Dutch draft bill on collective action for compensation – a note on extraterritorial application

As many readers will know, the Dutch collective settlement scheme – laid down in the Dutch collective settlement act (*Wet collective afhandeling massaschade*, WCAM) – has attracted a lot of international attention in recent years as a result of several global settlements, including those in the *Shell* and *Converium* securities cases. Once the Amsterdam Court of Appeal (that has exclusive competence in these cases) declares the settlement binding, it binds all interested parties, except those beneficiaries that have exercised the right to opt-out. When the WCAM was enacted almost ten years ago, the Dutch legislature deliberately choose not to include a collective action for the compensation of damages to avoid some of the problematic issues associated with US class actions and settlements.

However, following a Parliamentary motion, this summer the Dutch legislature published a draft proposal for public consultation (meanwhile closed, public responses available here) to extend the existing collective action to obtain injunctive relief to compensation for damages. As the brief English version of the consultation paper states, the draft bill aims to:

> *"enhance the efficient and effective redress of mass damages claims and to strike a balance between a better access to justice in a mass damages claim and the protection of the justified interests of persons held liable. It contains a five-step procedure for a collective damages action before the Dutch district court. Legal entities which fulfill certain specific requirements (expertise regarding the claim, adequate representation, safeguarding of the interests of the persons on whose behalf the action is brought) can start a collective damages action on behalf of a group of persons. The group of persons on whose behalf the entity brings the action must be of a size justifying the use of the collective damages action. Those persons must not have other efficient and effective means to get redress. The entity must have tried to obtain redress from the person held liable amicably."*

A point of particular interest is a provision regarding the extraterritorial

application of the proposed act. The Amsterdam Court of Appeal has been criticized by both Dutch and other scholars for adopting a wide extraterritorial jurisdiction in the WCAM procedure, on the basis of the Brussels Regulation, the Lugano Convention and domestic international jurisdiction rules. The application of the European jurisdiction rules is challenging in view of the particular procedural design of the WCAM scheme (a request to declare a settlement binding between a responsible party and representative organisations/foundations on behalf of interested parties). This draft bill does not introduce separate international jurisdiction rules, but proposes a 'scope rule' to ensure that the case is sufficiently connected to the Netherlands. The draft explanatory memorandum (in Dutch) states that a choice of forum of two foreign parties in relation to an event occurring outside the Netherlands will not suffice to seize the Dutch court for a collective compensatory action, even if parties have made a choice of law for Dutch law (yes, we see similarities to the US Supreme Court case *Morrison v. National Australia Bank*). It is required that either the party addressed has its domicile or habitual residence in the Netherlands (a), or that the majority of the interested parties have their habitual residence in the Netherlands (b), or that the event(s) on which the claim is based occurred in the Netherlands. Needless to say that these rules leave the application of the jurisdiction rules of Brussels and Lugano unimpeded. It is clear that the proposed provision limits the possibility for foreign parties to seek collective compensatory relief in the Netherlands. The risk of the Netherlands becoming a 'magnet jurisdiction' for collective redress as put forward by some commentators seems therefor absent.

See for two recent English publications on the Dutch collective settlements act, published in the *Global Business & Development Law Journal* 2014 (volume 27, issue 2) devoted to Transnational Securities and Regulatory Litigation in the Aftermath of Morrison v. Australia National Bank: Bart Krans (University of Groningen), *The Dutch Act on Collective Settlement of Mass Damages,* and Xandra Kramer (Erasmus University Rotterdam), *Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries.*

China’s Draft Law on Foreign State Immunity—Part II

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which is now available. In a prior post, I looked at the draft law’s provisions on immunity from suit. I explained that the law would adopt the restrictive theory of foreign state immunity, bringing China’s position into alignment with most other countries.

In this post, I examine other important provisions of the draft law, including immunity from attachment and execution, service of process, default judgments, and foreign official immunity. These provisions generally follow the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified.

China’s draft provisions on immunity from attachment and execution, service of process, and default judgments make sense. Applying the draft law to foreign officials, however, may have the effect of limiting the immunity that such officials would otherwise enjoy under customary international law. This is probably not what China intends, and lawmakers may wish to revisit those provisions before the law is finally adopted.

Immunity from Attachment and Execution

Articles 13 and 14 of China’s draft law cover the immunity of foreign state property from “judicial compulsory measures,” which the U.N. Convention calls “measures of constraint” and the U.S. Foreign Sovereign Immunities Act (FSIA) refers to as measures of attachment and execution. They include both pre-judgment measures to preserve assets and post-judgment measures to enforce judgments. Under customary international law, immunity from attachment and execution is separate from and generally broader than immunity from suit. It protects foreign state property located in the forum state, in this case the property of foreign states located in China.

Article 13 provides that the property of a foreign state shall be immune from judicial compulsory measures with three exceptions: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically designated property for the enforcement of such measures; and (3) to enforce Chinese court judgments when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 13 further states that a waiver of immunity from jurisdiction shall not be deemed a waiver of immunity from judicial compulsory measures.

Article 14 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 13(3). These include the bank accounts of diplomatic missions, property of a military character, central bank assets, property that is part of the state's cultural heritage, property of scientific, cultural, or historical value used for exhibition, and any other property that a Chinese court thinks should not be regarded as being in commercial use.

Articles 13 and 14 of China's draft law closely parallel Articles 19-21 of the U.N. Convention. The main difference appears in Article 13(3)'s exception for enforcing court judgments, which is expressly limited to Chinese court judgments and requires that the property "relates to the proceedings." Article 19(c) of the U.N. Convention, by contrast, is not limited to judgments of the state where enforcement is sought and does not require that the property relate to the proceedings. On first glance, China's draft law appears to resemble more nearly § 1610(a)(2) of the U.S. FSIA, which is expressly limited to U.S. judgments and requires that the property be used for the commercial activity on which the claim was based.

Upon reflection, however, it appears that China's limitation of draft Article 13(3) to Chinese court judgments sets it apart from the U.S. practice as well as the U.N. Convention. In the United States, a party holding a foreign judgment may seek recognition of that judgment in U.S. courts, thereby converting it into a U.S. judgment. Because the U.S. judgment recognizing the foreign judgment falls within the scope of § 1610(a), it is possible to attach the property of a foreign state in the United States to enforce a non-U.S. judgment.

It seems that the same is not true in China, which is to say that Article 13(3) cannot be used to enforce foreign judgments. Under Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation of the law prior to its

2022 amendment), the recognition of a foreign judgment results in a "ruling" (??). The text of Article 13(3), however, is limited to "judgments on the merits" (??), which appears to exclude Chinese decisions recognizing foreign judgments. (I am grateful to my students Li Jiayu and Li Yadi for explaining the distinction to me.) In short, Article 13(3) appears *really* to be limited to Chinese court judgments, as neither the U.N. Convention nor the U.S. FSIA are in practice.

There are other differences between the U.S. FSIA and China's draft law. With respect to the property of a foreign state itself, the FSIA requires that the property be used for a commercial activity in the United States by the foreign state—even when the foreign state has waived its immunity—which can be a difficult set of conditions to satisfy. Articles 13(1) and (2) of China's draft law, by contrast, impose no similar conditions. The U.S. FSIA has separate and looser rules for attaching the property of agencies or instrumentalities of foreign states in § 1610(b), rules that do not require the property to be used for a commercial activity in the United States as long as the agency or instrumentality is engaged in a commercial activity in the United States. And § 1611(b) of the FSIA singles out only central bank and military assets as exceptions to the rules allowing post-judgment attachment and execution, whereas the draft law's Article 14 additionally mentions bank accounts of diplomatic missions, property that is part of the state's cultural heritage, and property of scientific, cultural, or historical value used for exhibition.

Service of Process

China's draft law also provides for service of process on a foreign state. Article 16 states that service may be made as provided in treaties between China and the foreign state or "by other means acceptable to the foreign state and not prohibited by the laws of the People's Republic of China." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. Again, this provision closely follows the U.N. Convention, specifically Article 22.

Section 1608 of the FSIA is the U.S. counterpart. It distinguishes between service on a foreign state and service on an agency or instrumentality of a foreign state.

For service on a foreign state, § 1608 provides four options that, if applicable, must be attempted in order: (1) in accordance with any special arrangement between the plaintiff and the foreign state; (2) in accordance with an international convention; (3) by mail from the clerk of the court to the ministry of foreign affairs; (4) through diplomatic channels. For service on an agency or instrumentality, § 1608 provides a separate list of means.

Default Judgment

If the foreign state does not appear, Article 17 of China's draft law requires a Chinese court to "take the initiative to ascertain whether the foreign state is immune from … jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which shall have six months in which to appeal. Article 23 of the U.N. Convention is similar, except that it provides periods of four months between service and default judgment and four months in which to appeal.

U.S. federal courts must similarly ensure that a defaulting foreign state is not entitled to immunity, because the FSIA makes foreign state immunity a question of subject matter jurisdiction, and federal courts must address questions of subject matter jurisdiction even if they are not raised by the parties. Section 1608(e) goes on to state that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state … unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." In other words, courts in the United States are additionally obligated to examine the *substance* of the claim before granting a default judgment. China's draft law does not appear to impose any similar obligation.

