

# **Private International Law (Implementation of Agreements) Bill**

## **Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee**

### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with scrutiny of the Private International Law (Implementation of Agreements) Bill (“the Bill”). The Bill was introduced on Thursday 27 February. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains why the power has been taken and explains the nature of, and the reason for, the procedure selected. In addition to this memorandum, we intend to share a draft exemplar SI shortly which will illustrate the proposed use of this power to Parliament.

### **B. SUMMARY OF THE BILL**

#### **Background and Purpose**

2. The Bill is concerned with implementing international agreements on Private International Law (PIL) in domestic law. These agreements provide a legal framework for resolving difficult situations for those involved in disputes across borders. These agreements can help seek to return home a child abducted by one of their parents, or help two parents living in different countries to sort out their divorce and agree arrangements in the best interests of their children. Alternatively, they can help small businesses that have been left out of pocket by a supplier based in another country to seek redress.
3. Without these agreements, UK businesses, individuals and families engaged in cross border disputes will struggle to resolve them. There may be parallel court cases in different countries, on substantially the same matter, which reach conflicting decisions, and the decisions made by UK courts may not be recognised and thereby enforced abroad. International agreements on PIL also enable courts or public authorities to establish co-operation on procedural matters such as the service of legal documents and taking of evidence abroad or procedures on dealing with cross-border disputes particularly in the field of family law.
4. The certainty provided by PIL agreements is beneficial to the legal services sector in supporting litigants dealing with cross-border disputes. The sector contributes over £25bn gross value added to the economy and generates revenue of over £35bn. The UK’s trade surplus in legal services has more than doubled over the past 10 years to £6.5bn.
5. The Bill has two main clauses. These are summarised in paragraphs 6 and 7 below.

6. Clause 1 implements in domestic law three existing international agreements on PIL (or 'Hague Conventions') to which the UK will be an independent contracting party in its own right at the end of the transition period (TP). These are:

- 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 ('1996 Hague Convention');
- The 2005 Hague Convention on Choice of Court Agreements ('2005 Hague Convention'); and
- The 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance ('2007 Hague Convention').

For more detail on these agreements, please refer to the Bill, Explanatory Notes, or Policy Statement.

7. Clause 2 contains a clearly defined power to make regulations to implement in domestic law other international agreements on PIL. These agreements will contain rules relating, for example, to one or more of the following areas:

- Jurisdiction: rules which establish which country's courts or authorities should deal with a legal dispute which involves a foreign element.
- Applicable law: rules which clarify which country's law applies to a dispute in a situation involving foreign elements.
- Recognition and enforcement of judgments: rules allowing for the mutual recognition and enforcement of judgments handed down by foreign courts, and for the enforcement of legally binding decisions issued abroad by bodies competent to resolve a dispute.
- Cooperation between judicial or other authorities in different countries or territories on matters such as service of documents and taking of evidence, or in relation to any of the above matters, such as recognition and enforcement of each other's decisions in family cases.

8. We are bringing this Bill forward now because, from the end of the transition period, the UK will no longer participate in the EU's internal set of PIL instruments (known in the EU as "civil judicial co-operation" instruments) which apply as between EU Member States. Nor will the UK rely on EU membership or contracting party status for participation in some international PIL agreements from the end of the transition period, such as the Hague Conventions mentioned above. Instead, the UK has now regained full competence to enter into international agreements on PIL in its own right. This will allow us to agree ambitious new PIL frameworks with our international partners all over the world.

9. To this end, the UK is committed to becoming a contracting party to the 2005 and 2007 Hague Conventions in its own right with effect from the end of the transition period. This Bill re-implements

these conventions in domestic law to reflect this. Similarly, the UK will also no longer be subject to EU competence in relation to parts of the 1996 Hague Convention (the UK was authorised by the EU to become a contracting party to this Convention in respect of certain matters within EU competence since it was not possible for the EU itself to become a contracting party under the terms of the Convention), and the Bill will reflect this in domestic law from the end of the transition period. The Bill gives the UK the opportunity to remain at the forefront of international PIL development and best practice, and to continue to be a leading member of the Hague Conference on Private International Law under whose auspices many international PIL agreements are drawn up.

