

# 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 introduced in the House of Lords on 27 February 2020 (HL Bill 101).

- 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 international agreements on Private International Law (PIL).
- 2 The Bill contains two main clauses:
  - Clause 1 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”).
  - Clause 2 creates a delegated power which allows the Government to implement international agreements on PIL in domestic law in future via secondary legislation.

## 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 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.
- 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 1<sup>st</sup> 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 will ensure that new PIL agreements which the UK decides to join can be implemented in a timely manner as well as providing a clearer implementation of the 1996, 2005 and 2007 Hague Conventions at the end of the transition period (see paragraph 11). These measures, which are explained in greater detail below, will support the Government's ambition for the UK to be at the forefront of the development of international cooperation and best practice on PIL with countries all over the world. The Bill will also allow UK businesses, individuals and families to harness the benefits of new agreements as quickly as possible, after the Government has taken a decision to participate in any such agreement and subject to any necessary Parliamentary approval and scrutiny under the Constitutional Reform and Governance Act (CRAG) 2010 (see paragraph 29).

## **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-

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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, 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.<sup>1</sup> The Government intends to use the power in clause 2 of the Bill to amend the Civil Jurisdiction and Judgments Act 1982 to insert the text of the declarations and reservation in new Schedules to that Act, for

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<sup>1</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)

reference purposes, once the instruments of accession and ratification have been deposited, and the declarations and reservation have formally been made, prior to the end of the transition period.

- 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 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 Conventions<sup>2</sup>.
- 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 period<sup>3</sup>, 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 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

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<sup>2</sup> 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 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).

<sup>3</sup> 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'.

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.

## **Provisions for a delegated power to implement international agreements on Private International Law (PIL)**

- 21 As outlined above, the Government continues to believe that international co-operation to establish agreed rules on PIL can lead to significant benefits for individuals, families and businesses. The Government anticipates the UK playing a full role in the negotiation of future PIL agreements in the Hague Conference and elsewhere; and will decide to participate in them where that would be advantageous.
- 22 Any international agreements which the UK joins are likely to require implementing legislation in order to have legal effect in domestic law. The Bill would give the UK Government and the Devolved Administrations in Scotland and Northern Ireland a power to do this. There is existing legislation providing powers for the implementation of some types of international agreements on PIL. The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 enable the Government to implement bilateral agreements on recognition and enforcement of civil judgments, which conform to the requirements of the Acts. However, they are now very outdated and modern agreements (such as those adopted by the Hague Conference) cannot be implemented using these nearly 100-year-old powers.
- 23 The power allows international agreements on PIL to be implemented by regulations. For clarity the Bill provides a definition of PIL setting out a non-exhaustive list of the sorts of things such agreements may cover, which includes, in summary, rules on:
  - a) Jurisdiction and applicable law
  - b) Recognition and enforcement of:
    - i) judgments, orders and arbitral awards
    - ii) agreements and decisions determining or otherwise relating to rights and obligations
  - c) Co-operation between judicial or other authorities in different countries.

See clause 2(7) for the full text of the definition of PIL.

- 24 The Bill requires that regulations made under the power should always be subject to the affirmative procedure, and therefore always be subject to debate in and approval by both Houses of Parliament if:
  - The regulations implement a PIL agreement for the first time;
  - The regulations create or extend, or increase the penalty for, a criminal offence; or
  - The regulations amend primary legislation.

