

PRIVATE INTERNATIONAL LAW (IMPLEMENTATION OF AGREEMENTS) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Private International Law (Implementation of Agreements) Bill [HL] as brought from the House of Lords on 30 June 2020 (Bill 150).

- These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

1. The purpose of the Bill is to provide for the implementation in domestic law of three international agreements on Private International Law (PIL).
2. The Bill contains one main clause, clause 1, which implements the following three international agreements drawn up under the auspices of the Hague Conference on Private International Law:
 - the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (“the 1996 Hague Convention”);
 - the 2005 Hague Convention on Choice of Court Agreements (“the 2005 Hague Convention”); and
 - the 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance (“the 2007 Hague Convention”).

Policy background

3. Private International Law (“PIL”) – sometimes known as “conflict of laws” – comprises rules applied by courts and parties involved in legal disputes for dealing with cases raising cross-border issues. The rules generally apply in the context of civil law, including specialist areas such as commercial, insolvency and family law. PIL typically includes rules to establish whether a court has jurisdiction to hear a claim which has cross-border elements, which country’s law applies to such a claim, and whether a judgment of a foreign court should be recognised and enforced. It can also encompass rules on co-operation 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.

4. Most countries have their own domestic PIL rules dealing with matters such as jurisdiction, applicable law and recognition and enforcement of foreign judgments, but they also enter into international agreements under which states

agree to apply the same PIL rules to ensure reciprocal treatment, avoid parallel legal proceedings and conflicting decisions for private litigants, and establish streamlined cross-border co-operation. Such agreements mean that, for example, child maintenance obligations imposed by a court or public authority in one state can be recognised and enforced in another state; divorces can be recognised in other countries; and businesses feel confident entering into cross-border transactions knowing that, in the event of a dispute, there is a clear mechanism for deciding how it will be resolved and the outcome respected in different countries. Having internationally agreed rules on these issues creates legal certainty in cross border situations and saves time and costs, which benefits UK businesses, individuals and families.

5. Since the 1920s the UK has entered into bilateral treaties with Commonwealth and European countries on recognition and enforcement of civil judgments, service of documents and the taking of evidence. In addition to this, the Hague Conference on Private International Law (“the Hague Conference”), founded in 1893, has been working “for the progressive unification of the rules of private international law”, which cover

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civil, administrative and family proceedings. The work of the Hague Conference consists of developing new multilateral instruments and refreshing existing Conventions and guidance. The Hague Conference also supports States in the application of Conventions and works to promote wider accession by both Member and non-Member states. The UK has been a Member of the Hague Conference for over 60 years and currently participates in 13 Conventions (a full list is provided at **Annex B**). Agreements containing PIL rules may also be negotiated through the Council of Europe, the United Nations Commission on International Trade Law (UNCITRAL) and the Institute for the Unification of Private Law (UNIDROIT).

6. Multilateral conventions between European states on jurisdiction, recognition and enforcement of civil judgments and the law applicable to contractual obligations were adopted from the 1960s within the framework of the European Communities. The EU subsequently adopted a comprehensive set of internal EU PIL rules and mostly exercises competence on behalf of EU member states to enter into multilateral PIL conventions with third countries.

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7. PIL agreements cover a discrete area of law that is narrowly defined. Agreements on PIL are generally considered beneficial and are typically predictable in topic and scope. Key stakeholders, including representatives of the legal sector, have consistently made clear the importance of the UK continuing to take a leading role internationally on PIL.

8. During the transition period (TP), the UK will continue to participate fully in the EU's extensive 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 will need to take steps to ensure continued participation in key PIL international agreements in its own right. This includes those international agreements covered by clause 1 of the Bill (see paragraph 11).

9. From 1st February 2020, the UK has regained full competence to enter into international agreements on PIL in its own right. This will allow the UK to agree ambitious new PIL frameworks with international partners all over the world and to remain at the forefront of efforts to promote global cooperation and best practice in this area.

10. As the UK develops its wider trading policy with the EU and rest of the world, agreements on PIL will be key to supporting cross-border commerce by providing businesses, investors and consumers with greater confidence that disputes across borders can be resolved in a clear and efficient way. This Bill provides a clear approach to the implementation in domestic law of the 1996, 2005 and 2007 Hague Conventions from the end of the transition period (see paragraphs 11, 15 and 16).

Provision for the 1996, 2005 and 2007 Hague Conventions

11. The Bill provides a clear approach to the domestic implementation of the 1996, 2005 and 2007 Hague Conventions at the end of the transition period by simply stating that their provisions have the force of law in the UK.