10. The main delegated power in the Bill is found in clause 2 – the power to implement PIL agreements by regulations. Clause 2(1) describes the types of international agreements falling within scope of the implementing power and clause 2(7) sets out an inclusive definition of the term “private international law” for the purposes of clause 2. In deciding what procedure is appropriate for the exercise of the clause 2 power, MOJ has identified several circumstances that will trigger the use of the affirmative procedure in paragraphs 3 to 5 of Schedule 6 to the Bill. There is a second delegated power in clause 4 of the Bill which enables the Secretary of State to make commencement regulations to bring certain consequential provisions of Schedule 5 (together with clause 1(4) so far as it relates to them) into force.

### **C. ANALYSIS OF THE DELEGATED POWERS**

#### The power:

*Clause 2(1) gives an “appropriate national authority” the power to make regulations “for the purpose of, or in connection with, implementing any international agreement, as it has effect from time to time, so far as relating to private international law”.*

#### Power conferred on:

*The Secretary of State in relation to England and Wales, the Scottish Ministers or the Secretary of State (acting with the consent of the Scottish Ministers) in relation to Scotland, and a Northern Ireland department or the Secretary of State (acting with the consent of a Northern Ireland department) in relation to Northern Ireland.*

#### Private international law definition:

*“private international law” includes rules and other provisions about—*

*(a) jurisdiction and applicable law;*

*(b) recognition and enforcement in one country or territory of any of the following that originate in another country or territory—*

- (i) a judgment, order or arbitral award;*  
*(ii) an agreement, decision or authentic instrument determining or otherwise relating to rights and obligations;*
- (c) co-operation between judicial or other authorities in different countries or territories in relation to—*  
*(i) service of documents, taking of evidence and other procedures, or*  
*(ii) anything within paragraph (a) or (b)”*

Powers exercisable by: Regulations

Parliamentary Procedure:

*The affirmative procedure will apply:*

- *If the regulations are the first instance of Parliament legislating to implement an agreement or implement an arrangement with an overseas territory or Crown dependency to apply an agreement between that territory or Crown dependency and the UK;*
- *If the regulations amend primary legislation; and*
- *If the regulations create or extend, or increase the penalty for, a criminal offence.*

*but the negative procedure will otherwise apply.*

**Purpose of the power**

11. The aim of the clause 2 power is to allow the government to implement in domestic law international agreements on PIL in a timely manner. These may be new agreements which have yet to be negotiated with our international partners, or alternatively they could be existing multilateral agreements which the UK has not yet decided to join. The power can also be used to apply an international agreement on PIL (with suitable modifications) as between the different jurisdictions within the UK (i.e. between England & Wales, Scotland and Northern Ireland); or between the UK and one of its Overseas Territories or Crown Dependencies, but only if such an arrangement is mutually agreed between the UK government and the respective governments of the other jurisdictions, territories or dependencies in question. These provisions are set out in clause 2(2) and (3) of the Bill. The power can also be used to update or amend the implementation of agreements on PIL that have already been implemented in domestic law if this should become necessary.

12. Where it is possible to implement an international agreement on PIL on the face of the Bill, we have done so via clause 1. But there are other agreements on PIL that we may need to implement in domestic law in the future which cannot be placed on the face of the Bill at this point. For example, because joining the agreement remains subject to an application to accede (as is the case with the

2007 Lugano Convention), or where the government has not taken a formal decision yet on whether the UK should join a particular convention and further consideration is required including necessary engagement (e.g. as is the case with the Hague Judgments Convention 2019 and the Singapore Convention). These agreements are detailed below (see paragraph 18).