Foreign Officials

Article 2 of China's draft law defines "foreign state" to include "natural persons … authorized … to exercise sovereign powers." Thus, unlike the U.S. FSIA, China's draft law may cover the immunity of some foreign officials.

The impact of the draft law on foreign official immunity is mitigated by Article 19, which says that the law shall not affect diplomatic immunity, consular immunity, special missions immunity, or head of state immunity. Article 3 of the U.N.

Convention similarly specifies that these immunities are not affected by the Convention. What is missing from these lists of course, is conduct-based immunity. Under customary international law, foreign officials are entitled to immunity from suit based on acts taken in their official capacities, and such immunity continues after the official leaves office.

It appears that China's draft law would govern the conduct-based immunity of foreign officials in Chinese courts and would give them less immunity than customary international law requires. By including "natural persons" within the definition of "foreign state," the draft law makes the exceptions to immunity for foreign states discussed in my prior post applicable to foreign officials as well. Thus, foreign officials who engage in commercial activity on behalf of a state might be subject to suit in their personal capacities and not just as representatives of the state. This does not make much sense.

Although it appears that China simply copied this quirk from the U.N. Convention, it makes no more sense in Chinese domestic law than it makes in the Convention. Chinese authorities would be wise to reconsider this issue before the law is finalized. They could address the problem by adding conduct-based immunity to Article 19's list of immunities not affected. Or, better still, they could omit "natural persons" from the definition of "foreign state" in Article 2.

Conclusion

Adoption of China's draft law on foreign state immunity would be a major step in the modernization of China's laws affecting transnational litigation. As described in this post and my previous one, the draft law generally follows the provisions of the U.N. Convention and would apply those rules to all states including states that chose not to join the Convention. The provisions of the U.N. Convention are generally sensible, but they are not perfect. In those instances where the U.N. Convention rules are defective—for example, with respect to the conduct-based immunity of foreign officials—China should not follow them blindly.

[This post is cross-posted at Transnational Litigation Blog.]

China’s Draft Law on Foreign State Immunity Would Adopt Restrictive Theory

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

On the question of foreign state immunity, the world was long divided between countries that adhere to an absolute theory and those that adopted a restrictive theory. Under the absolute theory, states are absolutely immune from suit in the courts of other states. Under the restrictive theory, states are immune from suits based on their governmental acts (acta jure imperii) but not from suits based on their non-governmental acts (acta jure gestionis).

During the twentieth century, many countries adopted the restrictive theory. (Pierre-Hugues Verdier and Erik Voeten have a useful list of the dates on which countries switched on the last page of this article.) Russia and China were the most prominent holdouts. Russia joined the restrictive immunity camp in 2016 when its law on the jurisdictional immunity of foreign states went into effect. That left China. In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which has recently become available. If adopted, this law would move China to into the restrictive immunity camp as well.

China’s draft law on foreign state immunity has important implications for other states, which would now be subject to suit in China on a range of claims from which they were previously immune. The law also contains a reciprocity clause in Article 20, under which Chinese courts may decline to recognize the immunity of a foreign state if the foreign state would not recognize China’s immunity in the same circumstances. Chinese courts could hear expropriation or terrorism claims against the United States, for example, because the U.S. Foreign Sovereign Immunities Act (FSIA) has exceptions for expropriation and terrorism.

In this post, the first of two, I look at the draft law’s provisions on foreign state immunity from suit from a U.S. perspective. In the second post, I will examine the law’s provisions on the immunity of a foreign state’s property from attachment

and execution, its provisions on service and default judgments, and its potential effect on the immunity of foreign officials.

It is clear that China's draft law has been heavily influenced by the provisions of the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified. But the purpose of the draft law is not simply to prepare China for ratification. Indeed, Article 21 of the law provides that when a treaty to which China is a party differs from the law, the terms of the treaty shall govern. Rather, the purpose of the law appears to be to extend the basid rules of the U.N. Convention, which is not yet in effect, to govern the immunity of *all* foreign countries when they are sued in Chinese courts, including countries like the United States that are unlikely ever to join the Convention.

China's Adherence to the Absolute Theory of Foreign State Immunity

The People's Republic of China has long taken the position that states and their property are absolutely immune from the jurisdiction of the courts of other states. The question rose to the level of diplomatic relations in the early 1980s. China was sued in federal court for nonpayment of bonds issued by the Imperial Government of China in 1911, did not appear to defend, and suffered a default judgment. After much back and forth, the State Department convinced China to appear and filed a statement of interest asking the district court to set aside the judgment and consider China's defenses. "The PRC has regarded the absolute principle of immunity as a fundamental aspect of its sovereignty, and has forthrightly maintained its position that it is absolutely immune from the jurisdiction of foreign courts unless it consents to that jurisdiction," the State Department noted. "China's steadfast adherence to the absolute principle of immunity results, in part, from its adverse experience with extraterritorial laws and jurisdiction of western powers." In the end, the district court set aside the default, held that the FSIA did not apply retroactively to this case, and held that China was immune from suit. The Eleventh Circuit subsequently affirmed.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property. The Convention (available in each of the U.N.'s official languages here) adopts the restrictive theory, providing exceptions to foreign

state immunity for commercial activities, territorial torts, etc. Although China has not ratified the Convention and the Convention has not yet entered into force—entry into force requires 30 ratifications, and there have been only 23 so far—China's signature seemed to signal a shift in position.

The question arose again in *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011), in which the Hong Kong Court of Final Appeal had to decide whether to follow China's position on foreign state immunity. During the litigation, China's Ministry of Foreign Affairs wrote several letters to the Hong Kong courts setting forth its position, which the Court of Final Appeal quoted in its judgment. In 2008, the Ministry stated:

> *The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.*

In 2009, the Ministry wrote a second letter explaining its signing of the U.N. Convention. The diverging practices of states on foreign state immunity adversely affected international relations, it said, and China had signed the Convention "to express China's support of the … coordination efforts made by the international community." But the Ministry noted that China had not ratified the Convention, which had also not entered into force. "Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues." "After signature of the Convention, the position of China in maintaining absolute immunity has not been changed," the Ministry continued, "and has never applied or recognized the so-called principle

or theory of ‘restrictive immunity.’”

The Draft Law on Foreign State Immunity

China’s draft law on foreign state immunity would fundamentally change China’s position, bringing China into alignment with other nations that have adopted the restrictive theory. The draft law begins, as most such laws do, with a presumption that foreign states and their property are immune from the jurisdiction of Chinese courts. Article 3 states: “Unless otherwise provided for by this law, foreign states and their property shall be immune from the jurisdiction of the courts of the People’s Republic of China.”

Article 2 defines “foreign state” to include “sovereign states other than the People’s Republic of China,” “institutions or components of … sovereign states,” and “natural persons, legal persons and unincorporated organisations authorised by … sovereign states … to exercise sovereign powers on their behalf and carry out activities based on such authorization.” Article 18(1) provides that Chinese courts will accept the Ministry of Foreign Affairs’ determination of whether a state constitutes a sovereign state for these purposes.

These provisions of the draft law generally track Article 2(1)(b) of the U.N. Convention, which similarly defines “State” to include a state’s “organs of government,” “agencies or instrumentalities” exercising “sovereign authority,” and “representatives of the State acting in that capacity.” The draft law differs somewhat from the U.S. FSIA, which determines whether a corporation is an “agency or instrumentality” of a foreign state based on ownership and which does not apply to natural persons.

Exceptions to Immunity from Suit

Waiver Exception

China’s draft law provides that a foreign state may waive its immunity from suit expressly or by implication. Article 4 states: “Where a foreign state expressly submits to the jurisdiction of the courts of the People’s Republic of China in respect of a particular matter or case in any following manner, that foreign state shall not be immune.” A foreign state may expressly waive its immunity by treaty,

contract, written submission, or other means.

Article 5 provides that a foreign state "shall be deemed to have submitted to the jurisdiction of the courts of the People's Republic of China" if it files suit as a plaintiff, participates as a defendant "and makes a defence or submits a counterclaim on the substantive issues of the case," or participates as third party in Chinese courts. Article 5 further provides that a foreign state that participates as a plaintiff or third party shall be deemed to have waived its immunity to counterclaims arising out of the same legal relationship or facts. But Article 6 provides that a foreign state shall *not* be deemed to have submitted to jurisdiction by appearing in Chinese court to assert its immunity, having its representatives testify, or choosing Chinese law to govern a particular matter.

These provisions closely track Articles 7-9 of the U.N. Convention. The U.S. FSIA, § 1605(a)(1), similarly provides that a foreign state shall not be immune in any case "in which the foreign state has waived its immunity either explicitly or by implication." Section 1607 also contains a provision on counterclaims. In contrast to China's draft law, U.S. courts have held that choosing U.S. law to govern a contract constitutes an implied waiver of foreign state immunity (a position that has been rightly criticized).

