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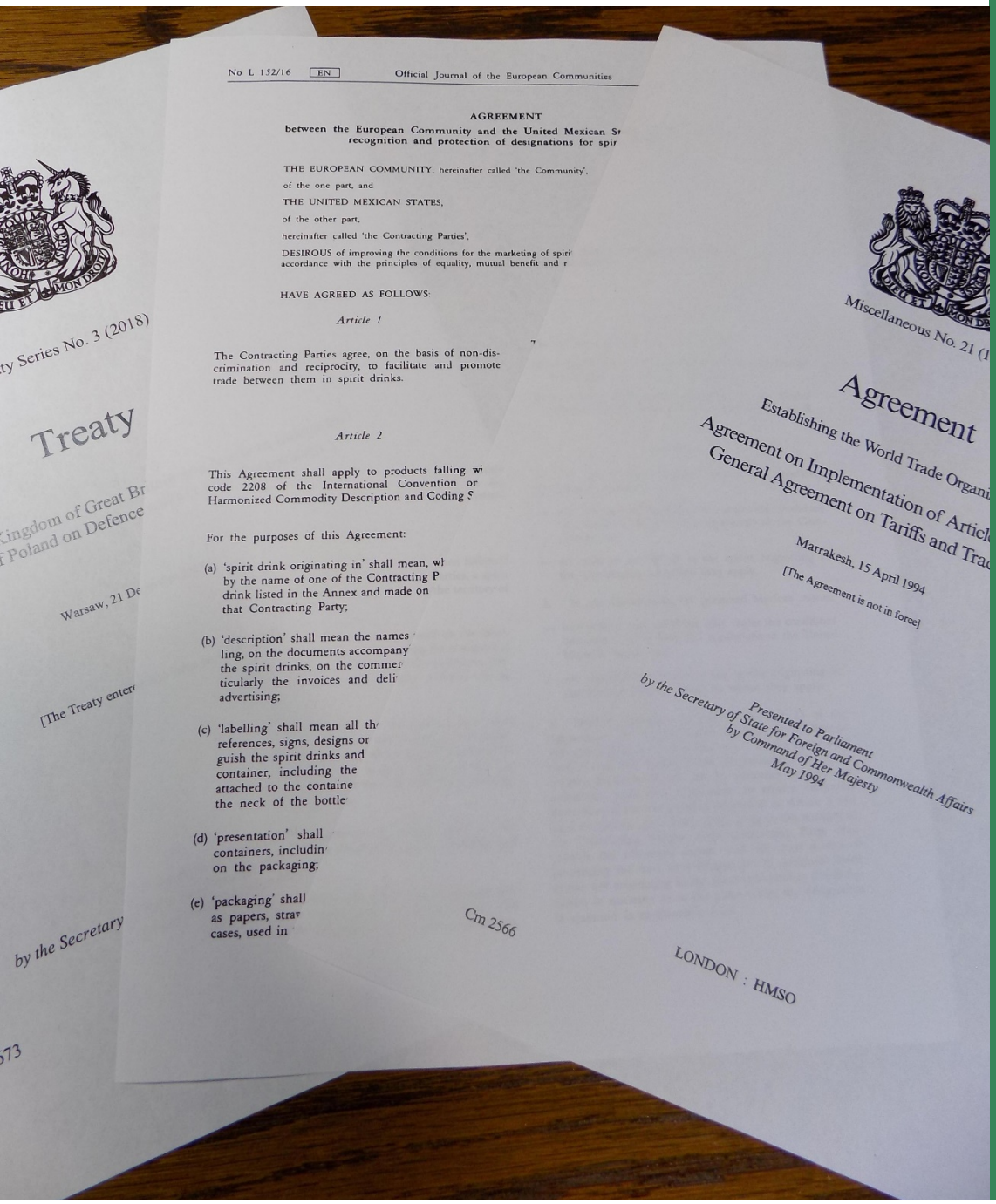
**BRIEFING PAPER**

Number 8700, 20 November 2020

# Private International Law (Implementation of Agreements) Bill 2019-2021

By Joanna Dawson

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# Summary

The *Private International Law (Implementation of Agreements) Bill 2019-2021* was introduced in the House of Lords on 27 February 2020 and had its second reading on 17 March. It had its second reading in the House of Commons on 2 September 2020 and all remaining stages on 6 October. The House of Lords considered a number of Commons amendments and made further amendments on 19 November. The House of Commons is due to consider those amendments on 24 November.

