



Law Society
of Scotland

Law Society Scotland Response

Private International Law (Implementation of
Agreements) Bill Briefing for Second Reading in the
House of Commons

August 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 briefing on the Second Reading of 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 through amendments to 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 until IP Day on 31 December 2020 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. The UK needs to take steps to ensure continued participation in the treaties referred to in Clause 1 before 31 December 2020.

Specific Comments

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 in the Bill are within the legislative competence of the Scottish Parliament which agreed to the relative Legislative Consent Motion on 17 June 2020.

The Society’s View

This Bill is a very important measure. The Society endorses the general principles of the approach taken in the bill.

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 recognised 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 (Crown application)

The Society's View

We have no comment to make.

Clause 3 (Extent, commencement and short title)

The Society's View

We note that the bill extends to England and Wales, Scotland and Northern Ireland.

Additional comments

When the bill was introduced into the House of Lords it contained a clause which provided for ministers (including the Devolved Administrations in Scotland and Northern Ireland) to be able to meet regulations to implement "any international agreement, as it has effect from time to time, so far as relating to private international law...". That clause was removed from the bill during the report stage in the House of Lords. The bill no longer contains any delegated powers. As originally envisaged the delegated powers would have been used to implement in domestic law future Private International Law agreements, one of which is the Lugano Convention 2007.

This approach to implementing future agreements was without prejudice to the procedure for Parliamentary scrutiny of treaties prior to ratification under the Constitutional Reform and Governance Act 2010 (CRAGA). As an incidental matter we draw attention to the House of Lords 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 House of Lords Constitution Committee 5th Report of Session 2019–21 entitled Private International Law (Implementation of Agreements) Bill [HL paper 55] noted Clause 2 would change a long-standing convention of the Constitution, which is that...international legal agreements that make changes to UK law are given domestic force by an Act of Parliament.” The Constitution Committee concluded that the Clause 2 powers were a matter of “significant constitutional concern “.

The Society’s View

We agreed with the approach of HL Bill 101 before it was amended subject to, where possible, consultation on the draft regulation (pending further reform of the Parliamentary process for scrutiny of treaties).

However, as reform of the treaty process is not imminent, we consider that if the Government intend to reinstate the new regulation making power it should at this point be applied specifically to the implementation of the Lugano Convention. Such a change is needed for the purposes of implementing the Lugano Convention as quickly as possible in the event of the UK acceding to the Convention.

The Lugano Convention 2007 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 recognised 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>

We agree with the Government’s policy to re-join the Lugano Convention in its own right. If the UK manages to accede to the Convention by 31 December 2020 a relatively simple and quick mechanism will be needed for the implementation of the Convention.

Therefore, in view of the potential problems if the UK cannot implement the Convention quickly, we suggest the introduction of clause 2 on the basis that it focusses only on the implementation of the Lugano Convention.

If the Government does not agree to this approach and considers that it should reinstate the original general order making power under Clause 2 which was rejected in the House of Lords, we recommend that the exercise of that power should be subject to a sunset provision limited to 1 year.



For further information, please contact:

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 0131476 8361

michaelclancy@lawscot.org.uk