13. PIL is a vibrant and active area of international cooperation with regular substantial developments that the UK will likely want to take advantage of in the future (including within international fora such as the Hague Conference on Private International Law). We therefore anticipate that there will be other agreements on PIL in the longer term which the UK will join and will need to use the power in this Bill to implement in domestic law. This is why we need a power which is available long into the future.
14. International agreements on PIL are generally narrowly defined, predictable in scope and content, and widely considered beneficial by Parliament and stakeholders. The power is confined by reference to what are generally understood to be the limits of the expression "private international law", a highly technical and specialised field of law. We are confident that it will generally be clear whether agreements fall under the power or not, and the power will not be able to be used to implement agreements which are outside of the usual scope of the narrow field of PIL.
15. Without the power, it would be necessary for the government to pass primary legislation to implement each new international agreement on PIL which would cause unnecessary delay in stakeholders being able to enjoy the advantages of any agreement. To be clear, we do not currently have powers in existing primary legislation which would allow implementation of a modern PIL framework in domestic law. The UK is seeking to remain at the forefront of developing the future international framework in this area with our international partners.

#### *Who will exercise the power?*

16. Negotiating and joining international agreements on PIL is reserved, but implementing them in domestic law is devolved in relation to Scotland and Northern Ireland. PIL is a reserved matter in relation to Wales (with a limited exception in relation to the functions of Cafcass Cymru which provides support to families involved in family court cases in Wales).
17. The Bill therefore provides that the Secretary of State will exercise the power in relation to England and Wales. The Scottish Ministers may exercise the power in relation to Scotland and a Northern Ireland Department may exercise the power in relation to Northern Ireland. However, the Secretary of State may also exercise the power in relation to Scotland or Northern Ireland, with the relevant devolved administration's consent. Our legislative approach fully adheres to the constitutional devolution settlements in this area.

#### **Justification for taking the power**

### *Possible future uses of the power*

18. Where it is possible to implement an agreement on the face of the Bill we have done so in clause 1. However, as referred to above, there are also a number of potential international agreements on PIL which the UK is currently considering joining and which the government could implement using the clause 2 power. These agreements are:

#### **The 2007 Lugano Convention**

- The 2007 Lugano Convention deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It provides certainty on where a cross-border dispute should be heard and ensures that the resulting judgment can be recognised and enforced across borders. This helps prevent multiple court cases taking place on the same subject matter and reduces the costs and expenses for the parties involved. This important convention currently underpins our PIL relationship with Norway, Switzerland and Iceland. The convention will continue to apply to the UK for the duration of the transition period.
- The government has made clear its intention to seek to re-join this convention in our own right. This would require the agreement of all the contracting parties to the convention including the EU, Denmark, Norway, Switzerland and Iceland. We do not currently know the outcome of any application. However, should our continued participation in the convention in our own right be secured for the end of the transition period, we will need the delegated power in the Bill to implement it in domestic law quickly in order to ensure there is no gap in coverage. A delegated power is the only way to implement the convention in a timely manner to minimise disruption to UK businesses, individuals and families who rely on its rules to resolve cross-border disputes.

#### **The Singapore Convention**

- This is a new convention on the enforcement of mediated settlement agreements. Mediation is an important alternative dispute resolution (ADR) mechanism. It involves a neutral third party assisting parties to work towards a negotiated settlement of their dispute, with the parties retaining control of the decision on whether or not they settle and on what terms. This new convention allows for settlement agreements in commercial disputes, which have been reached through mediation, to be enforceable in contracting states. China, the US and 44 other countries have now signed the convention. The government has not taken a formal decision yet on whether the UK should join this convention and further consideration is required including necessary engagement with the sector. But the power could be used to quickly implement the convention if the government decided to join it.