The Bill as introduced into the House of Commons contained only one substantive clause, which would give domestic effect to three international agreements governing aspects of private international law: the Hague Conventions of 1996, 2005 and 2007. These provide frameworks for determining jurisdiction and enforcement in international disputes covering child custody and maintenance, and civil and commercial matters.

The UK currently participates in these arrangement as a result of its former membership of the EU, as well as EU wide measures governing cooperation in cross border legal disputes. At the end of the transition period the UK will need to make alternative arrangements, including gaining membership of the Hague Conventions in its own right.

Clause 2 of the Bill as originally introduced in the House of Lords would have provided for a power to implement future international agreements on private international law via secondary legislation, limiting Parliament's oversight of such arrangements. It met with significant opposition in the House of Lords, and was removed from the Bill at Report stage. Amendments were tabled in the Commons to reinstate clause 2 and related provisions. The House of Lords agreed to these amendments and made a number of further amendments designed to constrain the use of the delegated power provided for by clause 2 in response to the concerns raised in the House of Lords.

The Bill would extend to England and Wales, Scotland and Northern Ireland. Legislative Consent Motions were agreed by the Scottish Parliament, and by the Northern Ireland Assembly. Annex A to the Explanatory Notes sets out the relevant devolved responsibilities.

The Bill page contains links to the Explanatory Notes, the Bill as introduced in the House of Lords and the accompanying Explanatory Notes, the Impact Assessment, and the Delegated Powers Memorandum.

# 1. Background

## 1.1 Private international law

Private international law (PIL) is a technical subject governing the procedure for determining the jurisdiction in which disputes with a cross border dimension are heard; the applicable law; and the recognition and enforcement of judgments between different jurisdictions. Nonetheless it has significant implications for people's everyday lives, determining the costs, procedure and outcome of disputes over the maintenance and custody of children; divorce; insolvency, and commercial matters. It also has economic significance for the financial and legal sectors, underpinning London's status as a global centre for concluding commercial agreements and resolving disputes.

PIL is based on reciprocal international agreements, in the form of bilateral or multilateral treaties, which are then implemented at a domestic level.

At present, many of the rules on cross-border disputes within the EU are governed by EU instruments. The EU also has competence on behalf of member states to enter into multilateral agreements with third countries. As a result, the UK was also party to a number of wider international agreements to which the EU acceded. However, at the end of the transition period the UK will lose access to these measures. It is therefore necessary to find replacement arrangements which will govern cross-border disputes with the EU 27 and with countries outside of the EU in the future.

### EU measures

As a member of the EU the UK participated in various measures designed to facilitate judicial cooperation in civil, family and commercial matters. These concern the choice of court to be used to determine disputes, the applicable law, and the automatic recognition and enforcement of legal decisions in different Member States.

The Justice Sub-Committee of the House of Lords EU Committee summarised the practical effect of these measures:

> In the area of family law [these measures] provide certainty and protection to children and families in the often fractious and difficult environment of family disputes. … [S]uch disputes can be made additionally complicated by a cross-border element. …
>
> In the civil field [the measures facilitate] the affairs of all those engaged in the myriad cross-border links enabled by the EU's rules, from the tourist hit by a car in Warsaw, the consumer seeking redress for a defective product in Lisbon, to the employee seeking equal pay in London, and the tenant enforcing their rights in Nicosia. For businesses operating within the Single Market, from large multinational corporations to Small and Medium Enterprises, the [measures offer] all these people the reassurance

that when problems arise legal remedies are readily available and easily enforceable across borders.[1]

The main instruments in this area are the recast Brussels Regulations (the 'Brussels regime') and the Rome Regulations.