12. The 1996 Hague Convention is a multilateral treaty aimed at improving the protection of children. It provides a framework for the resolution of issues such as residence of, and contact with, children where parents have separated and live in different countries; and establishes co-operation between national authorities involved in protecting children. This is important because it provides legal certainty that

decisions relating to children (e.g. contact/ access arrangements) made in one country will be respected in others, so that people do not have to incur the expense and trouble of bringing fresh proceedings when they move to another country.

13. The 2005 Hague Convention is a multilateral treaty aimed at ensuring the effectiveness of exclusive choice of court agreements between parties to international commercial transactions. Where a court (in a state that is a contracting party to the Convention) has been designated by a choice of court agreement to deal with disputes arising under that agreement, the Convention requires that court to hear any such dispute (and other courts to decline to do so), and requires any judgment rendered by the chosen court to be recognised and enforced in the courts of all other contracting party States, as necessary. These “choice of court” clauses are common in high value commercial contracts. The Convention provides greater legal certainty for parties to cross- border commercial transactions and maintains UK jurisdictions as an attractive choice for the resolution of disputes in commercial contracts. For example, for the small UK business that has a contract with a supplier based in another state (which is a party to the 2005 Hague Convention) with whom it has

agreed that any disputes should be resolved in the UK courts, it provides certainty that the supplier will not renege on that dispute resolution agreement and that any resulting judgment can be recognised and enforced in the supplier's home state. This reduces the length and cost of litigation in commercial cases which have a cross-border element.

14. The 2007 Hague Convention is a multilateral treaty which provides rules for the international recovery of child support and other forms of family maintenance, and for administrative cooperation between contracting States. It provides rules for recognition and enforcement of maintenance decisions across borders and for administrative cooperation between national authorities on the processing of maintenance claims. This makes it easier, for example, for one parent to put in place enforceable child maintenance obligations where the other parent lives abroad. This is important because having such a framework in place for maintenance matters helps reduce financial hardship for the children of UK resident parents.

15. As explained in paragraph 8 and 18, these international agreements on PIL continue to apply to the UK for the duration of the transition period. However, prior to the transition period's

conclusion the Government will need to take steps to ensure the UK's continued participation in them in its own right, and ensure their provisions are implemented in domestic law. In relation to the 2005 and 2007 Hague Conventions, the UK will need to become a contracting party to those Conventions in its own right by submitting the necessary instruments of accession and ratification, prior to the end of the transition period. Parliamentary scrutiny of these Conventions prior to ratification under the CRAG Act 2010 took place during November/December 2018 (as part of the preparations for leaving the EU without a Withdrawal Agreement being in place) including the text of the declarations and reservation to those Conventions which the UK still proposes to make in the future.¹

16. The UK has participated in both the 2005 and 2007 Hague Conventions since 2015 and 2014 respectively, with the EU being the contracting party and having concluded the conventions during that period. The UK has been a contracting party to the 1996 Hague Convention since 2012, however, the EU authorised its

¹ Hague 2005 CRAG details : https://www.gov.uk/Government/publications/ms-no112018-convention-on-choice-of-court-agreements?utm_source=39b98bb5-d064-4bfb-895e-896e9805cae1&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate;

and Hague 2007 CRAG details: https://www.gov.uk/government/publications/ms-no102018-international-recovery-of-child-support-and-other-forms-of-family-maintenance?utm_source=89e03892-4dec-4d78-9e97-f30d4d9af7f1&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

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member states, including the UK at that time, to sign and ratify the 1996 Hague Convention because the EU had competence in relation to some of its provisions, but was unable itself to become a contracting party under the terms of the Convention. The Bill re-implements in domestic law these three existing international agreements on PIL to which the UK will be an independent party in its own right at the end of the transition period.

17. Prior to the UK's departure from the EU, implementation of these Conventions relied primarily on section 2(1) of the European Communities Act (ECA) 1972 and the principle of direct effect of EU law under which provisions of EU treaties which created legal rights or obligations were directly applicable in the national law of EU member states, provided they met the necessary conditions including that they were sufficiently clear and unconditional. This meant that the Convention provisions did not need to be replicated in domestic law in order to have legal effect. All three Hague Conventions constituted EU treaties under section 1 of the ECA 1972. There were also additional regulations made under section 2(2) of that Act to give further effect to the Conventions².

² In relation to the 1996 Hague Convention see the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010 (SI 2010/1898) and the Parental *These Explanatory Notes relate to the Private International Law (Implementation of Agreements) Bill [HL] as brought from the House of Lords on 30 June 2020 (Bill 150)*

18. During the transition period, the current implementation in domestic law of these Conventions via the ECA 1972 is saved by the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020. However, this Bill provides a new approach to domestic implementation which ensures that these Conventions will continue to operate effectively at the end of the transition period in a way which is clearer for users of them.