## Future Hague Conventions

- The Hague Conference is the leading international forum for PIL with a membership of 82 states and the EU. The UK currently participates in 13 of its conventions. The Hague Conference has a busy programme of work on new PIL projects<sup>1</sup> which could lead to new or updated conventions on PIL in due course. Should the UK decide to join any new or updated Hague Conventions on PIL in the future the power could be used to implement them in a timely manner. This is a useful example of why we need to future proof this legislation as the field of PIL continues to evolve and as best practice is developed. (See **Annex A** for an overview of current Hague Conventions including those which the UK currently participates in our own right or as a result of EU contracting party status during the transition period). If the UK wished to join these in the future, they would also require implementation in domestic law.
- For example, in 2019 the Hague Conference adopted a new convention on the recognition and enforcement of civil and commercial judgments known as the Hague Judgments Convention 2019. The government has not taken a formal decision yet on whether the UK should join this convention and further consideration is required including necessary engagement. But the power could be used to quickly implement the convention if the government decided to join it.

## Historical Bilateral Agreements

- We may also need to revisit, update and/or replace some existing historical bilateral agreements on PIL which the UK has entered into with other countries including some Commonwealth countries (e.g. Australia and Canada). The UK has many historical bilateral agreements on PIL with countries across the globe, some dating back to the 1920s. These were entered into by the UK with these countries prior to the EU gaining competence in this area. Some of these agreements are no longer entirely fit for purpose. Therefore, the power in the Bill could be used to allow us to implement a more modern PIL framework with these countries than is currently possible under existing legislation in this area (see paragraph 29 for further information). These updated bilateral or multilateral relationships and frameworks on PIL could also underpin any new free trade agreements successfully negotiated with these countries, as PIL facilitates cross-border trade and commerce.

19. The UK may also use the power to apply an international agreement on PIL which it has joined, as between the different jurisdictions within the UK if they agree to do this (there is unlikely to be an obligation to do this in the international agreement itself which will only apply between states).

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<sup>1</sup> Current legislative projects of the Hague Conference: [www.hcch.net/en/projects/legislative-projects](http://www.hcch.net/en/projects/legislative-projects)

Modified versions of internal EU PIL instruments such as the Brussels 1 Regulation and the Maintenance Regulation have previously been applied as between the different UK jurisdictions. This avoided having different systems for intra UK cases and foreign cases, reducing the number of different sets of PIL rules that could be applied.

20. The power in the Bill also allows the government to implement in domestic law in the UK an arrangement agreed with a UK Overseas Territory or Crown Dependency to apply the international agreement which the UK has joined, subject to suitable modifications, between the UK and territory or dependency in question, should both sides decide this is beneficial. Engagement with relevant territories and dependencies to date has been positive on this legislative proposal. The approach of applying an arrangement based on international agreements on PIL, as between the UK and an Overseas Territory or Crown Dependency (where international obligations would not normally apply as a matter of law given the UK's constitutional relationship with these territories and dependencies), reflects the approach that was adopted under the Civil Jurisdiction and Judgments Act 1982. The original purpose of that Act was to implement in UK domestic law the 1968 Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters.
21. Section 39 of the 1982 Act enabled an Order in Council to be made which would apply a modified version of the Brussels Convention 1968 between metropolitan UK and specified Overseas Territories and Crown Dependencies, and the power was subsequently exercised in relation to Gibraltar. This allows a more streamlined process for the recognition and enforcement of civil and commercial judgments between the UK and Gibraltar. It also provides more legal certainty and reduces the costs for parties based in the UK and Gibraltar.
22. In addition to implementing new international agreements on PIL, the power could also be used to amend the current implementation of existing PIL agreements. This might be used, for example, if the UK ever wanted to review, in the future, any declarations it currently intends to make when we accede to the 2005 Hague Convention on Choice of Court Agreements in our own right at the end of the transition period. The government's current position is that it should continue to exclude certain insurance contracts from the scope of the 2005 Hague Convention, but should it be decided that this approach is no longer appropriate for the UK in the longer term, further consideration may be required. We currently propose using the power to implement in domestic law any declaration the UK will make for the 2005 and 2007 Hague Conventions prior to becoming bound in our own right to these conventions at the end of the transition period. The power might also be used if changes, clarifications or corrections are needed to the existing implementation in domestic law of a PIL agreement, for example following court decisions interpreting an agreement or the adoption of central guidance by the Hague Conference on Private International Law ('the Hague Conference') on the application of one of its conventions.

