

**EXPLANATORY MEMORANDUM TO
THE CHOICE OF COURT AGREEMENTS (HAGUE CONVENTION 2005 ETC) (EU
EXIT) REGULATIONS 2018
[2018] No. [XXXX]**

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Committees on the UK's exit from the European Union.

2. Purpose of the instrument

- 2.1 This Statutory Instrument (SI) has been made under the European Union (Withdrawal) Act 2018 to ensure that the UK statute book is ready, on Exit, to comply with The Hague Convention of 30 June 2005 on Choice of Court Agreements (the 2005 Hague Convention). The 2005 Hague Convention aims to ensure the effectiveness of choice of court agreements made between parties to international commercial contracts.
- 2.2 The UK and EU have agreed that during the implementation period, the UK is to be treated as a Member State for the purposes of international agreements, including the 2005 Hague Convention. This Statutory Instrument therefore would only apply in the unlikely event that the Withdrawal Agreement with the EU is not concluded.
- 2.3 The UK currently participates in the 2005 Hague Convention by virtue of EU membership, the EU itself having concluded the Convention in 2015 and thus being a Contracting Party. UK participation will therefore cease on Exit.
- 2.4 As explained in the Government's *'Providing a cross-border civil judicial cooperation framework – A future partnership paper'* (August, 2017), the UK remains committed to continuing to participate in the 2005 Hague Convention after the UK leaves the EU.¹
- 2.5 This SI is required as part of the UK's overall preparations to achieve full independent contracting party status to the 2005 Hague Convention after we leave the EU and to ensure an effectively functioning statute book. It will underpin the UK's future ability to meet its international treaty obligations by ensuring the smooth continuation of existing domestic implementing legislation relating to this Convention, on and after exit day.
- 2.6 This SI will ensure that the rules of the 2005 Hague Convention on the recognition of exclusive choice of court agreements can work effectively between the UK and all the

¹ See *'Providing a cross-border civil judicial cooperation framework – a future partnership paper'* (August, 2017), p. 6 (www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper).

existing contracting parties to this Convention including the EU, Denmark, Montenegro, Mexico and Singapore. It will also ensure that the UK can operate the 2005 Hague Convention with any future contracting parties to this Convention.

2.7 Explanations

What did any relevant EU law do before exit day?

- 2.8 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 (the “chosen court”) in a State which is a contracting party to the Convention has been designated by an agreement (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 parties, as necessary.
- 2.9 At present, the 2005 Hague Convention is largely inapplicable between EU Member States. The EU’s internal civil judicial cooperation (CJC) framework – namely the Brussels I and IA Regulations on jurisdiction, recognition and enforcement of judgments in civil and commercial matters – takes priority over exclusive choice of court agreement arrangements involving Member States where the relevant conditions are fulfilled. There are separate arrangements in place for Denmark. This ensures that the rules of the 2005 Hague Convention do not conflict with the EU’s internal CJC framework in this area.
- 2.10 Therefore, the 2005 Hague Convention currently only takes priority in exclusive choice of court agreement arrangements involving the UK and non-EU member state contracting parties – at present Singapore, Montenegro and Mexico.

Why is it being changed?

- 2.11 Currently the UK’s relationship with EU Member States on the recognition of exclusive choice of court agreements arrangements is governed by the Brussels IA Regulation. However, once the UK leaves the EU and in the absence of a future agreement in this area, that Regulation will no longer be operable on a reciprocal basis with the remaining Member States.
- 2.12 The UK intends to become an independent contracting party to the 2005 Hague Convention, and to apply the Convention’s rules with all other contracting parties including the EU Member States. This SI contains implementing legislation to ensure that the necessary domestic legislation to do this is in place.

What will it now do?

- 2.13 This implementing legislation will ensure that the 2005 Hague Convention’s rules will govern questions relating to exclusive choice of court agreements with the EU

Member States in addition to the other existing (and future) contracting parties to the Convention, where those agreements are concluded after we leave the EU.