The Rome Regulations standardise the rules by which the applicable law is determined. They aim to ensure that the courts in EU Member States apply the same law to the same international dispute, in order to reduce the risk of forum shopping (choosing the most favourable jurisdiction for a particular dispute, rather than the most appropriate):

- Rome I Regulation:[2] applies in relation to contractual disputes. It provides that, in the absence of party choice, the applicable law is the law of the place where the party performing the service characterising the contract has their habitual residence. It also applies with respect to the law of non-Member States.
- Rome II Regulation:[3] applies in relation to non-contractual obligations. It provides that the applicable law for the resolution of non-contractual disputes is determined on the basis of where the damage occurs, or is likely to occur, regardless of where the act giving rise to the damage occurs. As with Rome I, it applies equally to the law of non-Member States.

The Brussels regime governs jurisdiction and enforcement:

- Brussels I Regulation (recast): applies in civil and commercial cases, typically with a cross-border or external element. It sets out reciprocal rules on:
  - Jurisdiction, that is, which court in which Member State should hear a particular civil/commercial dispute. The primary rule is that a defendant must be sued in courts of the state in which he or she is domiciled, although there are specific exceptions to this rule;
  - Enforcement of judgments, so that court judgments delivered by one Member State court must be recognised and enforced in another Member State without additional processes or procedures
- Brussels IIa Regulation:[4] sets out a system for establishing jurisdiction in relation to divorce, legal separation and the annulment of marriage. It provides that an individual may take a matrimonial action in the courts of the Member State where one or both parties to the marriage are or were habitually resident or the Member State of the parties' common nationality or domicile. It also provides a framework for the automatic recognition of divorces concluded in other EU Member States, without the need

1 Brexit: justice for families, individuals and businesses?, House of Lords European Union Committee, 17th Report of Session 2016-17, 20 March 2017
2 Rome I Regulation on the law applicable to contractual obligations ((EC) 593/2008)
3 Regulation (EC) No 864/ 2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
4 Council Regulation (EC) No 2201/2003 of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

for any special procedure, and deals with matters of parental responsibility, including custody, access, and guardianship.

- The EU Maintenance Regulation:[5] establishes similar rules on jurisdiction, recognition and enforcement of decisions in matters relating to maintenance obligations. It is designed to enable an individual to whom maintenance is owed to easily obtain in one Member State a decision that will be automatically enforceable in another without further formalities. It also establishes jurisdiction for the making of maintenance decisions and includes rules on the applicable law, that is, which Member State's law should be applied to a particular dispute.

The Withdrawal Agreement provides that these measures will continue to apply during the transition period. After this, some rules may remain as part of EU retained law.[6] But from the end of the year the UK will need to make alternative arrangements where rules are based on reciprocity, in particular for the Brussels regime.

## Lugano Convention

The Lugano Convention was concluded in 1988 by the (then) 12 Member States of the European Community and the (then) six Member States of the European Free Trade Association (EFTA). It was based on an earlier version of the Brussels regime and created common rules on jurisdiction and the enforcement and recognition of judgments across the EU and EFTA. The non-EU Members – Norway, Iceland and Switzerland - are not subject to the jurisdiction of the CJEU but are required to pay due account to any relevant decisions.

The Convention is incorporated into UK law by the *Civil Jurisdiction and Judgment Regulations 2009*.[7]

The UK has applied to join the Convention in its own right at the end of the transition period and has received statements of support from Norway, Iceland and Switzerland. The EU will also need to agree to the UK's participation.[8] It has been reported that the Commission has noted that the other signatory countries are all part or substantially part of the single market, and has indicated that it will not recommend that the UK to be allowed to join.[9]

## The Hague Conventions

The Hague Conference on Private International Law was founded in 1893 and works "for the progressive unification of the rules of private international law",[10] covering civil, administrative and family

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5 Council Regulation (EC) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

6 Under the *European Union (Withdrawal) Act 2018*, as amended by the *European Union (Withdrawal Agreement) Act 2020*. The *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479* would make the necessary changes to domestic law at the end of the transition period.

7 SI 2009/3131

8 Support for the UK's intent to accede to the Lugano Convention 2007, 28 January 2020, Ministry of Justice, Gov.uk

9 Britain risks losing access to valuable European legal pact, Financial Times, 27 April 2020

10 Explanatory Notes, para 5

proceedings. The UK currently participates in 13 Conventions as a Member State of the EU. These are listed in Annex B of the EN. They cover matters such as child maintenance, divorce, child abduction, and choice of courts.