### *Timing issues*

23. The primary timing concern relates to the possible need to implement in domestic law the 2007 Lugano Convention before the end of the transition period in order to ensure that there is no gap in coverage that could create significant disruption. Of course, we do not yet know the outcome of any application.
24. Our intention is to prevent a 'gap' in application of the 2007 Lugano Convention to the UK from the end of the transition period. These entry into force requirements are laid out in the Convention's text. Engagement with the parties to the convention are still ongoing on this matter, and we will not know the outcome of our planned application for some months. But subject to a successful accession to the convention, we may need to move quickly to implement this convention in UK domestic law.
25. If we cannot operate the 2007 Lugano Convention by the end of the transition period, there will be less legal certainty around how to handle cross-border civil and commercial cases which have an element relating to the EU or other participating contracting party states. There will be less certainty on where relevant civil or commercial cross-border disputes should be heard, or that the resulting judgment can be easily recognised and enforced across borders. This could lead to multiple court cases taking place on the same subject matter in the UK and different countries, increasing the costs and expenses for the parties involved. As a result, international litigants in the future may choose to resolve disputes in jurisdictions other than the UK, including the EU member states, which would allow any resultant judgment to be more easily recognised and enforced within the EU and or relevant states.
26. More generally the government is committed to the UK remaining at the forefront of international developments in PIL. A swift implementation mechanism, in an area which is both technical and highly beneficial, will allow the UK to continue to develop and maintain its PIL framework with new and existing international partners.
27. The UK is also a leading provider of ADR services (e.g. arbitration and mediation) and businesses operating in that field will benefit from swift implementation of new agreements in those areas. Over 40,000 disputes were resolved via ADR in the UK in 2018 – 37,000 of these were domestic and around 3,000 mostly international.<sup>2</sup>

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<sup>2</sup> The City UK: Legal Excellence, International Renowned UK Legal Services 2019: <https://www.thecityuk.com/assets/2019/Report-PDFs/294e2be784/Legal-excellence-internationally-renowned-UK-legal-services-2019.pdf>

### *Reputational issues*

28. Being unable to implement new PIL agreements quickly would damage the UK's reputation as a leading member of the Hague Conference on Private International Law and a reliable international partner. In the event that primary legislation is required for each new PIL agreement but a slot in Parliament is not available for some time, there may be significant delays in the UK being able to join and implement in domestic law new agreements on PIL, which may result in countries becoming less willing to negotiate seriously with the UK in the future.

### *Precedents for using delegated powers to implement international agreements*

29. In the field of PIL, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 are examples of existing Acts containing powers to give effect to reciprocal agreements on recognition and enforcement of civil and commercial judgments. There is also the Maintenance Orders (Facilities for Enforcement) Act 1920 and the Maintenance Orders (Reciprocal Enforcement) Act 1972 which enabled reciprocal arrangements for the mutual recognition and enforcement of maintenance obligations to be given effect between the UK and other countries. However, these powers only cover bilateral agreements in their specific PIL subject areas and contain very prescriptive provisions. These Acts are limited in scope and their terms are now quite outdated, with some being almost 100 years old, although there are still a number of bilateral agreements in force which are implemented via Orders in Council made under these Acts. Furthermore, the Orders in Council process for implementing these bilateral agreements in domestic law does not provide the increased level of Parliamentary scrutiny that we are proposing for use of the power in our Bill to implement new agreements on PIL in the future.