- 2.14 This domestic implementing legislation is necessary in order to fully implement our international treaty obligations under the 2005 Hague Convention as an independent contracting party to this Convention.
- 2.15 Under the terms of the 2005 Hague Convention, it will cease to operate on a reciprocal basis with the existing contracting parties immediately on the UK leaving the EU, and until the Convention again comes into force in the UK on the 1st day of the month following the expiration of three months after depositing our instrument of ratification (confirmation that the UK has met its domestic legislative and treaty ratification requirements) with the Hague Depository.
- 2.16 This domestic implementing legislation will in particular provide legal certainty regarding how ‘transitional’ cases to which the 2005 Hague Convention currently applies, and agreements entered into during any period between disapplication of the 2005 Hague Convention to the UK by virtue of EU Exit, and the Convention coming into force for the UK once again following accession will be dealt with immediately on Exit – namely that:
- the UK will continue to apply the 2005 Hague Convention rules to existing exclusive choice of court agreements to which the Convention would have applied but for its disapplication resulting from EU Exit. This means that UK courts will continue to take jurisdiction according to those rules when UK courts were chosen in a choice of court clause to which the 2005 Hague Convention applied after its original entry into force for the UK, 1st October 2015; they will stay proceedings or decline jurisdiction on the basis of 2005 Hague Convention rules where the courts of another Contracting Party were so chosen; and they will recognise and enforce judgments from such courts according to the 2005 Hague Convention rules; and
 - the UK will apply the 2005 Hague Convention rules to exclusive choice of court agreements to which the 2005 Hague Convention would have applied but for its disapplication resulting from EU Exit where those agreements are entered into after Exit but before the Convention enters into force again for the UK following UK accession. Again, this will involve application of the 2005 Hague Convention rules by UK courts regarding taking or declining of jurisdiction, and recognition and enforcement of judgments from the courts of Contracting Parties. By contrast with the bullet above, this approach will apply regarding EU Member States as well as other Contracting Parties.
- 2.17 The operation of the 2005 Hague Convention between the UK and the EU Member States has been almost entirely disconnected as explained at paragraph 2.8 above. Choices of court relating to EU Member States are currently governed by the Brussels IA Regulation, therefore the approach at the first bullet of paragraph 2.15 will not apply to such cases. These will be addressed in a related statutory instrument which will deal with the treatment of Brussels Regulation regime cases. Because the disconnection will no longer apply once the UK leaves the EU, the approach at the second bullet of paragraph 2.15 will apply to EU Member States in the same way as it will to other Contracting Parties.

- 2.18 This SI will provide legal certainty to the individuals and businesses who rely on the rules in this Convention to resolve cross-border disputes after we leave the EU.

3. Matters of special interest to Parliament

Matters of special interest to the Committees on the UK's exit from the European Union

- 3.1 This instrument will be laid for sifting before the relevant House Committees pursuant to the European Union (Withdrawal) Act 2018. Accordingly, this explanatory memorandum contains relevant information for those Committees.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent and application of this Instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Secretary of State, David Gauke, has made the following statement regarding Human Rights:

“In my view the provisions of the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005)(EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The UK has participated in the 2005 Hague Convention by virtue of its conclusion by the EU since 1 October 2015. This will cease on Exit. Domestic implementation of this international treaty obligation was achieved by virtue of section 2(1), and Regulations drafted under section 2(2), of the European Communities Act (ECA) 1972.
- 6.2 Between EU Member States, the relevant internal EU CJC framework – namely the Brussels I and Brussels IA Regulations – are prioritised so that these rules govern the operation of exclusive choice of court agreements as between Member States. This situation is specifically permitted under the terms of the 2005 Hague Convention. It ensures there is no conflict between the internal EU rules in this area and the 2005 Hague Convention rules. The 2005 Hague Convention rules currently apply between

EU Member States and the other contracting parties to this Convention –at present Singapore, Montenegro and Mexico.

- 6.3 As indicated above, on leaving the EU, the UK will need to achieve independent contracting party status to this Convention. This Statutory Instrument will ensure that the UK is able to meet its international treaty obligations domestically and to operate this convention with all the current and future contracting parties to it.

7. Policy background

What is being done and why?

- 7.1 This statutory instrument ensures that the UK’s existing domestic implementation of the 2005 Hague Convention continues, on and after exit day, to support operation of that Convention once it comes back into force for the UK, and makes provision to ensure consistent and clear treatment of cases which would have benefitted from the 2005 Hague Convention rules in the UK had the Convention not been disapplied to the UK upon Exit, by requiring UK courts to treat such cases according to the 2005 Hague Convention rules.
- 7.2 Continued participation in the 2005 Hague Convention will provide greater legal certainty to the individuals and businesses who engage in cross-border commercial activities.
- 7.3 The 2005 Hague Convention provides an important framework for resolving cross-border disputes by governing the application of exclusive choice of court agreements, including where a case should be heard, and requiring that the resultant judgment can be recognised and enforced in any Contracting State. This Convention will assist to ensure that the UK legal environment remains amenable to international trade and investment after we leave the EU.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 (‘the Act’) in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Parliamentary Under-Secretary of State for Justice has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

- 9.1 The Ministry of Justice has no plans for consolidation of relevant enactments at present.