Commercial Activities

China's draft law also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities "take place in the territory of the People's Republic of China or take place outside the territory of the People's Republic of China but have a direct impact in the territory of the People's Republic of China." Article 7 defines "commercial activity" as "any transaction of goods, services, investment or other acts of a commercial nature otherwise than the exercise of sovereign authority." "In determining whether an act is a commercial activity," the law says, "the courts of the People's Republic of China shall consider the nature and purpose of the act." Unlike the FSIA, but like the U.N. Convention, the draft law deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

In extending the commercial activities exception to activities that "have a direct impact" in China, the draft law seems to have borrowed from the commercial

activities exception in the U.S. FSIA. Section 1605(a)(2) of the FSIA applies not just to claims based on activities and acts in the United States, but also to activities abroad "that act cause[] a direct effect in the United States."

The draft law's definition of "commercial activity," on the other hand, differs from the FSIA. Whereas the draft law tells Chinese courts to consider both "the nature and purpose" of the act," § 1603(d) of the FSIA says "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." (Article 2(2) of the U.N. Convention makes room for both approaches.) Considering the purpose of a transaction would make it easier for a government to argue that certain transactions, like issuing government bonds or buying military equipment are not commercial activities and thus to claim immunity from claims arising from such transactions.

Territorial Torts

Article 9 of the draft law creates an exception to immunity "for personal injury or death, or for damage to movable or immovable property, caused by that foreign state within the territory of the People's Republic of China." This exception corresponds to Article 12 of the U.N. Convention and § 1605(a)(5) of the U.S. FSIA. Unlike § 1605(a)(5), China's draft law contains no carve-outs maintaining immunity for discretionary activities and for malicious prosecution, libel, misrepresentation, interference with contract rights, etc.

The English translation of the draft law does not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China. The FSIA's territorial tort exception has been interpreted to require that the "entire tort" occur within the United States. Article 12 of the U.N. Convention does not. This question has become particularly important with the rise of spyware and cyberespionage. As Philippa Webb has discussed at TLB, U.S. courts have dismissed spyware cases against foreign governments on the ground that the entire tort did not occur in the United States, whereas English courts have rejected this requirement and allowed such cases to go forward. If the Chinese version of the draft law is ambiguous, it would be worth clarifying the scope of the exception before the law is finalized.

Property

Article 10 of the draft law creates an exception to immunity for claims involving immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely parallels Article 13 of the U.N. Convention and finds a counterpart in § 1605(a)(4) of the FSIA.

Arbitration

The draft law also contains an arbitration exception. Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from suit with respect to "the effect and interpretation of the arbitration agreement" and "the recognition or annulment of arbitral awards." Like Article 17 of the U.N. Convention, the arbitration exception in the draft law is limited to disputes arising from commercial activities but extends to investment disputes. The arbitration exception in § 1605(a)(6) of the FSIA, by contrast, extends to disputes "with respect to a defined legal relationship, whether contractual or not."

Reciprocity Clause

One of the most interesting provisions of China's draft law on state immunity is Article 20, which states: "Where the immunity granted by a foreign court to the People's Republic of China and its property is inferior to that provided for by this Law, the courts of the People's Republic of China may apply the principle of reciprocity." Neither the U.N. Convention nor the U.S. FSIA contains a similar provision, but Russia's law on the jurisdictional immunities of foreign states does in Article 4(1). Argentina's law on immunity also includes a reciprocity clause specifically for the immunity of central bank assets, apparently adopted by Argentina at the request of China.

The reciprocity clause in the draft law means that Chinese courts would be able to exercise jurisdiction over the United States and its property in any case where U.S. law would permit U.S. courts to exercise jurisdiction over China and its property. The FSIA, for example, has an exception for expropriations in violation of international law in § 1605(a)(3) and exceptions for terrorism in § 1605A and § 1605B. Although China's draft law does not contain any of these exceptions, its reciprocity clause would allow Chinese courts to hear expropriation or terrorism

claims against the United States. The same would be true if Congress were to amend the FSIA to allow plaintiffs to sue China over Covid-19, as some members of Congress have proposed.

Conclusion

China's adoption of the draft law would be a major development in the law of foreign state immunity. For many years, advocates of the absolute theory of foreign state immunity could point to China and Russia as evidence that the restrictive theory's status as customary international law was still unsettled. If China joins Russia in adopting the restrictive theory, that position will be very difficult to maintain.

[This post is cross-posted at Transnational Litigation Blog.]

A step in the right direction, but nothing more – A critical note on the Draft Directive on mandatory Human Rights Due Diligence

Written by Bastian Brunk, research assistant at the Humboldt University of Berlin and doctoral candidate at the Institute for Comparative and Private International Law at the University of Freiburg.

In April of 2020, EU Commissioner Didier Reynders announced plans for a legislative initiative that would introduce EU-wide mandatory human rights due diligence requirements for businesses. Only recently, Reynders reiterated his intentions during a conference regarding "Human Rights and Decent Work in Global Supply Chains" which was hosted by the German Federal Ministry of

Labour and Social Affairs on the 6. October, and asseverated the launch of public consultations within the next few weeks. A draft report, which was prepared by MEP Lara Wolters (S&D) for the European Parliament Committee on Legal Affairs, illustrates what the prospective EU legal framework for corporate due diligence could potentially look like. The draft aims to facilitate access to legal remedies in cases of corporate human rights abuses by amending the Brussels *Ibis* Regulation as well as the Rome II Regulation. However, as these amendments have already inspired a comments by Geert van Calster, Giesela Rühl, and Jan von Hein, I won't delve into them once more. Instead, I will focus on the centre piece of the draft report – a proposal for a Directive that would establish mandatory human rights due diligence obligations for businesses. If adopted, the Directive would embody a milestone for the international protection of human rights. As is, the timing could simply not be better, since the UN Guiding Principles (UNGPs) celebrate their 10th anniversary in 2021. The EU should take this opportunity to present John Ruggie, the author of the UNGPs, with a special legislative gift. However, I'm not entirely sure if Ruggie would actually enjoy this particular present, as the Directive has obvious flaws. The following passages aim to accentuate possible improvements, that would lead to the release of an appropriate legal framework next year. I will not address every detail but will rather focus on the issues I consider the most controversial – namely the scope of application and the question of effective enforcement.

General Comments

To begin with a disclaimer, I believe the task of drafting a legal document on the issue of business and human rights to be a huge challenge. Not only does one have to reconcile the many conflicting interests of business, politics, and civil society, moreover, it is an impossible task to find the correct degree of regulation for every company and situation. If the regulation is too weak, it does not help protect human rights, but only generates higher costs. If it is too strict, it runs the risk of companies withdrawing from developing and emerging markets, and – because free trade and investment ensure worldwide freedom, growth, and prosperity – of possibly inducing an even worse human rights situation. This being said, the current regulatory approach should first and foremost be recognised as

a first step in the right direction.

I would also like to praise the idea of including environmental and governance risks in the due diligence standard (see Article 4(1)) because these issues are closely related to each other. Practically speaking, the conduct of companies is not only judged based on their human rights performance but rather holistically using ESG or PPP criteria. All the same, I am not sure whether or not this holistic approach will be accepted in the regulatory process: Putting human rights due diligence requirements into law is difficult enough, so maybe it would just be easier to limit the proposal to human rights. Nonetheless, it is certainly worth a try.

Moving on to my criticism.

Firstly, the draft is supposed to be a Directive, not a Regulation. As such, it cannot impose any direct obligations on companies but must first be transposed into national law. However, the proposal contains a colourful mix of provisions, some of which are addressed to the Member States, while others impose direct obligations on companies. For example, Article 4(1) calls upon Member States to introduce due diligence obligations, whereas all other provisions of the same article directly address companies. In my eyes, this is inconsistent.

Secondly, the Directive uses definitions that diverge from those of the UNGPs. For example, the UNGPs define “due diligence” as a process whereby companies “identify, prevent, mitigate and account for” adverse human rights impacts. This seems very comprehensive, doesn’t it? Due diligence, as stipulated in the Directive, goes beyond that by asking companies to identify, cease, prevent, mitigate, monitor, disclose, account for, address, and remediate human rights risks. Of course, one could argue that the UNGP is incomplete and the Directive fills its gaps, but I believe some of these “tasks” simply redundant. Of course, this is not a big deal by itself. But in my opinion, one should try to align the

prospective mechanism with the UNGPs as much as possible, since the latter are the recognised international standard and its due diligence concept has already been adopted in various frameworks, such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the ISO 26000. An alignment with the UNGP, therefore, allows and promotes coherence within international policies.

Before turning to more specific issues, I would like to make one last general remark that goes in the same direction as the previous one. While the UNGP ask companies to respect "at minimum" the "international recognized human rights", meaning the international bill of rights (UDHR, ICCPR, ICESCR) and the ILO Core Labour Standards, the Directive requires companies to respect literally every human rights catalogue in existence. These include not only international human rights documents of the UN and the ILO, but also instruments that are not applicable in the EU, such as the African Charter of Human and People's Rights, the American Convention of Human Rights, and (all?) "national constitutions and laws recognising or implementing human rights". This benchmark neither guides companies nor can it be monitored effectively by the authorities. It is just too ill-defined to serve as a proper basis for civil liability claims or criminal sanctions and it will probably lower the political acceptance of the proposal.