These are given domestic effect primarily through the principle of direct effect under the *European Communities Act 1972*.

Although directly effective treaty rights will become part of retained EU law at the end of the transition period,[11] the Government considers that it would be clearer to give some of the Conventions direct effect in domestic law.[12]

The UK will also need to become a contracting party to the Conventions in its own right.

## 1.2 Background to the Bill

In the political declaration on the future relationship between the UK and the EU of October 2019, the two parties committed to the "effective application of the existing international family law instruments to which they are parties". In addition, the document noted the UK's intention to accede to the 2007 Hague convention on family maintenance in its own right. It also noted the parties' commitment to "explore options for judicial cooperation in matrimonial, parental responsibility and other related matters".[13]

The *Private International Law (Implementation of Agreements) Bill* was announced in the 2019 Queen's Speech as part of the Government's "Delivering Brexit" legislative programme. The stated aims of the Bill were to maintain and strengthen the UK's role in delivering justice across borders on civil and family justice issues, and to facilitate access to justice for those involved in international legal disputes.

In February 2020, the UK Government published a document setting out its approach to negotiations with the EU. This stated that the UK proposed to continue "working together with the EU in the area of civil judicial cooperation through multilateral precedents" set by the Hague Conference, and through the "UK's accession as an independent contracting party to the Lugano Convention 2007".[14]

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11 Under the *European Union (Withdrawal) Act 2018* as amended by the *European Union (Withdrawal Agreement) Act 2020*

12 Explanatory Notes, para 19

13 HM Government, *Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom*, 19 October 2019, p 11

14 HM Government, *The Future Relationship with the EU: the UK's Approach to Negotiations*, February 2020, CP 211

# 2. The Bill

## 2.1 Debate and amendments in the House of Lords

Introducing the Bill for the Government, Lord Keen said that it underpinned the Government's ambition to deliver "a new framework on private international law" after leaving the EU "on a bigger scale in a global setting".

He confirmed that the Government intended to use the power provided for by clause 2 to implement the Lugano Convention in order to provide clear reciprocal rules beyond the transition period. Other agreements under consideration included the Singapore Convention of 2019 and the Hague Convention on the Recognition and Enforcement of Foreign Judgments of 2019.

He suggested that the power was well defined and narrow, and that all draft regulations made under the provision would be subject to the affirmative resolution procedure. Further parliamentary oversight would be possible under the provision of the *Constitutional Reform and Governance Act 2010* (CRaG) prior to the Government entering in to any agreement, he suggested.[15]

Lord Wallace said that the Liberal Democrats were generally supportive of the Bill, but noted the shortcomings of CRaG for facilitating parliamentary scrutiny of treaties.[16]

Lord Collins indicated Labour's strong support for the principle of the Bill, but expressed concern about the adequacy of the Government's wider strategy to replace existing measures for civil justice cooperation beyond the transition period. He also expressed reservations about the clause 2 power enabling the Government to create new criminal offences via secondary legislation.[17]

Lord Mance, speaking as chair of the Lord Chancellor's advisory committee on private international law, noted the importance of reciprocal arrangements in order for London to maintain its leading role as a "world business centre" and expressed some scepticism about the UK's ability to achieve this outside of the EU arrangements. He noted a number of shortcomings of the Hague Convention by comparison with the Brussels regime. And he questioned whether signing up to the Lugano Convention would prevent subsequent implementation of the 2019 Hague Convention.[18]

Lord Judge was also concerned about clause 2, expressing "particular reservation about vesting power in a Minister … to change the entire law of arbitration".[19]

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15 HL Deb 17 March 2020, cc1439-1441
16 Ibid c1442
17 Ibid, c1449-1450
18 Ibid, c1445-1448
19 Ibid, c1444

The main issue of debate in Committee concerned the constitutional propriety of clause 2.