10. Consultation outcome

- 10.1 The Government has publicly committed to continuing to participate in the 2005 Hague Convention after we leave the EU in ‘Providing a cross-border civil judicial

cooperation framework – A future partnership paper’ (August, 2017). Furthermore, in its responses to the reports of the Lords EU Justice sub-Committee 17th Report of Session 2016-2017 ‘Brexit: Justice for Families, Individuals and Businesses?’ and the Justice Select Committee Ninth Report of Session 2016–17, ‘Implications of Brexit for the Justice System’ both published in December 2017, the Government made clear its intention to continue to participate in those Hague Conventions which we currently apply by virtue of the UK’s membership of the EU.

- 10.2 Finally, there is widespread support among commercial law stakeholders, such as the Bar Council of England & Wales, Law Society and CityUK for the UK to continue to participate in this Convention.

11. Guidance

- 11.1 The Ministry of Justice has no plans to issue guidance in relation to this Statutory instrument.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is that the 2005 Hague Convention has important implications for the UK businesses, who enter cross-border contracts, where there needs to be legal certainty over the recognition of exclusive choice of court agreements.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to choice of court agreements in transactions that may be entered into by small businesses. The 2005 Hague Convention provides benefits to businesses in this area in streamlining the recognition and enforcement of exclusive choice of court agreements in a State which is a contracting party to the Convention.

14. Monitoring & review

- 14.1 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Ed Tynan at the Ministry of Justice Email: Edward.Tynan@Justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kristen Tiley at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

- 15.3 The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriateness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

		to include these statements alongside all EUWA SIs	
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister’s opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument’s effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority’s response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement

1.1. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure). This is the case because the instrument does not contain provision falling within subparagraph 1(2) of schedule 7 to the Act and the purpose of the instrument is to ensure that the UK is ready to continue applying the rules of the 2005 Hague Convention after exit day and in particular deal with transitional cases pending its accession to the Convention in its own right, as explained in sections 2 and 7 of the Explanatory Memorandum.”

2. Appropriateness statement

2.1. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the provisions of the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 do no more than what is appropriate to address deficiencies in retained EU law arising from the UK leaving the EU. The Act provides that the directly applicable provisions of the 2005 Hague Convention, the Brussels 1A Regulation, and their related implementing legislation will become retained EU law immediately on exit day. Deficiencies arise because this retained EU law concerns reciprocal arrangements which operate under the 2005 Hague Convention and Brussels 1A Regulation, and that reciprocity will no longer exist from exit day. In the case of the 2005 Hague Convention, such reciprocal arrangements will operate again once the UK accedes to the Convention in its own right, but there will be a short gap after exit day before the Convention comes into force for the UK. The Regulations mitigate these deficiencies in three respects. Firstly, by providing for the continued application of the retained EU law, including directly applicable provisions of the 2005 Hague Convention, relating to that Convention, in relation to certain transitional cases as if the UK were still a state bound by the Convention pending the accession by the UK to the 2005 Hague Convention as a contracting party in its own right. In the case of agreements entered into between 1st October 2015 and exit day, this application also operates as if the UK were still an EU Member State (and bound by the Brussels 1A Regulation), in order to reflect the disapplication of the 2005 Hague Convention rules to cases involving the EU (in favour of Brussels 1A rules) during that period. (Note that necessary revocations of retained EU law and transitional provisions relating to the Brussels 1A Regulation will be dealt with in a separate set of Regulations). This approach to transitional cases is appropriate because it will provide legal certainty in respect of choice of court agreements which have been entered into while the UK was bound by the Convention by virtue of its EU membership, and any which are entered into during the short gap which will arise between exit day and the UK’s accession to the 2005 Convention in its own right. Secondly, the Regulations describe the effect of the directly applicable provisions of the 2005 Hague Convention retained by virtue of section 4 of the European Union (Withdrawal) Act 2018 at the point at which the Convention enters into force for the UK once

more, thus ensuring necessary implementation of the Convention in domestic law. Lastly, the Regulations also amend s24 of the Civil Jurisdiction and Judgments Act 1982 to remove redundant provisions dealing with proceedings involving preliminary references to the Court of Justice of the EU, and revoke Council Decisions concerning the EU's signature and conclusion of the 2005 Hague Convention which are redundant."

3. Good reasons

3.1. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action. These reasons are detailed in paragraph 7 of the explanatory memorandum."

4. Equalities

4.1. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement:

"This instrument does not amend, repeal or revoke any part of the Equality Acts 2006 or 2010 or subordinate legislation made under those Acts."

4.2. The Parliamentary Under-Secretary of State for Justice, Lucy Frazer, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, Lucy Frazer, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010. This Act does not extend to Northern Ireland, but as the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 extends to Northern Ireland, I have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland."

5. Explanations

5.1. The explanations statement has been made in section 2 of the main body of this explanatory memorandum.