19. Whilst section 4 of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) saves directly effective treaty rights in domestic law after the end of the transition period³, the Government considers it would be clearer for users of the Conventions for legal effect to be given to their provisions in UK domestic law by expressly providing for this in primary legislation. This means that the UK will

Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010 (SSI 2010/213); in relation to the 2005 Hague Convention see the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) 2015 (SI 2015/1644); and in relation to the 2007 Hague Convention see the International Recovery of Maintenance (Hague Convention 2007 etc) Regulations 2012 (SI 2012/2814), The International Recovery of Maintenance (Hague Convention 2007 etc.) Regulations (Northern Ireland) 2012 (Northern Ireland Statutory Rules 2012/413), and The International Recovery of Maintenance (Hague Convention 2007) (Scotland) Regulations 2012 (SSI 2012/301).

³ In addition, two EU Exit SIs were also made under the European Union (Withdrawal) Act 2018 dealing with Hague 2005 and Hague 2007: 'The International Recovery of Maintenance (Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007) (EU Exit) Regulations 2018' and 'The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018'.

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not have to continue relying on the EU concept of direct effect and the savings provisions for directly effective treaty rights in section 4 of the European Union (Withdrawal) Act 2018 after the end of the transition period. The Government is therefore implementing the Convention provisions directly on the face of the Civil Jurisdiction and Judgments Act 1982 via the Bill using an approach commonly used in domestic legislation for implementing non-EU treaties. Other consequential amendments are being made to ensure an effectively functioning statute book. The additional regulations made under section 2(2) of the ECA 1972 which gave further effect to the Hague Conventions will also continue to apply in domestic law after the end of the transition period (these are saved by section 2 of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020)).

20. The Bill will underpin the UK's future ability to meet its international treaty obligations by ensuring that there continues to be domestic implementing legislation in place relating to the 1996, 2005 and 2007 Hague Conventions at the end of the transition period, and that the legislation is clear for all users to understand.

Previous inclusion of a delegated power to implement international agreements on Private International Law (PIL)

21. The Bill originally gave the UK Government and the Devolved Administrations in Scotland and Northern Ireland a delegated power to implement new agreements (including Model Laws) on private international law via Regulations. It provided for the affirmative procedure to be used to implement new agreements.

22. However, amendments were carried in the House of Lords at Report stage and Third Reading which removed the delegated power and its consequential provisions.

Legal background

23. The relevant legal background is explained in the policy background section of these notes.

Territorial extent and application

24. Clause 3(1) of the Bill sets out the territorial extent of the Bill as England and Wales, Scotland and Northern Ireland. These are the jurisdictions in which the Bill forms part of the

law and the Bill applies throughout the whole of the UK.

Legislative Consent Motions

25. There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales, or the Northern Ireland Assembly without the consent of the legislature concerned.

26. The matters to which the provisions of the Bill relate are within the legislative competence of the Scottish Parliament and of the Northern Ireland Assembly, and, to a limited extent, the National Assembly for Wales. A legislative consent motion has been sought and granted from the Scottish Parliament and the Northern Ireland Assembly.

27. Annex A summarises the position regarding territorial extent and application in the United Kingdom.

Commentary on provisions of Bill

Implementation of international agreements

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

28. This clause amends the Civil Jurisdiction and Judgments Act 1982 (“the 1982 Act”).

29. Clause 1(1) inserts a definition of the 1996 Hague Convention into section 1(1) of the 1982 Act, which is the section dealing with interpretation of references to Conventions in that Act. The 1982 Act already contains definitions of the 2005 and 2007 Hague Conventions.

30. Clause 1(2) inserts new sections 3C, 3D and 3E into the 1982 Act, providing for the 1996, 2005 and 2007 Hague Conventions respectively to have the force of law in the UK, subject to any reservations and declarations made by the UK. The UK made the declarations to the 1996 Hague Convention which are referred to in new section 3C (2) when it joined that Convention in 2012.

31. Clause 1(3) inserts into the 1982 Act the Schedules set out in Schedules 1 to 4 to this Bill, which comprise the text of the three Hague Conventions, and of the declarations which the

UK made in 2012 in relation to the 1996 Hague Convention.

32. Clause 1(4) introduces Schedule 5 which contains provisions consequential on clause 1 of the Bill. The Government at Report stage in the House of Lords tabled six amendments to that Schedule with the aim of providing a clearer and simpler approach to transitional provisions in the 2005 and 2007 Hague Conventions. All these amendments were approved and Schedule 5 was duly amended (see further below).

33. Paragraph 1 of Schedule 5 adds the 1996 Hague Convention to the list of Conventions in relation to which the existing rule-making power in section 48 of the 1982 Act may be exercised, as a consequence of the 1982 Act being amended by the Bill to insert provisions implementing that Convention. This power already applies in relation to the 2005 and 2007 Hague Conventions.

