

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

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written by Adrián Trejo Santiago | February 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).

London calling: reflections on bilateral trade between the UK and Mexico

Category: Banking & Finance, Capital Markets, Energy, Infrastructure, PPPs and Government Procurement, Insurance and Reinsurance, Mergers and Acquisitions, Publications, Uncategorized

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In an extensive interview with Christina Mckeeon Frutuoso of Latin Lawyer, Nader, Hayaux & Goebel's resident partner in London, Yves Hayaux-du-Tilly Laborde, reflects on how far bilateral relations between the UK and Mexico have come and whether Brexit and the election of Donald Trump in the US will make that relationship stronger.

A transcript of the interview, which was first published on Latin Lawyer's website on

23 April 2018, is rendered below:

Latin Lawyer: Where is UK-Mexican trade currently looking positive?

Yves Hayaux-du-Tilly: The food and drinks industry is growing on both sides: whiskey is being exported to Mexico - it represents around 8% of exports into Mexico - and tequila imported to the UK. There's a massive consumer market now in Mexico, a country with a huge demographic and an increasing number of young consumers. Mexican restaurants are also growing exponentially in the UK. There's a lot of appetite for these kinds of projects.

Insurance investment has also been positive on both sides. There's currently only two Latin American investors into Lloyd's of London, both of which are Mexican, which is both a recent and important development.

LL: What makes Mexican investors more attractive than other Latin American insurance investors, using Lloyd's as a case study?

YH: I think the fact that the only two Latin American investors are both Mexican has to do with the sophistication of Mexican insurance companies; the appetite that Lloyd's and the London market has for Mexican risk; the volume [of risk] is also quite attractive; and the reputation of Mexican insurance companies which is very good.

LL: Which other sectors have seen strong relations between the two nations?

YH: Fintech is going to grow in a very important manner. The UK government has been extremely helpful and engaged in sharing best practices with Mexico in relation to the recently passed fintech law, especially concerning the sandbox concept and how the FCA has been dealing with it. Mexican companies [in London] are now looking forward to bringing some of the best practices they have learnt here over to Mexico.

LL: Where do you see room for improvement in UK-Mexico trade?

YH: We have all heard about UK Expert Finance (UKEF)'s £5 million pound facility [pledged to help UK businesses looking to export to Mexico] which is very important,

but not enough has been done to employ that £5 million in actual loans to British companies. There's only really been one project so far, the Metrobus project, funded by Santander, which will see the export of British double decker buses to Mexico City. But considering the sum available, I think there is more to be done.

LL: In what industries can we expect this UKEF money to be invested?

YH: I think a lot will go into energy, as was discussed at UK Mexico day last month, and the UK is already leading investments into Mexico's oil and gas sector. The number of British companies that have been successful in their bids exceeds any other nationality in general terms. You have the big companies like BP and Shell, but other lesser-known companies like Capricorn and Premier Oil are finding great ground to develop with the opening of Mexico's oil and gas industry.

LL: Where has investment been disappointing between the two nations?

YH: What's been most disappointing is the number of infrastructure projects in Mexico in general terms. There has only really been the one major project - the Mexico City airport - which of course has been very successful: a number of British companies have been involved in the project, including [British design and engineering firm] Foster and Partners, as well as others involved in the construction, supervision and engineering side of things.

A lot was said [by the Mexican administration] about doubling the capacity of ports and more social infrastructure at federal level but really, we haven't see this materialise. I wanted to see more major projects aside from hospitals or highways. There is the train project between Mexico City and Toluca currently underway, but there are question marks over the benefits of such a project. There was also the high-speed train to Guadalajara project, which was cancelled.

LL: A number of UK law firms have opened up offices in Latin America recently [Kennedys, Clyde & Co LLP and DAC Beachcroft]. Do you think we can expect to see more opening in Mexico?

YH: I don't really think many other firms are interested in opening up an office in Mexico. Most English firms we work with have not contemplated this and are quite

happy working with Mexican independent firms. The only thing that might bring about this change would be a tremendous increase in capital markets and energy work. But for now, everyone seems happy to continue working on a cross-border basis and relying on local counsel for the Mexican components. Of course, there are firms like Hogan Lovells and Norton Rose Fulbright [expanding in Mexico] that have decided not to work like that, but it's debatable whose approach is best.

LL: Going forward, how can the UK and Mexico make bilateral relations stronger?

YH: The only way we are going to be able to make this bilateral relationship work is through more engagement on a personal level from key stakeholders. This is something Nader Hayaux has previously considered, back in 2010 when we opened in London. We were in the midst of the financial crisis, coming from the boom of the 2000s when the problem at the time for lawyers was getting the work done, there was so much of it. That all then changed once the stock markets crashed. At the time, we were concerned over relying so much on the US, and we wanted to have more sources of work and relationships. Part of our decision to open in London was that we needed to divest our interest, and we saw that no Mexican firm was doing enough to develop relationships with European law firms and clients. By opening an office here, we were thinking long-term.

LL: Tell us about the role of the Mexican Chamber of Commerce, which you founded in 2011.

YH: When we [Nader Hayaux] opened our office in London, we also set our sights on helping to form a Mexican Chamber of Commerce to create a platform to permit private sector organisations and governments to collaborate with a mutual aim to grow trade and investment between UK and Mexico. Trade between the two countries is £3.6 billion, but more needs to be done. We hear a lot of rhetoric about the importance of Mexico for the UK, but the city of London is not pulling its weight in terms of allowing New York dominance over Mexican financial services. The UK would benefit from being more present, for example in areas like asset management, but I'm still waiting to see how long it will take London to put up a fight against New York to get more Mexican business. So far, New York dominates completely - there

are currently only two UK banks and only one UK insurance company, Bupa, in Mexico.

LL: Why do you think London, until now at least, has been hesitant to put up this fight?

YH: My theory is that the UK has been very comfortable with Europe, and their presence in Southeast Asia, in former colonies, is stronger than in Latin America. There probably is this perception that the US dominates and controls Latin America, and the UK has a natural tendency to leave Latin America to the US. But Brexit and the Trump administration have pulled all of this into question. Today, nothing is to be taken for granted.

LL: How has Brexit and the Trump administration affected legal practice around the world?

You've probably heard Einstein's definition of stupidity - doing the same thing and expecting different results. But times have changed, and I think Einstein fell short - nowadays, it seems stupidity is doing the same thing and expecting the same results! If countries continue dealing with Trump's US as they have dealt with the US in the past, their expectations are going to fall short. This attitude applies to the legal industry also - lawyers can't expect to practise law in the same way they did even five years ago. The Trump administration and Brexit have caused Mexico, the US and the UK to rethink their relationships. As a result, the UK government has singled out and made clear the relevance and importance it now places on its relationship with Mexico in a post-Brexit era.

LL: So Nader Hayaux feels prepared to face the challenges that come in a post-Brexit era?

Nowadays, law firms have Trump and Brexit as sources of potential work and relationships; when we opened in London in 2010, the financial crisis was our backdrop amid concerns that we were relying on the US so much. I think we are in the right place at the right time, as a result of the long-term project we set out on when we opened here in London. But opportunities are like red buses - you might be waiting for a while, and then suddenly five come at once. What's important though,

is to be standing in the bus stop, in order to see them coming.

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