30. In relation to PIL measures adopted by the EU over the past 20 years, implementing regulations were made using the power in section 2(2) of the European Communities Act (ECA) 1972. Whilst the main provisions of such measures were generally regarded as sufficiently clear and precise to be treated as directly effective as a matter of EU law and directly applicable in UK domestic law under s2(1) of the ECA 1972, regulations were usually required to be made under s2(2) ECA to give further effect to the EU measures, dealing with technical or procedural matters<sup>3</sup>. Following a similar pattern, it is anticipated that regulations made under clause 2 of the Bill to implement future PIL agreements will generally provide that the rules contained in the international agreement should

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<sup>3</sup> See the following for examples of regulations made under s2(2) ECA: EU Regulation 1215/2012 ("Brussels 1A Regulation" on jurisdiction and recognition and enforcement of judgments in civil and commercial matters) was given further effect by SI 2014/2947; EU Regulation 593/2008 ("Rome 1" Regulation on the law applicable to contractual obligations) was given further effect by SI 2009/3064; EU Regulation 864/2007 ("Rome II" Regulation on the law applicable to non-contractual obligations) was given further effect by SI 2007/864. EU Regulation 2201/2003 ("Brussels IIA" Regulation on jurisdiction and recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) was given further effect by SI 2005/265. EU Regulation 4/2009 (the "EU Maintenance Regulation") was given further effect by SI 2011/1484.

have direct effect in domestic UK law, and the sorts of additional provisions that will need to be made will reflect the sorts of provisions made in s2(2) Regulations used to implement EU PIL instruments over the last 20 years. But in contrast to the position for making implementing regulations under the ECA 1972, there will be a more thorough Parliamentary scrutiny of regulations made under the power in our Bill (see below section).

31. An updated power is needed to establish a modern international PIL framework for the UK that covers bilateral and multilateral agreements, and PIL rules for a full range of civil law areas (not just recognition and enforcement of civil and commercial money judgments and maintenance orders), and which extends to establishing cross-border co-operation between public authorities involved in resolving legal disputes, and PIL rules in the context of ADR methods not just court based dispute resolution. This will provide greater flexibility over the provisions which may be negotiated in agreements than the approach taken in the 1920s and 1930s.

#### *Parliamentary scrutiny of UK joining PIL Agreements*

32. The government has prerogative powers to enter into international agreements on PIL and is responsible for negotiating new PIL agreements and for decisions on signing and ratifying new or existing (multilateral) agreements. Under the Constitutional Reform and Governance Act 2010 ("CRAG Act 2010") Parliament has the opportunity to scrutinise the content of agreements and object to their ratification, before they become binding in the UK. This is in addition to the scrutiny of the SIs made under the delegated power which would implement the agreements once they are ratified.
33. For example, during November/December 2018, as part of preparation for the UK becoming an independent contracting party to the 2005 and 2007 Hague Conventions under a 'No Deal' scenario, the text of both conventions was laid in Parliament under the CRAG Act 2010, and no member raised any objections.<sup>4</sup> The 1996 Hague Convention was ratified by the UK before commencement of part 2 of the CRAG act, but the text of the Convention was also laid before Parliament as a command paper (number 7727) in 2009 under the Ponsonby Rule.
34. The government recognises the importance of consultation and engagement with stakeholders as we approach the negotiation of new international agreements on PIL in the future. What form this

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<sup>4</sup> 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](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](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)

will take will vary with the content and type of agreement, but it is usual for consultation to be undertaken while an agreement is being negotiated.

