furthermore required that any insurance and bonding company or financial group that decides not to follow the recommendations from the CNSF, must inform through its Chief Executive Officer to the CNSF, within ten business days, the reasons for its decision, on the understanding that the decision and reasoning of any such insurance and bonding company and financial group will be made public by the CNSF.

Each insurance and bonding company may or may not decide to adopt the recommendation from the CNSF, provided that the CNSF has no legal grounds to enforce its recommendations or impose fines for not adopting its recommendations, and any attempt to do so will be invalid. The foregoing must take into account the reputational damage, if any, that such decision and the reasoning thereof may have if same are made public by the CNSF.

The recommendations from the CNSF follows the trend imposed by regulators to banks and insurance companies in many jurisdictions to limit the distribution of dividends and other benefits to the shareholders, in fear of extraordinary solvency requirements that may arise from the COVID-19 Pandemic.

Should you have any questions regarding the CNSF recommendations or require to discuss the alternatives your company or financial group has in connection with these, please contact your regular contact at Nader, Hayaux & Goebel or either of the following partners [Yves Hayaux du Tilly L.](mailto:yhayaux@nhg.com.mx) (+52 (55) 4170 3078; yhayaux@nhg.com.mx) and [Luciano Pérez G.](mailto:lperez@nhg.com.mx) (+52 (55) 4170 3035 lperez@nhg.com.mx).

Insurance Newsletter: Release of the Principles of Reinsurance Contract Law

Category: Insurance and Reinsurance, Legal Alerts

written by Nader, Hayaux & Goebel | febrero 25, 2021

We inform our clients and friends that on November 28, 2019, the Principles of Reinsurance Contract Law (the “**Principles**”) were published by the Project Group (joint venture set between several Universities and professors, primary insurance companies’ representatives, reinsurance companies and reinsurance brokers and special advisors) in cooperation with the International Institute for the Unification of Private Law (“**UNIDROIT**”).

The Principles set specific reinsurance rules applicable to contract law, aiming to help such areas where reinsurance practitioners felt the urgency of improving legal certainty. Principle’s basis were made upon incorporating: (i) uniform rules on general contract law, (ii) uniform system and (iii) a set of standardized terms, which are set up to minimize the interpretation problems of reinsurance contracts.

The Principles only deal with reinsurance specific rules of contract law, considering that issues regarding general contract law are already included in the Principles of International Commercial Contract of 2016 (“**PICC**”).

The Principles have been drafted as “soft-law”, which means they will work as an optional guide of reinsurance contract law when it is chosen by the parties, and for these principles to have binding effect, the contracting parties should voluntarily choose to do so. However, there is also the possibility that the Principles may be applied by courts or arbitral tribunals, as the case may be, even in cases where the parties have not chosen to apply them.

The Principles are structured as follows: **(i)** Chapter 1 contains general provisions governing structural issues and the connection between the Principles and the PICC; **(ii)** Chapter 2 deals with the duties of the contracting parties, which are set upon good faith of the individuals; **(iii)** Chapter 3 supplement Chapter 2, insofar as it provides remedies in case one of the parties does not comply with its obligations under the reinsurance contract; **(iv)** Chapter 4 addresses the issue of loss allocation; and **(v)** Chapter 5 regulates loss aggregation.

The Principles represent a major step in the standardization of international reinsurance contracts.

For further information with respect to the matters set forth above and Insurance Law, please reach out to your regular contacts at Nader, Hayaux & Goebel or any of Yves Hayaux-du-Tilly L. +52 (55) 4170 3003 yhayaux@nhg.com.mx and Luciano Pérez G. +52 (55) 4170 3027 lperez@nhg.com.mx.

Minimum Paid-In Capital of Insurance and Surety Companies

Category: Insurance and Reinsurance, Legal Alerts

written by Nader, Hayaux & Goebel | febrero 25, 2021

On June 24, 2019, the National Insurance and Bonding Commission (Comisión Nacional de Seguros y Fianzas) published in the Official Gazette of the Federation (Diario Oficial de la Federación) the Circular 10/19 (Circular Modificatoria 10/19)

amending Annex 6.1.2. of the Sole Insurance and Bonding Circular (Circular Única de Seguros y Fianzas) and the minimum paid-in capital stock that insurance and surety companies must maintain for each authorized operation or line of business. Pursuant to Circular 10/19, the minimum paid-in capital stock is updated as follows on the [PDF attached here](#).

For further information, please get in touch with your regular contacts at Nader, Hayaux & Goebel.

Insurance team contributed to The Legal 500: Insurance & Reinsurance 3rd Edition Country Comparative Guide

Category: Insurance and Reinsurance, Publications

written by Nader, Hayaux & Goebel | febrero 25, 2021

Our Partners [Yves Hayaux-du-Tilly](#) and [Luciano Pérez](#) contributed to [The Legal 500: Insurance & Reinsurance 3rd Edition Country Comparative Guide](#). The aim of this guide is to provide its readers with a pragmatic overview of the law and practice of insurance & reinsurance law across a variety of jurisdictions.

Each chapter provides information about the current issues affecting insurance and reinsurance and addresses topics such as contract regulation, licensing, penalties, policyholder protection, alternative dispute resolution as well as personal insight and opinion as to the future of the insurance market over the next five years. The Q&A template for each chapter has been provided by Katherine Coates of Clifford Chance.

You can download a free copy of the Mexico chapter [here](#).



NHG recognized as Capital Markets Law Firm of the Year 2018 by Best Lawyers

Category: Awards, Capital Markets, Firm news, Infrastructure, PPPs and Government Procurement, Insurance and Reinsurance, Partners

written by Nader, Hayaux & Goebel | febrero 25, 2021

Nader, Hayaux & Goebel is pleased to inform that Best Lawyers, a publication that gathers information from other firms and lawyers, has recognized NHG as **Law Firm of the Year 2018** in the practice of [Capital Markets](#). This recognition is determined based on certain factors including comments from other attorneys, coverage and scope of the firm in this area of practice, historical analysis of the winners in **Lawyer of the Year** and the reputation of the firm as an expert in this area.

Likewise, we are pleased to inform you that [Michell Nader](#), [Yves Hayaux](#) and [Hans Goebel](#) have been recognized as **Lawyer of the Year**, in the practices of *Project Finance & Development*, *Insurance Law* and *Structured Finance Law*, respectively.

For the full rankings of Nader, Hayaux & Goebel, visit [Best Lawyers](#).