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- 25 It is anticipated that the majority of regulations made under the clause 2 power will trigger the affirmative procedure because they will be implementing an agreement on PIL for the first time and there are likely to be consequential amendments to primary legislation that need to be made, or the implementing provisions will be inserted into primary legislation, such as the Civil Jurisdiction and Judgments Act 1982. 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), could follow the negative procedure. The Government 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 order to implement effective enforcement provisions for future PIL agreements in some areas. 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.
- 26 The power to implement international agreements on PIL extends to the implementation of “model laws” on PIL adopted by an international organisation. Such model laws represent “legislative best practice” with regard to an aspect of PIL, so the UK may wish to adopt them, in order to remain at the forefront of such cooperation. An example of an existing PIL model law, which the UK has implemented, is the 1997 UNCITRAL Model Law on Cross-Border Insolvency.
- 27 Furthermore, the UK may enter into arrangements with the Crown Dependencies and Overseas Territories in the future to apply the terms of an international agreement on PIL between the UK and that territory or dependency (subject to necessary modifications). The Government believes that such arrangements could be mutually beneficial and would only be set up where a self-governing dependency or territory was content to do so. The power allows the UK to implement any such arrangements in domestic law in the UK. The domestic implementation in a Crown Dependency or Overseas Territory of any such arrangement with the UK would remain the responsibility of the Government of the territory in question. Such arrangements would likely take the form of Memoranda of Understanding (MoUs). There is a precedent for the Government agreeing such arrangements in section 39 of the Civil Jurisdiction and Judgments Act 1982 which enables provisions corresponding to the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (an early precursor to the EU’s internal set of PIL rules) to be applied between the UK and the Crown Dependencies and Overseas Territories. However, in practice the UK has only used that power in relation to Gibraltar. Engagement with the Crown Dependencies and Overseas Territories has been positive to date for including this provision in the power. The Government will continue to engage them on this matter.
- 28 The delegated power to implement international agreements on PIL could enable efficient implementation in domestic law of, for example:
- **The 2007 Lugano Convention:** The UK has made clear its intention to seek to re-join this convention in its own right. This would require the agreement of all the contracting parties to the convention, including the EU. The convention deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It provides certainty on 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 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 the UK's PIL relationship with Norway, Iceland and Switzerland. As explained in paragraph 8, this convention will continue to apply to the UK for the duration of the transition period.

- **The 2019 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 disputing 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.
- **2019 Hague Convention:** In 2019, the Hague Conference adopted a new international agreement on the recognition and enforcement of civil and commercial judgments (known as 'the Hague Judgments Convention 2019'). Where countries join this new convention, it will make it easier to recognise and enforce each other's judgments.
- **Future Hague Conventions:** The Hague Conference continues to consider the development of new conventions and protocols on a range of PIL topics. If the UK wished to join these in the future, they would likely also require implementation in domestic law.
- **Historical Bilateral Agreements** – The Government may also need to revisit, update 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). Some of these agreements are no longer entirely fit for purpose. Therefore, the power in the Bill could be used to implement a more modern PIL framework with these countries than is currently possible under existing legislation in this area (see paragraphs 5 and 22 for further information).

29 Any new agreements on PIL which the Government considers the UK should join, and which require ratification (which is normally the case), will be subject to Parliamentary scrutiny separately under the Constitutional Reform and Governance ('CRAG') Act 2010. Under the CRAG Act, the Government is required to lay copies of signed treaties before Parliament before they are ratified, providing Parliament with the opportunity at that stage to give its view on the detailed contents of the treaty and whether it should become binding in the UK. Regulations made under this Bill will relate purely to the implementation in domestic law of international agreements on PIL which, where it applies, will have been scrutinised by Parliament under the CRAG Act. Therefore, the Government would only use the delegated power to implement an international agreement on PIL which Parliament had already agreed the UK should join.

## Legal background

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

## Territorial extent and application

31 Clause 4(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

- 32 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.
- 33 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 is being sought from the Scottish Parliament and Northern Ireland Assembly.
- 34 Annex A summarises the position regarding territorial extent and application in the United Kingdom.

## Commentary on provisions of Bill

### Implementation of international agreement

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

- 35 This clause amends the Civil Jurisdiction and Judgments Act 1982 (“the 1982 Act”).
- 36 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.
- 37 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. The UK intends to accede to the 2005 Hague Convention, and ratify the 2007 Hague Convention, during Autumn 2020 and will make declarations and a reservation to those Conventions in the form already approved by Parliament when those Conventions were laid in Parliament for scrutiny under the CRAG Act 2010 in 2018 (see paragraph 15 above).
- 38 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. The Government intends to use the power in clause 2 of the Bill to amend the 1982 Act to insert Schedules containing the text of the reservation and declarations the UK will make for the 2005 and 2007 Hague Conventions, once it has submitted its instruments of accession and ratification to those Conventions, in Autumn 2020.
- 39 Clause 1(4) introduces Schedule 5 which contains provisions consequential on clause 1 of the Bill.
- 40 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.
- 41 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.

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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. This is subject to the savings for “section 4 rights” in the EU Exit Regulations referred to in subparagraph (2).