Scope of Application

The scope of application is delineated in Article 2 of the Directive. It states that the Directive shall apply to all undertakings governed by the law of a Member State or established in the territory of the EU. It shall also apply to limited liability undertakings governed by the law of a non-Member State and not established within EU-territory if they operate in the internal market by selling goods or providing services. As one can see, the scope is conceivably broad, which gives rise to a number of questions.

First off, the Directive does not define the term “undertaking”. Given the factual connection, we could understand it in the same way as the Non-Financial Reporting Directive (2014/95/EU) does. However, an “undertaking” within the scope of the Non-Financial Reporting Directive refers to the provisions of the Accounting Directive (2013/34/EU), which has another purpose, i.e. investor and creditor protection, and is, therefore, restricted to certain types of limited liability companies. Such a narrow understanding would run counter to the purpose of the proposed Directive because it excludes partnerships and foreign companies. On the other hand, “undertaking” probably does mean something different than in EU competition law. There, the concept covers “any entity engaged in an economic activity, regardless of its legal status” and must be understood as “designating an economic unit even if in law that economic unit consists of several persons, natural or legal” (see e.g. CJEU, Akzo Nobel, C-97/08 P, para 54 ff.). Under EU competition law, the concept is, therefore, not limited to legal entities, but also encompasses groups of companies (as “single economic units”). This concept of “undertaking”, if applied to the Directive, would correspond with the term “business enterprises” as used in the UNGP (see the Interpretive Guide, Q. 17). However, it would ignore the fact that the parent company and its subsidiaries are distinct legal entities, and that the parent company’s legal power to influence the activities of its subsidiaries may be limited under the applicable corporate law. It would also lead to follow-up questions regarding the precise legal requirements under which a corporate group would have to be included. Finally, non-economic activities and, hence, non-profit organisations would be excluded from the scope, which possibly leads to significant protection gaps (just think about FIFA, Oxfam, or WWF). In order to not jeopardise the objective – ensuring “harmonization, legal certainty and the securing of a level playing field” (see Recital 9 of the Directive) – the Directive should not leave the term “undertaking” open to interpretation by the Member States. A clear and comprehensive definition should definitely be included in the Directive, clarifying that “undertaking” refers to any legal entity (natural or legal person), that provide goods or services on the market, including non-profit services.

Secondly, the scope of application is not coherent for several reasons. One being that the chosen form of the proposal is a Directive, rather than a Regulation, thus providing for minimum harmonisation only. It is left to the Member States to lay

down the specific rules that ensure companies carrying out proper human rights due diligence (Article 4(1)). This approach can lead to slightly diverging due diligence requirements within the EU. Hence, the question of which requirements a company must comply with arises. From a regulatory law's perspective alone, this question is not satisfactorily answered. According to Article 2(1), "the Directive" (i.e. the respective Member States' implementation acts) applies to any company which has its registered office in a Member State or is established in the EU. However, the two different connecting factors of Article 2(1) have no hierarchy, so a company must probably comply with the due diligence requirements of any Member State where it has an establishment (agency, branch, or office). Making matters worse (at least from the company's perspective), in the event of a human rights lawsuit, due diligence would have to be characterised as a matter relating to non-contractual obligations and thus fall within the scope of the new Art. 6a Rome II. The provisions of this Article potentially require a company to comply with the due diligence obligations of three additional jurisdictions, namely lex loci damni, lex loci delicti commissi, and either the law of the country in which the parent company has its domicile (in this regard, I agree with Jan von Hein who proposes the use not of the company's domicile but its habitual residence as a connecting factor according to Article 23 Rome II) or, where it does not have a domicile (or habitual residence) in a Member State, the law of the country where it operates.

That leads us to the next set of questions: When does a company "operate" in a country? According to Article 2(2), the Directive applies to non-EU companies which are not established in the EU if they "operate" in the internal market by selling goods or providing services. But does that mean, for example, that a Chinese company selling goods to European customers over Amazon must comply fully with European due diligence requirements? And is Amazon, therefore, obliged to conduct a comprehensive human rights impact assessment for every retailer on its marketplace? Finally, are states obliged to impose fines and criminal sanctions (see Article 19) on Amazon or the Chinese seller if they do not meet the due diligence requirements, and if so, how? I believe that all this could potentially strain international trade relations and result in serious foreign policy conflicts.

Finally, and perhaps most controversially in regard to the scope, the requirements shall apply to all companies regardless of their size. While Article 2(3) allows the exemption of micro-enterprises, small companies with at least ten employees and a net turnover of EUR 700,000 or a balance sheet total of EUR 350,000 would have to comply fully with the new requirements. In contrast, the French duty of vigilance only applies to large stock corporations which, including their French subsidiaries and sub-subsidiaries, employ at least 5,000 employees, or including their worldwide subsidiaries and sub-subsidiaries, employ at least 10,000 employees. The Non-Financial Reporting Directive only applies to companies with at least 500 employees. And the due diligence law currently being discussed in Germany, will with utmost certainty exempt companies with fewer than 500 employees from its scope and could perhaps even align itself with the French law's scope. Therefore, I doubt that the Member States will accept any direct legal obligations for their SMEs. Nonetheless, because the Directive requires companies to conduct value chain due diligence, SMEs will still be indirectly affected by the law.

Value Chain Due Diligence

Value chain due diligence, another controversial issue, is considered to be anything but an easy task by the Directive. To illustrate the dimensions: BMW has more than 12,000 suppliers, BASF even 70,000. And these are all just Tier 1 suppliers. Many, if not all, multinational companies probably do not even know how long and broad their value chain actually is. The Directive targets this problem by requiring companies to "make all reasonable efforts to identify subcontractors and suppliers in their entire value chain" (Article 4(5)). This task cannot be completed overnight but should not be impossible either. For example, VF Corporation, a multinational apparel and footwear company, with brands such as Eastpack, Napapijri, or The North Face in its portfolio, has already disclosed the (sub?)suppliers for some of its products and has announced their attempt to map the complete supply chain of its 140 products by 2021. BASF and BMW will probably need more time, but that shouldn't deter them from trying in the first place.

Mapping the complete supply chain is one thing; conducting extensive human rights impact assessments is another. Even if a company knows its chain, this does not yet mean that it comprehends every potential human rights risk linked to its remote business operations. And even if a potential human rights risk comes to its attention, the tasks of "ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating" (see Article 3) it is not yet fulfilled. These difficulties call up to consider limiting the obligation to conduct supply chain due diligence to Tier 1 suppliers. However, this would not only be a divergence from the UNGP (see Principle 13) but would also run counter to the Directive's objective. In fact, limiting due diligence to Tier 1 suppliers makes it ridiculously easy to circumvent the requirements of the Directive by simply outsourcing procurement to a third party. Hence, the Directive takes a different approach by including the entire supply chain in the due diligence obligations while adjusting the required due diligence processes to the circumstances of the individual case. Accordingly, Article 2(8) states that "[u]ndertakings shall carry out value chain due diligence which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of their supply chain, the size of the undertaking, its capacity, resources and leverage". I consider this an adequate provision because it balances the interests of both companies and human rights subjects. However, as soon as it comes to enforcing it, it burdens the judge with a lot of responsibility.

Enforcement

The question of enforcement is of paramount importance. Without effective enforcement mechanisms, the law will be nothing more than a bureaucratic and toothless monster. We should, therefore, expect the Directive – being a political appeal to the EU Commission after all – to contain ambitious proposals for the effective implementation of human rights due diligence. Unfortunately, we were disappointed.

The Directive provides for three different ways to enforce its due diligence obligations. Firstly, the Directive requires companies to establish grievance mechanisms as low-threshold access to remedy (Articles 9 and 10). Secondly, the Directive introduces transparency and disclosure requirements. For example, companies should publish a due diligence strategy (Article 6(1)) which, inter alia, specifies identified human rights risks and indicates the policies and measures that the company intends to adopt in order to cease, prevent, or mitigate those risks (see Article 4(4)). Companies shall also publish concerns raised through their grievance mechanisms as well as remediation efforts, and regularly report on progress made in those instances (Article 9(4)). With these disclosure requirements, the Directive aims to enable the civil society (customers, investors and activist shareholders, NGOs etc.) to enforce it. Thirdly, the Directive postulates public enforcement mechanisms. Each Member State shall designate one or more competent national authorities that will be responsible for the supervision of the application of the Directive (Article 14). The competent authorities shall have the power to investigate any concerns, making sure that companies comply with the due diligence obligations (Article 15). If the authority identifies shortcomings, it shall set the respective company a time limit to take remedial action. It may then, in case the company does not fulfil the respective order, impose penalties (especially penalty payments and fines, but also criminal sanctions, see Article 19). Where immediate action is necessary to prevent the occurrence of irreparable harm, the competent authorities may also order the adoption of interim measures, including the temporary suspension of business activities.