Lord Falconer set out "very considerable objections to Clause 2", suggesting that it would be constitutionally improper "that there should be such little accountability to Parliament in respect of potentially very significant changes in the law".[20]

Lord Pannick suggested that it was a fundamental principle of the constitution that "international agreements can change the content of our domestic law only if and when they are given force by an Act of Parliament".[21] He noted that the clause 2 power would allow a Minister to create new criminal offences by SI and suggested that the Constitution Committee (of which he is a member) were concerned that it represented a proposal for a permanent shift in power to the Executive.[22]

Lord Mance suggested that it was "implausible for the Government to suggest that either speed or reputational risk require, for the first time in history, so unlimited …. a delegated legislative power".[23]

Lord Goldsmith spoke as chair of the EU International Agreements Sub-Committee, agreeing with the conclusions of the Constitution Committee (see section 3 below) that the clause would amount to an inappropriate reduction in parliamentary scrutiny of international agreements, noting the shortcomings of CRaG.[24]

Lord Marks suggested that the Bill would move a whole area of legislation from Parliament to the Executive, describing this as "a dangerous extension and an unwelcome trend". He concluded "As parliamentarians, and respecting the traditional role of this House as a guardian of the constitution, we have a responsibility to stop it".[25]

In addition to the question of whether clause 2 should stand part, various amendments sought to narrow its scope, or provide additional avenues for parliamentary scrutiny. These included amendments seeking to limit the power with respect to the creation of new criminal offences, and to limit the scope of the provision to the implementation of the Lugano Convention.[26]

An Opposition amendment was tabled at Report stage to remove clause 2 from the Bill. The House divided and the amendment was passed by 320 votes to 233.[27]

20 HL Deb 13 May 2020, c 711
21 Ibid, c 712
22 Ibid
23 Ibid, c 718
24 Ibid, c758
25 Ibid, c767
26 HL Deb 13 May 2020, cc 709-770
27 HL Deb 17 June 2020, c 2234

## 2.2 The Bill as introduced in the House of Commons

Clause 1 of the Bill would implement the Hague Conventions of 1996, 2005 and 2007 in domestic law. This would be done by amending the *Civil Jurisdiction and Judgments Act 1982*, inserting the text of the Conventions via new sections 3C-3E and schedules 3D-G.

### 1996 Convention

The Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children was concluded in October 1996. It provides a framework for determining jurisdiction for disputes concerning children where the parents live in different countries. This includes issues such as parental responsibility; rights of custody and access; and administration of property, but not maintenance. The primary basis for jurisdiction is the habitual residence of the child

### 2005 Convention

The Hague Convention on Choice of Court Agreements was concluded in June 2005. It aims to promote international trade and investment by creating a framework of rules relating to jurisdiction agreements in civil and commercial matters and the recognition and enforcement of judgments. It requires any court designated by a choice of court agreement to hear any dispute arising under that agreement, and other courts to decline to do so. It also requires courts of contracting party states to recognise and enforce judgments of the chosen court.

The Convention entered into force in all EU member states in 2015. It is implemented in the UK by the *Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) Regulations 2015*.[28]

According to the explanatory notes, these measures reduce the length and cost of litigation, and would maintain UK jurisdictions as an attractive choice for the resolution of disputes in commercial contracts.[29]

### 2007 Convention

The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance was agreed in November 2007. It provides rules for the recognition and enforcement of child support and other forms of family maintenance decisions across borders.

It has had effect in the UK since the EU acceded in 2014.[30] According to the explanatory notes it is important to maintain this framework

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28 The *Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018* would make necessary changes to domestic law at the end of the transition period

29 Explanatory Notes, para 13

30 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* would retain the provisions of the Convention domestically and make certain changes to retained EU law

because it helps to reduce financial hardship for the children of UK resident parents.[31]

Clause 1 also introduces schedule 5, which makes various consequential amendments, including providing that section 4 of the *European Union (Withdrawal) Act 2018* would cease to apply to directly effective rights derived from the Conventions and revoking certain provisions in the relevant EU Exit SIs. These would no longer be necessary in light of the Bill's provisions.

Clauses 2 and 3 deal with Crown Application, extent and commencement. The Bill would come into force at the end of the transition period, known as 'IP completion day'.

[31] Explanatory Notes, para 14

# 3. Amendments to the Bill

The Government tabled amendments in the House of Commons to restore the provisions which were removed from the Bill by the House of Lords, reinstating the power to implement PIL agreements via secondary legislation.