34. Paragraph 2 provides for section 4 of the European Union (Withdrawal) Act 2018 to cease to apply to directly effective rights derived from the 1996, 2005 and 2007 Hague Conventions. It

will not be necessary to rely on these directly effective rights, saved by section 4 of the 2018 Act, once the provisions of clause 1(2) of the Bill have provided for those Conventions to have the force of law.

35. Paragraphs 3 and 4 make consequential amendments to the EU Exit Regulations made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018, which were originally made for the event of a non-negotiated withdrawal from the EU. These paragraphs revoke the transitional provisions of the EU Exit Regulations. Instead, the transitional provisions in Article 16 of the 2005 Hague Convention and Article 56 of the 2007 Hague Convention will apply, as they are given legal force by clause 1 of the Bill. This means that, for example, a case already pending in a UK court before the end of the Transition Period will continue to be governed by the provisions of the relevant Hague Convention.

36. Paragraph 5 makes minor amendments to headings in the 1982 Act, through amendment of an EU Exit Regulation (S.I. 2019/479).

37. Paragraph 6 revokes the Council Decision, adopted by the EU, authorising Member States to join the 1996 Hague Convention. This Council Decision will otherwise be saved in domestic law by section 3 of the European Union (Withdrawal) Act 2018, but is redundant.

38. Paragraphs 7-9 provide for interpretation of the 2005 and 2007 Hague Conventions as they have the force of law in the UK, to make clear that these Conventions came into force for the UK on the dates when the UK originally became bound by them - upon EU accession to the Conventions - and that, when the UK joins these conventions in its own right after the end of the Transition Period, it should be treated as having been bound by the Conventions without interruption.

General

Clause 2: Crown Application

39. Clause 2 provides that the amendments made by the Bill to the Civil Jurisdiction and Judgments Act 1982 bind the Crown in accordance with section 51 of that Act which provides that the 1982 Act binds the Crown, subject to certain exceptions.

Clause 3: Extent, commencement and short title

40. Clause 3(1) provides that the Bill extends to England and Wales, Scotland and Northern Ireland.

Schedules 1 to 5

41. See paragraphs 33-38 .

Commencement

42. Clause 3(2) provides that the provisions of the Bill dealing with the implementation of the 1996, 2005 and 2007 Hague Conventions and consequential amendments set out in Schedule 5 come into force on “IP completion day”, which is at the end of the transition period.

Financial implications of the Bill

43. Clause 1 means that the provisions of three Hague Conventions, which were directly applicable in UK law during the transition period, continue to have legal effect in UK law after the end of the transition period. No substantive changes are being made to the Hague Convention provisions being implemented under the Bill and clause 1 is therefore not expected to have any financial implications.

44. Clause 2 and 3 have no financial impact.

45. The Bill will not require a money resolution or a ways and means resolution.

Compatibility with the European Convention on Human Rights

46. The Government does not consider that the Bill raises any significant issues in relation to the European Convention on Human Rights (ECHR) and the Lord Chancellor and Secretary of State for Justice, Robert Buckland QC, has made a statement under section 19(1)(a) of the Human Rights 1998 that the Bill is compatible with the ECHR.

Equalities

47. In relation to the policy which is given effect by the Bill, the Lord Chancellor has had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equalities Act 2010. In addition, the Lord Chancellor has had equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland.

Annex A - Territorial extent and application in the United Kingdom

The Bill extends and applies UK wide:

Repeals and amendments made by the Bill have the same territorial extent and application as the legislation that they are repealing or amending. The information provided is the view of the UK Government.⁴

| |
|---|
| Legislative Consent Motion needed? |
| Would corresponding provision be within the competence of the relevant devolved legislature? |
| Would corresponding provision be within the competence of the Scottish Parliament? |
| Would corresponding provision be within the competence of the National Assembly for Wales? |
| Extends and applies to Northern Ireland? |
| Extends and applies to Scotland? |
| Extends to E & W and applies to Wales? |
| Extends to E & W and applies to England? |
| Provision |

⁴ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

| |
|-----------------------------|
| Yes (S, NI) |
| Yes |
| Yes |
| No |
| Yes |
| Yes |
| Yes |
| Yes |
| Clauses 1 Hague Conventions |

Annex B – Hague Conventions in the UK

Hague Conventions to which the UK is a contracting party:

1. Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.
2. Convention of 5 October 1961 on Abolishing the Requirement of Legalisation for Foreign Public Documents.
3. Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
4. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.
5. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.
6. Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.
7. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
8. Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.
9. Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.
10. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition,

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Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

11. Convention of 13 January 2000 on the International Protection of Adults.
12. Convention of 30 June 2005 on Choice of Court Agreements.
13. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

In addition, the UK has signed:

14. Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons.

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