At first glance, public enforcement through inspections, interim measures, and penalties appear as quite convincing. However, the effectiveness of these mechanisms may be questioned, as demonstrated by the Wirecard scandal in Germany. Wirecard was Germany’s largest payment service provider and part of the DAX stock market index from September 2018 to August 2020. In June of 2020, Wirecard filed for insolvency after it was revealed that the company had cooked its books and that EUR 1.9 billion were “missing”. In 2015 and 2019, the Financial Times already reported on irregularities in the company’s accounting practices. Until February 2019, the competent supervisory authority BaFin did not intervene, but only commissioned the FREP to review the falsified balance

sheet, assigning only a single employee to do so. This took more than 16 months and did not yield any results before the insolvency application. While it is true that the Wirecard scandal is unique, it showcased that investigating malpractices of large multinational companies through a single employee is a crappy idea. Public enforcement mechanisms only work if the competent authority has sufficient financial and human resources to monitor all the enterprises covered by the Directive. So how much manpower does it need? Even if the Directive were to apply to companies with more than 500 employees, in Germany alone one would have to monitor more than 7.000 entities and their respective value chains. We would, therefore, need a whole division of public inspectors in a gigantic public agency. In my opinion, that sounds daunting. That does not mean that public enforcement mechanisms are completely dispensable. As Ruggie used to say, there is no single silver bullet solution to business and human rights challenges. But it is also important to consider decentralised enforcement mechanisms such as civil liability. In contrast to public enforcement mechanisms, civil liability offers victims of human rights violations "access to effective remedy", which, according to Principle 25, is one of the main concerns of the UNGP.

So, what does the Directive say about civil liability? Just about nothing. Article 20 only states that "[t]he fact that an undertaking has carried out due diligence in compliance with the requirements set out in this Directive shall not absolve the undertaking of any civil liability which it may incur pursuant to national law." Alright, so there shouldn't be a safe harbour for companies. But that does not yet mean that companies are liable for human rights violations at all. And even if it were so, the conditions for asserting a civil claim can differ considerably between the jurisdictions of the Member States. The Directive fails to achieve EU-wide harmonisation on the issue of liability. That's not a level playing field. This problem could be avoided by passing an inclusive Regulation containing both rules concerning human rights due diligence and a uniform liability regime in case of violations of said rules. However, such an attempt would probably encounter political resistance from the Member States and result in an undesirable delay of the legislative process. A possible solution could be to only lay down minimum requirements for civil liability but to leave the ultimate drafting and implementation of liability rules to the Member States. Alternatively, the Directive could stipulate that the obligations set out in Articles 4 to 12 are

intended to determine the due care without regard to the law applicable to non-contractual obligations. At least, both options would ensure that companies are liable for any violation of their human rights due diligence obligations. Is that too much to ask?

Draft Withdrawal Agreement, Continued

It is not quite orthodox to follow on oneself's post, but I decided to make it as a short answer to some emails I got since yesterday. I do not know why Article 63 has not been agreed upon, although if I had to bet I would say: too complicated a provision. There is much too much in there, in a much too synthetic form; *per se* this does not necessarily lead to a bad outcome , but here… it looks like, rather. Just an example: Article 63 refers sometimes to provisions, some other to Chapters, and some to complete Regulations. Does it mean that "provisions regarding jurisdiction" are just the grounds for jurisdiction, without the *lis pendens* rules (for instance), although they are in the same Chapter of Brussels I bis?

One may also wonder why a separate rule on the assessment of the legal force of agreements of jurisdiction or choice of court agreements concluded before the end of the transition period in civil and commercial matters (Regulation 1215/2912) and maintenance (Regulation 4/2009): does the reference to "provisions regarding jurisdiction" not cover them already? Indeed, it may just be a reminder for the sake of clarity; but taken literally it could lead to some weird conclusions, such as the Brussels I Regulation taken preference over the 2005 Hague Convention "in the United Kingdom, as well as in the Member States in situations involving the United Kingdom", whatever these may be. Of course I do not believe this is correct.

At any rate, for me the most complicated issue lies with the Draft Withdrawal Agreement provisions regarding time. As I already explained yesterday, according

to Article 168 “Parts Two and Three, with the exception of Articles 17a, 30(1), 40, and 92(1), as well as Title I of Part Six and Articles 162, 163 and 164, shall apply as from the end of the transition period”, fixed for December 31st, 2020 (Article 121). In the meantime, ex Article 122, Union Law applies, in its entirety (for no exception is made affecting Title VI of Part Three). What are the consequences? Following an email exchange with Prof. Heredia, Universidad Autónoma de Madrid, let’s imagine the case of independent territorial insolvency proceedings – Article 3.2 Regulation 2015/848: if opened before December 31st, 2020, they shall be subject to the Insolvency Regulation. If main proceedings are opened before that date as well, the territorial independent proceedings shall become secondary insolvency proceedings – Article 3.4 Insolvency Regulation. If the main proceedings happen to be opened on January 2nd, 2021, they shall not – Article 63.4 c) combined with Article 168 Draft Withdrawal Agreement (I am still discussing Articles 122 and 168 with Prof. Heredia).

Another not so easy task is to explain Article 63.1 in the light of Articles 122 and 168. The assessment of jurisdiction for a contractual claim filed before the end of the transition period will be made according to Union Law, if jurisdiction is contested or examined *ex officio* before December 31st, 2020; and according to the provisions regarding jurisdiction of Regulation 1215/2012 (or the applicable one, depending on the subject matter, see Article 63.1 b, c, d) Draft Withdrawal Agreement, if it -the assessment- happens later. Here my question would be, what situations does the author of the Draft have in mind? Does Article 63.1 set up a kind of *perpetuatio iurisdictionis* rule, so as to ensure that the same rules will apply when jurisdiction is contested at the first instance before the end of the transition period, and on appeal afterwards (or even only afterwards, where it is possible)? Or is it a rule to be applied at the stage of recognition and enforcement where the application therefor is presented after the end of the transition period (but wouldn’t this fall under the scope of Article 63.3)?

That is all for now – was not a short answer, after all, and certainly not the end of it.

(Addenda: as for the UK, on 13 July 2017, the Government introduced the Withdrawal Bill to the House of Commons. On 17 January 2018, the Bill was given a Third Reading and passed through the House of Commons. Full text of the Bill as introduced and further versions of the Bill as it is reprinted to incorporate amendments (proposals for change) made during its passage through

Parliament are available here. The Bill aims at converting existing direct EU law, including EU regulations and directly effective decisions, as it applies in the UK at the date of exit, into domestic law.)

New Dutch bill on collective damages action

Following the draft bill and consultation paper on Dutch collective actions for damages of 2014 (see our previous post), the final – fully amended – draft has been put before Parliament.

The following text has been prepared by Ianika Tzankova, professor at Tilburg University.

On 16 November 2016 the Dutch Ministry of Justice presented to Parliament a new Bill for collective damages actions. The proposal aims to make collective settlements more attractive for all parties involved by improving the quality of representative organizations, coordinating the collective (damages) procedures and offering more finality. It is unclear when or whether the Bill will be passed in its current form, but below are my first impressions and a personal selection of some noteworthy features of the Bill.

1. The proposed regime covers all substantive areas of law, which is a continuation of the status quo. What is new is that plaintiffs would be able to claim collective damages, not only declaratory and injunctive relief, and that the same requirements would apply to all types of actions: injunctive, declaratory or damages. More specifically, under the new legislation it would be much harder for claimants to file actions for injunctive and declaratory relief (see further below under 5. and further).
2. Exclusive jurisdiction in the first instance would be with the Amsterdam District Court, but it would be possible to transfer the collective action to another lower court if that would be more appropriate in a given

situation.

3. There would be a registry for class actions so the public is notified once a class action has been initiated.
4. A system of 'lead representative organizations' would be introduced to streamline the process if there are multiple candidates for the position. There could also be co-lead representative organizations if that is appropriate for a specific action. Under the current regime it is possible to have multiple competing collective actions, a situation that is perceived as confusing for consumers and burdensome for defendants.
5. Only non-profit entities would be allowed to file the collective action, as under current law. Those could also be ad hoc foundations, but heavy governance requirements would be put in place for their Board and Supervisory Board structure, which would require D&O insurance, guarantees for non-profit background of the Board and Supervisory Board members, a website and communication strategy for the group, the preparation of financial statements etc. This would require a significant financial investment beforehand in the logistical infrastructure of the organization, and it is unclear how this could be funded on a non-commercial basis. There is an exception for matters with a idealistic public policy background. Those ad hoc foundations might be exempted from some of the requirements, but in fact the Bill puts the ad hoc foundations in a disadvantageous position in comparison to pre-existing non-profit organizations.
6. Moreover, the lead representative candidates would need to demonstrate expertise and track record in class actions, have a sufficient number of claimants supporting them in relation to the specific action, and have sufficient financial means. The parliamentary notes specify that the court might ask a neutral third party to review the agreement, which would not need to be shared with the defendant.
7. Opt out seems to be the main rule under the new regime, but this is somehow mitigated, because under the selection test for lead representative organization (see under 6 above), the candidate has to demonstrate that it has a large enough group of claimant supporters behind it and is not an empty shell. This assumes at least some book-building effort beforehand and is therefore at least in part an opt in. After the lead representative organization is appointed, the whole group will be represented on an opt out basis.