- 42 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 in relation to the directly effective treaty rights derived from the 2005 and 2007 Hague Conventions.
- 43 Paragraph 5 makes minor amendments to headings in the 1982 Act.
- 44 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.

## Clause 2: Implementation of other agreements on private international law

- 45 Clause 2(1) gives an “appropriate national authority” the power to make regulations (secondary legislation) to implement international agreements on PIL. The power can also be used to amend existing domestic provisions implementing a PIL agreement if any changes to its implementation are required.
- 46 Clause 2(2) provides that regulations may also be made to implement an international agreement on PIL for application between England & Wales, Scotland and Northern Ireland, so the same rules can be applied in cases raising cross-border issues between the three different legal jurisdictions in the UK, even if that is not a requirement of the international agreement itself.
- 47 Clause 2(3) provides that regulations may be made to give effect in UK domestic law to any arrangements for applying a relevant international agreement on PIL (with or without modifications), entered into by the Government and the Crown Dependencies and Overseas Territories. The term “relevant territory” is defined in clause 2(7).
- 48 Clause 2(4) and (5) make further provisions about the sorts of provisions regulations made under clause 2(1) may include. Clause 2(5) makes clear that regulations may implement obligations in a PIL agreement which relate to the provision of legal aid or provisions which concern the sharing of information between courts or competent authorities dealing with cross border disputes. Clause 2(5) also makes clear that regulations may include enforcement provisions, but these will be subject to the restrictions in paragraph 1 of Schedule 6.
- 49 Clause 2(6) introduces Schedule 6.
- 50 Clause 2(7) provides definitions of various terms used in clause 2.
- 51 The effect of the definition of “appropriate national authority” is that the power in clause 2(1) could be exercised by a Secretary of State in relation to England and Wales, the Scottish Ministers in relation to Scotland, and a Northern Ireland department in relation to Northern Ireland. The Secretary of State may also make regulations in relation to Scotland and Northern Ireland but only with the consent of the relevant devolved administrations.
- 52 The definition of “international agreement” covers a convention, treaty or agreement to which the UK has already become a contracting party or to which it intends to become a contracting party (for example, it may have signed but not ratified the agreement). This ensures that it will be possible to exercise the power in clause 2(1) to make implementing regulations before an agreement is ratified. It is normal practice to ensure that domestic implementing legislation is in place before the UK formally becomes bound by an international obligation, so that it is able to comply with it immediately.

- 53 The definition of “private international law” provides examples of the sorts of issues typically covered by international agreements in this field of law. The definition means that the power could be used, for example, to implement the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the 2019 Singapore Agreement on Enforcement of Mediated Settlement Agreements, and the 2019 Hague Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters, should the Government decide to join these in future.
- 54 Clause 2(8) provides for the implementation of model laws relating to PIL adopted by an international organisation of which the UK is a member. It provides that the regulation making power in clause 2(1) may be used to “give effect to” – rather than “implement” – a model law, because the text of a model law is not binding in the way that an international agreement is, and states may adapt a model law when giving effect to it.
- 55 Clause 2(6) introduces Schedule 6 which sets out restrictions on the use of the power in clause 2 and the legislative procedure to be followed when making regulations under clause 2.
- 56 Paragraph 1(1)(a) of Schedule 6 provides that regulations made under clause 2 may not themselves confer a new power to legislate, other than a power to make procedural rules for courts or tribunals, but can modify or extend an existing power. Paragraph 1(1)(b) imposes limits on making regulations which create an offence subject to a term of imprisonment.
- 57 Paragraphs 2 to 6 deal with the procedure and Parliamentary scrutiny for making regulations under clause 2. Paragraph 2 provides that the power to make regulations is exercisable by statutory instrument, or in relation to Northern Ireland, by statutory rules. For regulations made by the Scottish Ministers, see section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010. Paragraph 3 deals with the procedure for regulations made by the Secretary of State. Paragraph 4 deals with the procedure for regulations made by the Scottish Ministers. Paragraph 5 deals with the procedure for statutory rules made by a Northern Ireland department. In each case, the affirmative procedure will be triggered if the regulations:
- are implementing a new international agreement on PIL for the first time in domestic law, or a new arrangement entered into between different jurisdictions in the UK, or between the UK and an Overseas Territory or Crown Dependency to apply an arrangement based on an international agreement (suitably modified) between them;
  - create, extend or increase the penalty for a criminal offence; or
  - amend primary legislation (defined by paragraph 6 to include an Act of the Scottish Parliament, and Act or Measure of the Welsh Assembly or any Northern Ireland legislation).
- 58 It is anticipated that most regulations made under the power will trigger the affirmative procedure because they will be implementing new agreements which the UK has decided to join. However, it is possible that regulations may need to be made subsequently to make adjustments to technical or procedural aspects of the approach to implementation originally adopted when an agreement was first implemented. For example, an update to forms to be used, or as indicated above, to schedule the text of the declarations and reservation which will be made when the UK joins the 2005 and 2007 Hague Conventions as a contracting party in its own right after the end of the transition period. However, in the latter case it is also likely that the affirmative procedure will anyway be triggered because primary legislation is being amended.
- 59 International agreements on PIL rarely contain provisions about criminal offences, but it may be necessary when implementing some agreements, for example in the field of family law, to