#### *Nature of the provisions likely to be contained in implementing regulations*

35. As noted above, international PIL agreements tend to contain technical sets of rules or procedures, and the details will already have been carefully negotiated, usually following consultation with relevant experts in the sector, and the content of the agreement will be scrutinised by Parliament before it becomes binding on the UK under the CRAG Act 2010 wherever an agreement is subject to ratification (which is normally the case).
36. It will therefore not be possible to amend the substantive rules contained in the agreement itself when implementing it via regulations in domestic law, and for that reason implementation of many PIL agreements is likely to consist of stating that the provisions of the agreement (i.e. the rules it contains) “shall have the force of law”, with little or no need for further elaboration of those rules. The implementing regulations may also need to amend existing legislation to make way for the new agreement’s rules such as removing inconsistencies or making provisions establishing the details of the domestic procedures to be followed, but these are unlikely to involve significant policy choices. For example, it may be necessary to specify to which domestic courts an application (e.g. to enforce a foreign decision) should be made which may involve deciding whether, for example, a magistrate’s court or the High Court in England & Wales, is the appropriate forum, or it may be necessary to specify which public body should act as a competent authority to carry out tasks under an agreement. But these are unlikely to be matters of controversy which merit the sort of debate relevant to most other primary legislation.
37. Taking the example of the 2007 Hague Convention, the UK first became bound by this PIL agreement by virtue of the EU becoming a contracting party in 2014. The PIL rules in the Convention itself were directly effective in EU law and directly applicable in UK domestic law. Additional implementing regulations were made under section 2(2) of the ECA 1972. These dealt with: the designation of a central authority; the identification of which courts in England & Wales would receive applications for the recognition and enforcement of foreign maintenance decisions under the Convention, the route for appeals, provisions about interest payable on overdue payments, conversion of amounts shown in foreign currencies into sterling, admissibility of documents for the purposes of proceedings, the procedures for applications for the establishment or modification of maintenance decisions, sharing of information between relevant authorities and consequential amendments to other primary and secondary legislation (see the International Recovery of Maintenance (Hague Convention 2007 etc) Regulations 2012 (SI 2012/2814). It is

anticipated that these are the sorts of provisions which will generally need to be made by any implementing regulations under clause 2, coupled with a provision stating that the relevant PIL agreement's contents (the rules or cross-border procedures which it establishes) have the force of law.

#### *Mitigating concerns around the inclusion of a delegated power in the Bill*

38. We appreciate that there are concerns around the inclusion in Bills of delegated powers and we have aimed to mitigate these in the preparation of the Bill. Firstly, the power only applies in the narrow field of implementing international agreements on PIL. This is a highly technical and specialised field of law with which the legal profession and courts, which have to apply PIL rules in cases raising foreign issues, are familiar, but may not be well known to the general public. Clause 2(7) of the Bill provides an inclusive definition of "private international law" in the form of a list of the sorts of matters usually covered by PIL agreements. We anticipate it will be clear in most cases whether the provisions of a future agreement fall within scope of the power or not: in the case of multilateral agreement these are likely to be agreements adopted by the Hague Conference on Private International Law.

#### **Justification for the procedure used**

39. It is proposed that regulations made under Clause 2 should always be subject to the draft affirmative procedure if:

- The regulations implement a PIL agreement for the first time or implement for the first time an arrangement with an Overseas Territory or Crown dependency to apply an agreement between that territory or dependency and the UK;
- The regulations create or extend or increase the penalty for a criminal offence; or
- The regulations amend primary legislation.

40. It is anticipated that the majority of regulations made under the clause 2 power will trigger the draft affirmative procedure because they will be implementing an agreement for the first time and there are likely to be consequential amendments to primary legislation that need to be made. However, it is possible that technical changes to the implementation of PIL agreements, which have previously been implemented in domestic law (by affirmative procedure regulations under the power or under other legislation), will not meet any criteria requiring the draft affirmative procedure. For example if the power was used to change the identity of the court which was to receive applications under an agreement, because of some domestic change to the court system which meant that a different court should deal with such applications in future, this would not trigger the affirmative procedure, unless the amendment was being made to primary legislation.