8. The lead representative organization would need to demonstrate the superiority of the collective action in comparison to individual law suits.
9. The lead representative organization would need to demonstrate a sufficient link with the Netherlands. The Dutch legislator has consulted the Dutch State Commission for Private International Law and the Advisory Commission on Civil Procedure in relation to that requirement. According to the legislature, the test for a sufficient link with the Netherlands is compatible with Brussels I, because it does not concern the jurisdictional test but the certification of a civil action, which is a matter of national civil procedure. It aims to exclude from the collective action situations where the defendant is not based in the Netherlands, the harmful events did not take place in the Netherlands or the majority of the claimants are not domiciled in the Netherlands. In those situations the claimants will still have the option of starting an individual action. This requirement seems to aim to address the recent VEB v BP type of collective actions, where the Dutch Investors' Association VEB initiated a collective action for declaratory relief for all investors who had their BP shares in bank accounts in the Netherlands, following the ECJ's criteria formulated in the Kolassa ruling (C-375/13). The Amsterdam District Court declared on 28 September of this year that it lacked jurisdiction to hear the action, which is questionable in view of the Kolassa ruling. The current proposal aims to eliminate the use of the new Dutch collective actions regime in situations where Dutch courts under Brussels I and ECJ case law would have jurisdiction to hear individual cases for the 'Kolassa type' of claimant, but those would not be able to use the Dutch collective action regime to effectuate their rights.
10. Group members could opt out at the beginning of the certified class action and start an individual proceeding, but those individual proceedings could be stayed at the request of the defendant, at least for one year after the parties opted out. The court would have discretion to allow the stay of the proceedings. This departs somewhat from the systems existing in other jurisdictions (e.g. US and Canada) where claimants who opt out can resume their individual actions with no delays.
11. The collective action tolls the statute of limitation for the whole group represented by the lead representative organization. Parties who choose to opt out need to preserve their individual rights within 6 months after they have opted out. Under Dutch law it is not necessary to start a civil

action to preserve one's rights. It is sufficient to send a letter to that effect to the defendant.

12. Under current Dutch law, adverse cost orders are fixed. Under the proposal it would be possible for the lead representative organization to recover the real costs of litigation if parties reach a settlement. The lead representative organization would be liable for any adverse costs if it loses the action.
13. Any settlement reached under the new collective action regime would need to be approved by the District Court. It is unclear whether the new regime aims to limit the extra-territorial application of the WCAM: the Dutch act on collective settlements that has already been used twice for global settlement purposes. Presumably not, if globally settling parties choose to invoke the WCAM directly and not via the Dutch collective action regime.

Cross-Border Civil Litigation in Peru: a New Draft

A Bill for International Litigation was presented to the Congress of Peru in November 2011. Based on the Latin American Model Bill for International Litigation of 2004, it is an apparently simple draft – just ten articles-, which nevertheless covers some of the most important topics in cross-border litigation: service of process; evidence; damages (compensation); appeals; settlements; *lis pendens*; actionability; and mass claims.

The Peruvian project aims to provide a practical tool for Peruvians plaintiffs in Peruvian cross-border conflicts. Article 1 makes this task easier by accepting summons in any form admitted in the country where the documents are to be served, therefore allowing an enormous saving of time and money.

Article 2 declares the admissibility of evidence already used in a foreign proceeding; such materials will nevertheless be considered again by the Peruvian

judge “according to the principles of sound criticism.” Only the relevant part of the foreign documents needs translation: again, a measure to save time and money.

Article 3 deals with damages, which will be awarded (calculated) following the parameters of the relevant foreign law. Though the conflict rule is adequate, it could still be improved through a *favor laesi.*

Appeal as a delaying tactic is prevented by Article 4. Appeal will normally deploy only suspensive effect, thus allowing the international procedure to be carried out speedily.

Article 5 prevents defendant and plaintiff from reaching an agreement without the latter’s counsel being informed. The purpose of the rule is to protect both the lawyer who has invested time and money in the process and the actor who, pressed by necessity, accepts an inconvenient settlement.

Article 6 recalls an already existing rule: in cases of concurrent international proceedings the court where the lawsuit was filed first keeps jurisdiction, just as it happens in domestic cases.

Article 7 of the Bill provides with a separate action against all unjustifiable harm committed abroad. The rule tends to the protection of Peruvians interests when no other remedy is available.

The project includes a ten-year statute of limitations that can be extended to fifteen years in case of debtor’s bad faith. Prescription is interrupted under several circumstances: for instance, when the creditor did not know about the damage or its source; the fact of filing overseas also suspends the limitation period. This is reasonable and should be welcomed in view of the technical development that has led, for example, to diseases with a long period of latency, as it happens with exposure to chemicals products.

Consolidation of claims in cases involving a large number of actors or defendants is provided for in Article 9. It is for the judge to take “practical steps for the case to develop rapidly within the limits of due process.” It seems that this Article contains the seeds of mass action or class actions.

The overall conclusion is that the Bill, if approved, will certainly help cross-

border litigation to be easier and more efficient in Peru.

Many thanks to Henry Saint Dahl, Inter-American Bar Foundation, for the hint.

Lord Lester's Defamation Bill on Jurisdiction

As an addendum to the current symposium on Rome II and Defamation, Hugh Tomlinson QC at the International Forum for Responsible Media Blog has written a piece on the current proposals in Lord Lester's Defamation Bill as to when an English court could assume jurisdiction over claims involving publication outside the jurisdiction. The current Clause 13 of the draft Bill reads:

> *(1) This section applies in an action for defamation where the court is satisfied that the words or matters complained of have also been published outside the jurisdiction (including publication outside the jurisdiction of any words or matters that differ only in ways not affecting their substance).*
>
> *(2) No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant's reputation having regard to the extent of publication elsewhere.*

Read the Inforrm blog post for a full analysis of the clause.

Brazil's New Law on Forum Selection Clauses: Throwing the Baby out with the Bathwater?

This post was written by Luana Matoso, a PhD candidate and research associate at Max Planck Institute for Comparative and International Private Law in Hamburg, Germany.

Brazil has changed its law on international forum selection clauses. In June this year, a new statutory provision came into force, adding, unexpectedly, new requirements for their enforceability. In this attempt to redistribute *domestic* litigation, the Brazilian legislator may well have thrown out the baby, *international* forum selection clauses, with the bathwater.

The Recognition of International Forum Selection Clauses Under Brazilian Law

International forum selection clauses are among the most controverted topics in Brazilian Private International Law. Although the positive effect of such clauses has been generally accepted in Brazil since 1942, their negative effects have been in center of the legal debate ever since. Until very recently, Brazilian courts would not enforce a clause that selected a foreign forum, arguing that parties could not, by agreement, oust the jurisdiction of Brazilian courts established by law — an approach quite similar to that adopted by U.S. courts prior to the landmark U.S. Supreme Court decision in *Bremen v Zapata Off-Shore Co.* (1972).

Brazilian courts seemed to follow suit in 2015, when — as a result of serious efforts by legal scholars — a provision explicitly recognizing the derogatory effect of forum selection clauses was included in the latest reform of the Brazilian Code of Civil Procedure (CCP). According to Art. 25 CCP, Brazilian courts do not have jurisdiction over claims in which the parties have agreed to the exclusive jurisdiction of a foreign forum. The provision references Art. 63 §§1-4 CCP, which sets out the requirements for national forum selection clauses. Thus, national and international forum selection clauses are subject to similar requirements for

validity, including that the agreement must be in writing and relate to a particular transaction.

The New Amendment of June 2024: A Setback for Party Autonomy

What seemed settled since 2015 is now back in the center of debate. On June 4, 2024, the Brazilian National Congress passed a law amending Art. 63 CCP and creating additional requirements for forum selection clauses. According to the new wording of Art. 63 §1 CCP, a forum selection clause is valid only if the chosen court is "connected with the domicile or residence of one of the parties or with the place of the obligation."

Essentially, this new law significantly limits the autonomy of the parties in selecting a forum of their choice. Before the amendment there were no restrictions on the forum to be selected; now Brazilian courts will only enforce clauses in which the chosen forum is related to the dispute. In practice, the choice of a "neutral" forum in a third State will not be enforceable in Brazilian courts.

International Forum Selection Clauses: The Wrong Target?

The application of the new requirements also to international clauses may have resulted from an oversight on the part of the legislator. The explanatory memorandum accompanying the draft bill indicates that the main objective of the reform was to address a problem of domestic, not international, forum shopping. The document specifically cites the current congestion of the courts of the Federal District, the federal unit in which Brazil's capital, Brasília, is located. It is known for its efficient courts, which have increasingly received disputes that have no connection to the court other than a forum selection clause. Unlike common law jurisdictions, Brazilian courts may not decline jurisdiction based on *forum non conveniens*. Rather, forum selection clauses, if valid, will bind the jurisdiction of the chosen court. Describing this practice as "abusive" and "contrary to the public interest," the legislator sought to address this (domestic) issue.

The memorandum makes no mention of international forum selection clauses. Nevertheless, it seems clear that the amendment also applies to international

forum selection clauses. The explicit reference of Art. 25 CCP to Art. 63 §1 leaves little room for an argument to the contrary.

