



Law Society
of Scotland

Private International Law (Implementation of Agreement) Bill – Legislative Consent Motion in the Scottish Parliament

May 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Public Policy Committee welcomes the opportunity to provide this comment to the Scottish Parliament in connection with the Legislative Consent Motion regarding the Private International Law (Implementation of Agreements) Bill. The Committee has the following comments to put forward for consideration.

General Comments

Private International Law - sometimes known as "International private law" or "conflict of laws" or "transnational civil litigation" is that body of law of any legal system which applies to decide questions involving foreign aspects. Private International Law which is part of Civil or Private law includes the rules of jurisdiction, choice of law and recognition and enforcement of the decisions of foreign courts. Private International

Law rules form the basis of civil judicial cooperation (as the Bill's Explanatory Notes state) "between courts and other public authorities in different countries involved in dealing with cross border issues, such as service of documents or taking of evidence abroad, or establishing efficient procedures to assist with the resolution of cross-border disputes, for example, in the family law area" (para 3).

The Bill's Explanatory Notes confirm that the objectives of private international law "ensure reciprocal treatment, avoid parallel legal proceedings and conflicting decisions for private litigants, and establish streamlined cross-border co-operation" (para 4).

A number of international bodies are involved in the formulation and promotion of Private international law rules. These include the Hague Conference on Private International Law which works "for the progressive unification of the rules of private international law", in civil, administrative and family proceedings. The Council of Europe, the United Nations Commission on International Trade Law (UNCITRAL) and the Institute for the Unification of Private Law (UNIDROIT). Of course the courts have an important role in connection with the development and interpretation of Private International Law too for example in connection with the development of aspects of the law such as domicile.

The Bill provides for the domestic implementation of the Hague Conventions referred to in Clause 1 at the end of the transition period by providing that they have the force of law in the UK by amending the Civil Jurisdiction and Judgements Act 1982.

The Bill engages the European Convention on Human Rights (ECHR) as some of its provisions touch on vindication and enforcement of civil rights or obligations (Article 6) and right to a family life (Article 8). We agree with the statement in the Explanatory Notes (para 68) that the Bill does not raise “any significant issues” in relation to the ECHR.

During the transition period, the UK will continue to participate in the EU’s framework of PIL rules. This includes those international agreements to which the EU is the contracting party. Prior to the end of the transition period, the UK needs to take steps to ensure continued participation in the treaties referred to in Clause 1.

In the Scottish context private international law is part of Scots private law under section 126(4)(a) of the Scotland Act 1998. It includes law relating to choice of law, choice of jurisdiction, recognition of judgements and enforcement of decisions.

The bill engages the Legislative Consent Convention, declared in the Scotland Act 1998 Section 28(8) that the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament without the consent of the Parliament.

The matters to which the provisions of the Bill relate are within the legislative competence of the Scottish Parliament. A legislative consent motion is also being sought from the Northern Ireland Assembly and the Welsh Assembly.

The Scottish Government has lodged a legislative consent memorandum in the Scottish Parliament which contains a draft motion inviting the Scottish Parliament to consent to the UK Parliament legislating in terms of the bill.

The Society’s View

This Bill is a very important measure. The Society endorses the general principles of the approach taken in the bill and the proposal that the Legislative Consent Motion should be agreed.

Specific Comments

Clause 1 (Implementation of the 1996, 2005 and 2007 Hague Conventions)

This clause implements the following three treaties formulated by the Hague Conference on Private International Law:

- A. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children 1996. This treaty provides a framework for choice of jurisdiction, law and enforcement of judgements on questions about residence and contact of children where parents have separated and live in different countries; and co-operation between national authorities which protect children.

- B. The Hague Convention on Choice of Court Agreements 2005. This treaty concerns choice of court agreements between parties to international commercial transactions. Where a court (in a state party to the Convention) is referred to in a choice of court clause in a contract, the Convention requires that court to hear any such dispute (and ensures other courts decline to do so), and requires any judgment to be recognized and enforced in the courts of all States which have agreed the Convention; and
- C. The Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007. This treaty concerns the international recovery of child support and maintenance payments. It contains rules for recognition and enforcement of maintenance decisions in contracting states' courts and for administrative cooperation between national authorities regarding maintenance claims.

These treaties will apply to the UK until 31 December 2020, the end of the transition period. Before that date the Government needs to ensure the UK's participation in them in its own right, and ensure they are implemented in domestic law.

The Society's View

We agree with the proposal to implement these Conventions into domestic law.

Clause 2 (Implementation of other agreements on private international law)

Clause 2 creates a delegated power which allows an appropriate national authority (e.g. the Secretary of State, Scottish Ministers or other devolved Administration to implement international agreements on PIL in domestic law by affirmative procedure secondary legislation.

This provision is without prejudice to the procedure for Parliamentary Scrutiny under the Constitutional Reform and Governance Act 2010 (CRAGA). As an incidental matter we draw attention to the House of Lord's Constitution Committee 20th Report of Session 2017-2019 entitled *Parliamentary Scrutiny of Treaties* which highlighted shortcomings in Parliament's scrutiny of treaties including the CRAGA process and made recommendations for a new treaty scrutiny select committee to be established and a general principle of transparency throughout the treaty process.

The Society's View

We agree with this approach subject to, where possible, consultation on the draft regulation pending further reform of the Parliamentary process for scrutiny of treaties.

Agreements which may fall into this category mentioned in the Explanatory Notes include:

- A. The Lugano Convention 2007 which deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The treaty regulates where a relevant case involving a cross-border element should be heard and that the resulting judgment can be recognized and enforced across borders. This avoids multiple court cases taking place on the same subject matter and reduces

the costs of the parties involved. The Lugano Convention regulates the UK's PIL relationship with Norway, Iceland and Switzerland see:

<https://www.gov.uk/Government/publications/ms-no112018-convention-on-choice>

The Society's View

We agree with the UK policy to re-join this convention in its own right.

B. The Hague Judgements Convention 2019 is a treaty on recognition and enforcement of civil and commercial judgments.

The Society's View

We take the view that this treaty will make it easier to recognise and enforce judgements of courts in States which have adopted the Convention.

We consider that the UK should take steps to accede to the Convention.

Clause 3 (Crown application)

The Society's View

We have no comment to make.





For further information, please contact:

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