create enforcement provisions involving criminal offences. This is likely to be the case where there is already an equivalent domestic enforcement provision involving criminal offences. For example, breaches of “protection measures” such as non-molestation orders in England and Wales under Part 4 of the Family Law Act 1996 or injunctions under section 3 of the Protection from Harassment Act 1997, may be punishable as criminal offences. Paragraph 1 of Schedule 6 restricts national authorities from making regulations which create criminal offences imposing sentences of imprisonment of more than two years.

## General

### Clause 3: Crown Application

- 60 Clause 3 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. Regulations made under clause 2 of the Bill may also contain provisions binding the Crown, subject to the same exceptions.

### Clause 4: Extent, commencement and short title

- 61 Clause 4(1) provides that the Bill extends to England and Wales, Scotland and Northern Ireland.

### Schedules 1 to 6

- 62 See paragraphs 38-44 and 55-59.

## Commencement

- 63 Clause 4(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. However, there is a power for the Secretary of State to appoint the day on which certain provisions of Schedule 5 will come into force. These are the amendments to the EU Exit Regulations dealing with the 2005 and 2007 Hague Conventions (SI 2018/1124 and 2018/1125) dealing with cases arising during any gap in the application of those Conventions to the UK after the end of the transition period and before the UK has become a contracting party to them in its own right. The Government plans to time the UK’s accession to and ratification of the 2005 and 2007 Hague Conventions so that a gap does not arise, in which case the provisions listed in section 4(3) will be commenced on “IP completion day”, that is, at the end of the transition period. However, subsection (3) provides flexibility not to bring these provisions into force if a gap is unavoidable.
- 64 Clause 4(4) means that the provisions of the Bill relating to the clause 2 power will come into force on Royal Assent. This means that the Government will be able to make regulations under the power to implement any international agreements on PIL which it intends should be in force ready for the end of the transition period.

## Financial implications of the Bill

- 65 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.

66 Clause 2 creates the delegated power which will be used to implement a range of international agreements on PIL which could have financial implications for UK businesses, individuals and families. However, each use of this power will require separate financial analysis with the implications depending on the agreement being implemented. The creation of the power has no financial effect in and of itself.

67 Clause 3 and Clause 4 have no financial impact.

## Compatibility with the European Convention on Human Rights

68 The Government does not consider that the Bill raises any significant issues in relation to the European Convention on Human Rights (ECHR) and the Advocate General for Scotland and Ministry of Justice Lords spokesperson, Lord Keen of Elie QC, has made a statement under section 19(1)(a) of the Human Rights 1998 that the Bill is compatible with the ECHR.

## Equalities

69 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

70 The Bill extends and applies UK wide:

71 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.<sup>4</sup>

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 1 Hague Conventions	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes (S, NI)
Clause 2: Power to implement PIL agreements	Yes	Yes	Yes	Yes	No, unless it fell within the exception to the reservation for private international law	Yes	Yes	Yes (S, NI, W)

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<sup>4</sup> 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.

## 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, 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.



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

## **EXPLANATORY NOTES**

These Explanatory Notes relate to the Private International Law (Implementation of Agreements) Bill [HL] as introduced in the House of Lords on 27 February 2020 (HL Bill 101).

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