The circumstances of this apparent oversight have led to strong criticism. Scholars have argued that the legislative process lacked publicity and public participation, especially from legal experts. The process was indeed fast-paced. Less than 14 months elapsed between the introduction of the draft bill and its enactment. After less than 10 months in the Chamber of Deputies, the bill was approved in the Senate under an emergency procedure and entered into force immediately after its publication on June 4, 2024.

And Now? First Clues in Recent Case Law

The implications of the new amendment for courts and parties remain unclear. First, is the new amendment applicable only to forum selection agreements concluded after its entry into force, on June 4, 2024, or for court proceedings commenced after that date? Second, what is a sufficient connection of the chosen court to "the domicile or residence of one of the parties or with the place of the obligation" under Art 63 §1 CCP?

Three recent decisions provide a few clues. A district court in the county of Santos, São Paulo, addressed the temporal application of the rule in a decision of November 7, 2024, holding that the new amendment applies only to contracts concluded after June 4, 2024, since the selected forum and the enforceability of the clause have a significant impact on the parties' risk calculation when entering into the contract. Applying the law as of before the amendment, the court enforced a forum selection clause in a bill of lading that selected New York courts to hear the dispute, even though both parties to the contract were seated in Brazil.

On June 24, 2024, another decision, this time by a district court in the state of Ceará, enforced a jurisdiction clause in which the chosen forum had no direct connection with the dispute or the domicile of the parties. The dispute arose between a Brazilian seafood retailer and the Brazilian subsidiary of the global shipping company Maersk. Without even mentioning the new amendment, the court stayed proceedings on the basis of the forum selection clause contained in the bill of lading, which selected the courts of Hamburg, the German headquarters of Maersk's parent company, Hamburg Süd, as having jurisdiction

over the dispute. This leaves open the question of whether, in the future, the choice of the seat of the parent company of one of the parties as the place of jurisdiction will constitute a sufficient connection as required by the new amendment.

Another interesting decision was rendered on September 4, 2024, in the county of Guarulhos, also in the state of São Paulo, concerning a forum selection clause in a publishing contract between an author and a publisher, both domiciled in Brazil. The clause selected Lisbon, Portugal, as the forum for hearing the dispute. In enforcing the clause, the court stayed proceedings brought by the author in Brazil. Although the new amendment was not explicitly mentioned in the decision, the court's reasoning included the justification that the clause was enforceable since the contract provided that the title, which was the subject of the publishing contract, was also to be marketed in Portugal. This could be an indication that the place of performance of the contract establishes a sufficient connection with the "place of the obligation" pursuant to Art. 63 §1 CCP. Referring to Article 9 of the Law of Introduction to the Brazilian Civil Code, scholars argue that the place of conclusion of the contract may also satisfy this requirement.

Conclusion

Ultimately, the broader or narrower approach taken by the courts in interpreting the new requirements will determine the extent to which the amendment will restrict the parties' ability to choose where to litigate their disputes. Equally important for parties, as a factor of predictability, is the question of how consistent this interpretation will be among the various courts in Brazil. To date, I am not aware of any decision in which a Brazilian court has expressly refused to enforce a forum selection clause on the basis of the new wording of the law. How this will play out in practice remains to be seen.

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Same-sex relationships concluded abroad in Namibia – Between (Limited) Judicial Recognition and Legislative Rejection

There is no doubt that the issue of same-sex marriage is highly controversial. This is true for both liberal and conservative societies, especially when the same-sex union to be formed involves parties from different countries. Liberal societies may be tempted to open up access to same-sex marriage to all, especially when their citizens are involved and regardless of whether the same-sex marriage is permitted under the personal law of the other foreign party. For conservative societies, the challenge is even greater, as local authorities may have to decide whether or not to recognise same-sex marriages contracted abroad (in particular when their nationals are involved). The issue becomes even more complicated in countries where domestic law is hostile to, or even criminalises, same-sex relationships.

It is in this broader context that the decision of the Supreme Court of Namibia in *Digashu v. GRN, Seiler-Lilles v. GRN* (SA 7/2022 and SA 6/2022) [2023] NASC (16 May 2023) decided that same-sex marriages concluded abroad should be recognised in Namibia and that the failure to do so infringes the right of the spouses to dignity and equality. Interestingly, the Supreme Court ruled as it did despite the fact that Namibian law does not recognise, and also criminalises same-sex relationships (see *infra*). Hence, the Supreme Court's decision provides valuable insights into the issue of recognition of same-sex unions contracted abroad in Africa and therefore deserves attention.

I. General Context

In his seminal book (*Private International Law in Commonwealth Africa* (Cambridge University Press, 2013) p. 182), Richard F. Oppong describes the issue of same-sex unions in Commonwealth Africa as follows: *'It still remains*

highly contentious in most of the countries under study whether the associations between persons of the same sex should be recognized as marriage. In Zambia, a marriage between persons of the same sex is void. It only in South Africa where civil unions solemnised either as marriage or a civil partnership are recognized' (footnotes omitted). As to whether other African countries would follow the South African example, Richard F. Oppong opined that '*[t]here is little prospect of this happening […]. Indeed, there have been legislative attempts […] in countries such as Nigeria, Uganda, Malawi and Zimbabwe – to criminalise same-sex marriage.*' (*op. cit.* p. 183). For a detailed study on the issue, see Richard F. Oppong and Solomon Amoateng, 'Foreign Same-Sex Marriages Before Commonwealth African Courts', *Yearbook of Private International Law*, Vol. 18 (2016/2017), pp. 39-60. On the prohibition of same-sex marriages and same-sex unions and other same-sex relationships in Nigeria under domestic law and its implication on the recognition of same-sex unions concluded abroad, see Chukwuma S. A. Okoli and Richard F. Oppong, *Private International Law in Nigeria* (Hart Publishing, 2020) pp. 271-274.

II. The Law in Namibia

A comprehensive study of LGBT laws in Namibia shows that same-sex couples cannot marry under either of the two types of marriage permitted in Namibia, namely civil or customary marriages (see Legal Assistance Center, *Namibian Laws on LGBT Issues* (2015) p. 129). In one of its landmark decisions decided in 2001 known as 'the *Frank* case' (*Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC)*), the Supreme Court held that the term 'marriage' in the Constitution should be interpreted to mean only a '*formal relationship between a man and a woman*' and not a same-sex relationship. Accordingly, same-sex relationships, in the Court's view, are not protected by the Constitution, in particular by Article 14 of the Constitution, which deals with family and marriage. With regard to same-sex marriages contracted abroad, the above-mentioned study explains that according to the general principles of law applicable in Namibia, a marriage validly contracted abroad is recognised in Namibia, subject to exceptions based on fraud or public policy (p. 135). However, the same study (critically) expressed doubt as to whether Namibian courts would be willing to recognise a foreign same-sex marriage (*ibid*). The same study also referred to a draft bill discussed by the Ministry of Home Affairs and Immigration

which '*contained a provision specifically forbidding the recognition of foreign same-sex marriages*' (p. 136).

III. The Case

The case came before the Supreme Court of Namibia as a consolidated appeal of two cases involving foreign nationals married to Namibians in same-sex marriages contracted abroad.

In the first case, the marriage was contracted in South Africa in 2015 between a South African citizen and a Namibian citizen (both men) under South African law (Civil Union Act 17 of 2006). The couple in this case had been in a long-term relationship in South Africa since 2010. In 2017, the couple moved to Namibia.

In the second case, the marriage was contracted in Germany in 2017 under German law between a German citizen and a Namibian citizen (both women). The couple had been in a long-term relationship since 1988 and had entered into a formal life partnership in Germany under German law in 2004. The couple later moved to Namibia.

In both cases, the foreign partners (appellants) applied for residency permits under the applicable legislation (Immigration Control Act). The Ministry of Home Affairs and Immigration ('the Ministry'), however, refused to recognise the couples as spouses in same-sex marriages contracted abroad for immigration purposes. The Appellants then sought, *inter alia*, a declaration that the Ministry should recognise their respective marriages and treat them as spouses under the applicable legislation.

IV. Issue and Arguments of the Parties

'*The central issue*' for the Court was to determine whether '*the refusal of the [Ministry] to recognise lawful same-sex marriage of foreign jurisdictions […] between a Namibian and a non-citizen [was] compatible with the [Namibian] Constitution*' (para. 20). In order to make such a determination, the Court had to consider whether or not the applicable domestic legislation could be interpreted to treat same-sex partners as 'spouses'.

The Ministry argued that, in the light of the Supreme Court's earlier precedent (the abovementioned *Frank* case), spouses in a same-sex marriage were excluded from the scope of the applicable legislation, irrespective of whether the marriage had been validly contracted abroad in accordance with the applicable foreign law (para. 58). The Ministry considered that the Supreme Court's precedent was binding (para. 57); and the position of the Supreme Court in that case (see II above) (para. 36) reflected the correct position of Namibian law (para. 59].