41. We do not anticipate using the power to create, extend or increase the penalty for, a criminal offence very often, however it may be needed, in very limited circumstances, in order to implement effective enforcement provisions for some potential future PIL agreements. For example, if the UK were to enter into a future agreement on reciprocal recognition and enforcement of protection measures (such as non-molestation orders in England and Wales under Part 4 of the Family Law Act 1996 or breaches of injunctions under section 3 of the Protection from Harassment Act 1997) the power to extend criminal penalties for breach of such orders may need to be extended to cover breach of a foreign order. Paragraph 1 of Schedule 6 means that it would not be possible to make regulations which create criminal offences imposing prison sentences of more than two years.
42. Use of the draft affirmative procedure means that under the new power there will be increased Parliamentary scrutiny of agreements being implemented in domestic law, compared with the section 2(2) ECA procedure (under which most implementing regulations for PIL instruments were made under the negative procedure) or the Order in Council procedure used under the 1920 and 1933 Acts (which does not involve any Parliamentary procedure). The scrutiny provided by the use of the affirmative procedure is in addition to the Parliamentary scrutiny which applies under the CRAG Act 2010. This Bill does not change the CRaG Act process, or the process for negotiating new agreements, but only gives a power to implement PIL agreements in domestic law, once the UK has decided to become bound by them. Therefore, the government considers this power to be reasonable and proportionate.

#### *Commencement Power*

43. Clause 4(3) of the Bill contains a power to commence certain specified provisions of Schedule 5 to the Bill on a day or days appointed by regulations made by the Secretary of State by statutory instrument. This is standard procedure where flexibility is needed in relation to the commencement date for the provisions of any Bill and it is also standard that no parliamentary procedure attaches to such regulations. The provisions in question concern consequential amendments to certain provisions of two EU Exit SIs made in relation to the 2005 and 2007 Hague Conventions, and the commencement date for these depends on the timing of the coming into force of the UK's accession to and ratification of those Hague Conventions. The power includes the power to make transitional, transitory or saving provision.

**Ministry of Justice**  
**February 2020**

## **Annex A:**

### **Overview of Conventions, Protocols and Principles of the Hague Conference of Private International Law**

**Note:** *The Hague Conventions which the UK currently participates in its own right and / or by virtue of EU contracting party status are highlighted with an asterisk (\*).*

1. Statute of the Hague Conference on Private International Law
2. Convention of 1 March 1954 on civil procedure
3. Convention of 15 June 1955 on the law applicable to international sales of goods
4. Convention of 15 April 1958 on the law governing transfer of title in international sales of goods
5. Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods
6. Convention of 15 June 1955 relating to the settlement of the conflicts between the law of nationality and the law of domicile
7. Convention of 1 June 1956 concerning the recognition of the legal personality of foreign companies, associations and institutions
8. Convention of 24 October 1956 on the law applicable to maintenance obligations towards children
9. Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children
10. Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants
11. Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions\*
12. Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents\*
13. Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions
14. Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters\*
15. Convention of 25 November 1965 on the Choice of Court
16. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations\*
17. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters\*
18. Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
19. Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
20. Convention of 4 May 1971 on the Law Applicable to Traffic Accidents

- 21.** Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons<sup>5</sup>
- 22.** Convention of 2 October 1973 on the Law Applicable to Products Liability
- 23.** Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations\*
- 24.** Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations
- 25.** Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes
- 26.** Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages
- 27.** Convention of 14 March 1978 on the Law Applicable to Agency
- 28.** Convention of 25 October 1980 on the Civil Aspects of International Child Abduction\*
- 29.** Convention of 25 October 1980 on International Access to Justice
- 30.** Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition\*
- 31.** Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods
- 32.** Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons
- 33.** Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption\*
- 34.** Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children\*
- 35.** Convention of 13 January 2000 on the International Protection of Adults\*<sup>6</sup>
- 36.** Convention of 30 June 2005 on Choice of Court Agreements\*
- 37.** Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary
- 38.** Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance \*
- 39.** Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations
- 40.** Principles on Choice of Law in International Commercial Contracts
- 41.** Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

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<sup>5</sup> The UK signed but never ratified this convention.

<sup>6</sup> The only part of the UK which has ratified the Convention of 13 January 2000 on the International Protection of Adults is Scotland.