The Minister, Alex Chalk, argued that the provisions were necessary and proportionate because such agreements were recognised across the House to be in the public interest, and therefore unlikely to be contentious so as to necessitate further parliamentary scrutiny.[32]

The amendments were passed on a division by 324 votes to 175.

The House of Lords considered the amendments on 19 November, along with further Government amendments which would introduce a number of additional safeguards to the exercise of the delegated power provided for by clause 2 of the original Bill:

- Excluding the creation of criminal offences punishable by imprisonment;
- Introducing a renewable five-year sunset clause; and
- Introducing a duty to consult before exercising the power.

The Commons amendments and further amendments were agreed without division.[33]

32 HC Deb 6 October 2020, c827
33 HL Deb 19 November 2020, cc 1553-1580

# 4. Commentary

### Parliamentary

The Delegated Powers and Regulatory Reform Committee (DPRRC) reported on the Bill on 18 March 2020

The DPRRC noted that PIL agreements concern matters of considerable public interest, and typically need to be implemented in domestic law before people in this country can rely on them. Traditionally this has been done via Acts of Parliament.

The Committee rejected the argument put forward by the Ministry of Justice that PIL is "highly technical and specialised" and thus amendable to implementation via secondary legislation:

> Indefinitely to exclude private international law agreements from being given the force of law by an Act of Parliament ought not to be based on the technical nature of the subject matter, given the public interest in so many of these agreements.[34]

It concluded that the power to implement future international agreement on private international law by secondary legislation represented "an inappropriate delegation of power" and recommended that it be removed from the Bill.[35]

The House of Lords Constitution Committee also recommended that clause 2 be removed from the Bill, on the basis that doing so would not affect the important and necessary measures in the Bill, but would remove a power to implement future agreements "without legislation and its attendant scrutiny".[36]

The Committee also questioned why the Government had not consulted its own advisory committee on PIL about the Bill.[37]

### Legal profession

In a briefing for Peers, the Bar Council welcomed clause 1 of the Bill, suggesting that although it might not be necessary, it would be helpful in making things clearer in primary legislation.[38]

The Bar Council also noted that the Bill does not address the issue of declarations that the UK might make in ratifying international conventions with the effect of limiting their ambit, or modifications that might be made when giving domestic effect to conventions. It noted that this involves important policy decisions, and suggested that the Government should commit to consulting with experts in PIL on such issues.

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34 Delegated Powers and Regulatory Reform Committee, 8th Report of Session 2019-2021, para 10
35 Para 15
36 Private international Law (Implementation of Agreements) Bill [HL], Select Committee on the Constitution, 4 May 2020, para 27
37 Para 7
38 Briefing for Peers: Private International Law (Implementation of Agreements) Bill, the Bar Council, barcouncil.org.uk

The Bar Council also expressed concern about the breadth of the power in clause 2, and a wider concern about the need for "adequate protection in the Bill to ensure proper scrutiny and consultation". It suggested that these powers should be clearly circumscribed.

Considering the broader implications, the Bar Council noted the significant changes to PIL that would be brought about by the various EU Exit SIs if they were to come into force, and expressed concern that inadequate thought and consultation had been given to these policy decisions.

The briefing concluded

> Private international law is at once both a highly technical field and one that is extremely important in regulating the lives of individuals and businesses when they cross borders. Never has there been a greater need to consult specialists in this field and to ensure rigorous scrutiny to produce a cogent and coherent strategy in this field. Time is short to ensure that United Kingdom private international law is left in a clear and satisfactory state upon exit day.

In briefing prepared for second reading in the Commons, the Scottish Law Society welcomed the Bill as a very important measure and endorsed the approach taken in clause 1.[39]

Commenting on the Bill as introduced in the Lords, the briefing suggested that if the Government were to seek to reintroduce the clause 2 power, it should be limited in scope to the Lugano Convention, given the limitations on parliamentary scrutiny under CRaG.

[39] Private International Law (Implementation of Agreements) Bill Briefing for Second Reading in the House of Commons, August 2020, Law Society of Scotland, lawscot.org.uk

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