The appellants argued that the *Frank* case relied on by the Ministry was not a precedent, and should not be considered as binding (para. 54). They also argued that the approach taken by the Court in that case should not be followed (paras. 52, 55). The appellants also contended that the case should be distinguished, *inter alia*, on the basis that, unlike the *Frank* case were the partners were not *legally married* (i.e. in a situation of long-term cohabitation), the couples *in casu* had entered into lawful same-sex marriages contracted in foreign jurisdictions and that their marriages were valid *on the basis of general principles of common law* – the *lex loci celebrationis* (para. 50). Finally, the appellants argued that the Ministry's refusal to recognise their marriage was inconsistent with the Namibian Constitution as it violated their rights (para. 51).

V. The Ruling

In dealing with the case, the Supreme Court focused mainly on the applicability of the doctrine of precedent in the Namibian context and the constitutional rights of the appellants. Interestingly, comparative law (with references to the law of some neighbouring African jurisdictions, English law, American law, Canadian law and even the case law of the European Court of Human Rights) was mobilised by the Court to reach its conclusion, i.e. that the Ministry's decision to interpret and apply the applicable legislation in a manner that excluded spouses in same-sex marriages validly entered into abroad violated the appellants' constitutional rights.

With regard to the validity of same-sex marriages contracted abroad, the Supreme Court ruled as follows:

[82] According to the well-established general principle of common law, if a marriage is duly concluded in accordance with the statutory requirements for a

valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia. […]

[83] […] The term marriage is likewise not defined in the [applicable legislation] and would contemplate valid marriages duly concluded and ordinarily recognised, including those validly contracted outside Namibia in accordance with the law applicable where the marriage is concluded in accordance with the general principle of common law already referred to. […].

[84] The Ministry has not raised any reason relating to public policy as to why the appellants' marriage should not be recognised in accordance with the general principle of common law. Nor did the Ministry question the validity of the appellants' respective marriages.

[85] On this basis alone, the appellants' respective marriages should have been recognised by the Ministry for the purpose of [the applicable legislation] and [the appellants] are to be regarded as spouse for the purpose of the [applicable legislation][…]

VI. The Dissent

The views of the majority in this case were challenged in a virulent dissent authored by one of the Supreme Court's Justices. With respect to the issue of the validity of same-sex marriages concluded abroad, the dissent considered that the majority judgment holding that *'in the present appeals, the parties concluded lawful marriages in jurisdictions recognising such marriages'* (145) failed to consider that *'the laws of Namibia (including the Constitution of the Republic) do not recognise same-sex relationships and marriages.'* (146). The dissent then listed many examples, including the criminalisation of sodomy and other legislation excluding same-sex relationships or providing that marriage shall be valid when two parties are of different sexes (para. 146).

More importantly, the dissent also criticised the recognition of the same-sex marriages based on their being valid under the law of the place where they were concluded by stating as follow:

[152] [the main finding of the majority judgment] has its basis on a well-established principle of common law, that if a marriage is duly concluded in

accordance with the statutory requirements for a valid marriage in a foreign jurisdiction, it fall to be recognised in Namibia and that, that principle find its application to these matters. […].

[170] […] The common law principle relied on by the majority is sound in law but there are exceptions to the rule and Namibia is under no obligation to recognise a marriage inconsistent with its policies and laws for the reason that the said marriage is warranted by the municipal law of the country in which it was contracted. The marriages of the appellants offend the policies and laws of Namibia […]. (Emphasis in the original).

VII. Comments

The case presented here is interesting in many regards.

First, it introduces the Namibian approach to the question of the validity of marriages in general, including same-sex marriages. According to the majority judgment and the dissenting judgment, the validity of marriages is to be determined in accordance with the 'well-established common law principle' that a marriage should be governed by the law of the place where it was contracted (i.e. *lex loci celebrationis*).

According to the Namibian Supreme Court judges, the rule arguably applies to marriages contracted within the jurisdiction as well as to marriages contracted abroad. The rule also appears to apply to both the formal and substantive (essential) validity of marriages. This is a particularly interesting point. In Richard F. Oppong's survey of approaches in Commonwealth Africa (but not including Namibia), the author concludes that '*most of the countries surveyed make a distinction between the substantive and formal validity of marriage*' (*op. cit.* 185). The former is generally determined by the *lex domicilii* (although there may be different approaches to this), while the latter is determined by the *lex loci celebrationis*. (*op. cit.*, pp. 183-186). The author goes on to affirm that '*the main exception appears to be South Africa, where it has been suggested that the sole test of validity [for both substantive and formal validity] is the law of the place of celebration*' (op. cit., p. 185). The case presented here shows that Namibia also follows the South African example. This is not surprising given that the majority opinion relied on South African jurisprudence for its findings and analysis (see

paras. 82, 90, 108 for the majority judgment and paras. 152, 155-162 of the dissenting opinion).

Secondly, the majority judgment and the dissenting opinion show the divergent views of the Supreme Court judges as to whether the *lex loci celebrationis* rule should be subject to any limitation (*cf.* II above). For the majority, the rule is straightforward and does not appear to be subject to any exception or limitation. Indeed, in the words of the majority, '*if a marriage is duly solemnised in accordance with the legal requirements for a valid marriage in a foreign jurisdiction, it falls to be recognised in Namibia*' (emphasis added). No exception is allowed, including public policy. It is indeed interesting that the majority simply brushed aside public policy concerns by considering that that the Ministry had not raised any public policy ground (para. 84) (as if the intervention of public policy depended on its being invoked by the parties).

This aspect of the majority decision was criticised by the dissenting opinion. According to the dissenting opinion (para. 170), the application of the *lex loci celebrationis* is subject to the intervention of public policy. In other words, public policy should be invoked to refuse recognition of marriages validly celebrated abroad (cf. Oppong, *op. cit*, p. 186) if the marriage is '*inconsistent with the policies and laws*' of Namibia.

Finally, and most importantly, it should be pointed out that although the majority generally reasoned about 'marriage' and 'spouses' in broad terms. Indeed, the majority repeatedly pointed out that the appellants 'had concluded valid marriages' that should be recognised in application of the *lex loci celebrationis*. Yet, when the the majority reached its final conclusions, it carefully indicated that the issue of the recognition of same-sex marriages was addressed *for immigration purposes only.* Indeed, the majority was eager to include the following paragraph at the end of its analyses:

[134] the legal consequences for marriages are manifold and multi-facetted and are addressed in a wide range of legislation. This judgment only addresses the recognition of spouses for the purpose of [the applicable legislation] and is to be confined to that issue. (Emphasis added).

The reason for the inclusion of this paragraph seems obvious: the Court cannot simply ignore the general legal framework in Namibia. Moreover, one can see in

the inclusion of the said paragraph an attempt by the majority to limit the impact of its judgment in a rather conservative society and the intense debate it would provoke (see VIII below). In doing so, however, the majority placed itself in a rather obvious and insurmountable contradiction. In other words, if the Court recognises the validity of the marriage under the *lex loci celebrationis*, and (in the words of the dissenting opinion) 'conveniently overlooks' (para. 162) the intervention of public policy, nothing prevents the admission of the validity of same-sex marriages in other situations, such as inheritance disputes, maintenance claims or divorce. Otherwise, the principles of legal certainty would be seriously undermined if couples were considered legally 'married' for immigration purposes only. For example, would couples be considered as married if they later wished to divorce? Would one of the spouses be allowed to enter into a new heterosexual marriage without divorcing? Can the parties claim certain rights by virtue of their status as 'spouses' (e.g. inheritance rights)?

This issue is particularly important even for the case at hand. Indeed, in one of the consolidate cases, the appellants obtained before moving to Namibia an adoption order in South Africa declaring them joint care givers of a minor and granting them joint guardianship (para. 5). In a document prepared by the Ministry of Gender Equality and Child Welfare (Guide to Namibia's Child Care and Protection act 3 of 2015 (2019)), it was clearly indicated that '*only "spouses in a marriage" can adopt a child jointly*' and that '*[i]f same-sex partner were legally married in another country, it depends on whether the marriage is recognised as a marriage under the laws of Namibia*' (p. 10). Therefore, in light of the decision at hand, it remains to be seen whether the South African adoption order will be or not recognised in Namibia. (On the adoption by same-sex couples in Namibia and the recognition of same-sex adoptions concluded in other countries, see the study undertaken the Legal Assistance Center on the *Namibian Laws on LGBT Issues* (2015) pp. 143-145).

VIII. The Aftermath of the Ruling: The Legislative Response

It is undeniable that Supreme Court decision could be considered as groundbreaking. It is no surprise that human rights and LGBT+ activists have welcomed the decision, despite the majority judgment's confined scope. On the other hand, legislative reaction was swift. In an official letter addressed to the

Parliament, the Prime Minister expressed the intention its Government to bring a bill that would reverse the Supreme Court decision by modifying '*the relevant common law principle in order that same sex marriage even where solemnized in Countries that permit such marriages cannot be recognised in Namibia*'. Later, two bills (among many others) were introduced in order to define ?the term 'marriage' as to exclude same-sex marriages; and ?to define the term 'spouse'. Both bills intend to prohibit the conclusion and the recognition of same-sex marriage in Namibia. Last July, the bills were discussed and approved by the Namibian's Parliament Upper House (The National Assembly). The bills need now to be approved by the Lower House (The National Council) and promulgated by the President to come into force.