

Private International Law (Implementation of Agreements) Bill

ECHR Memorandum

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) and the United Nations Convention on the Rights of the Child (“UNCRC”) in relation to the Private International Law (Implementation of Agreements) Bill. On introduction the Lord Chancellor made a statement under section 19(1)(a) of the Human Rights Act 1998 that the Bill is compatible with the ECHR.

Background: private international law and human rights

2. Private international law rules are those rules which are applied by courts and others to deal with cases involving foreign elements. For example, the parties to a legal claim may be based in different countries, or the litigation may relate to events which happened in a different country from where a claim is being made (e.g. a car accident). In these situations, private international law rules will be applied to determine matters such as which country’s courts should hear a case (jurisdiction), which country’s law should apply to determine a case (applicable law), and whether a foreign judgment should be recognised and enforced. International agreements on private international law rules enable countries to apply an agreed set of rules to these sorts of issues in order to avoid the risk of costly parallel legal proceedings in different countries and conflicting judgments. Agreements may also establish co-operation between courts or national authorities involved in resolving cross-border legal disputes, for example, in relation to the service of court documents abroad, taking evidence abroad or in the field of cross-border family law disputes such as disputes about maintenance payments.
3. Private international law rules have the potential to engage rights under the ECHR and UNCRC. In particular, private international law rules on recognition and enforcement of judgments may engage Article 6 ECHR rights (access to justice or right to a fair trial) because the ability to have a judgment from one country recognised and enforced in another country improves access to justice. This is because it means that parties need only litigate a dispute once and can avoid the costs of multiple proceedings and potential for conflicting judgments in different countries. Rules on mutual recognition and enforcement of judgments generally include safeguards to ensure fairness. For example, if the defendant did not receive proper notice of, or was unable to attend the original proceedings, the rules may provide that a foreign judgment should not be recognised or enforced. Some private international law agreements in the family law field also contain provisions on legal aid requirements, improving access to justice for individuals who may otherwise be unable to pay for litigation costs. Private international law agreements in the field of family law also have the potential to engage Article 8 (right to respect for private and family life) because they provide rules for dealing with matters such as cross-border disputes about contact between a child and a parent with whom the child does not live.
4. The UNCRC contains provisions concerning the care and protection of children (Article 3), the right for a child not to be separated from its parents against its will (Article 9), respect for parental responsibility (Article 18), and the right to an adequate standard of living (Article 27). These rights may also potentially be engaged by private international law agreements in the family law field.

Summary of the Bill

5. The purpose of the Bill is to provide for the implementation in domestic law of three international agreements in the field of private international law following the end of the transition period (TP). During the TP, the UK will remain bound by international agreements in this field to which the EU is a contracting party, but when the TP is concluded, the UK will regain full competence to enter into new private international law agreements which it will need to implement in domestic law. The Bill contains one main clause:
 - i. Clause 1 implements the following three international agreements, drawn up under the auspices of the Hague Conference on Private International Law, to which the UK will become a contracting party in its own right after the end of the Implementation Period. The agreements are:
 - a. 1996 Hague Convention on Parental Responsibility and Measures for the Protection of Children. This agreement provides a framework of rules for the resolution of issues such as residence of or contact with children where parents live in different countries, and establishes co-operation mechanisms between national authorities involved in protecting children.
 - b. 2005 Hague Convention on Choice of Court Agreements. This agreement ensures respect for choice of jurisdiction clauses in international commercial agreements and that the resulting judgment will be recognised and enforced.
 - c. 2007 Hague Convention on maintenance. This agreement ensures the effective recovery of child support and other forms of family maintenance across borders.
6. On introduction in the House of Lords, the Bill also contained a provision providing for a delegated power to allow the government to implement in domestic law any international agreements on private international law via secondary legislation (regulations), once a decision had been taken to join an agreement and subject to Parliamentary scrutiny requirements under the Constitutional Reform and Governance Act 2010, where ratification is required. This provision was removed from the Bill during passage in the House of Lords.

Human rights issues engaged by clause 1 of the Bill

7. The UK began operating the three Hague Conventions implemented by clause 1 when it was a member of the EU and has been doing so for a number of years prior to the UK's withdrawal from the EU. The EU was the contracting party to the 2005 and 2007 Hague Conventions which it approved in 2015 and 2014 respectively, and the UK ratified the 1996 Hague Convention in 2012 following authorisation by the EU. These Conventions were directly applicable in the UK before exit day as a matter of EU law, and this continues under the EU (Withdrawal Agreement) Act 2020 during the TP. In order to give further effect in domestic law to the Conventions, implementing regulations were made under section 2(2) European Communities Act 1972 ("ECA"), and statements were made at the time by Ministers that the implementing regulations were compatible with the ECHR.¹

¹ For the 1996 Hague Convention, see the Explanatory Memorandum to SI 2010/1898 (this SI applied to England and Wales and Northern Ireland, separate implementing regulations were made by Scottish Ministers for Scotland – SSI 2010/213). For the 2005 Hague Convention see the Explanatory Memorandum to SI 2015/1644. For the 2007 Hague Convention, see the Explanatory Memorandum to SI 2012/2814.

8. The Bill provides for the three Hague Conventions to be implemented in domestic law after the end of the TP, by inserting provisions in the Civil Jurisdiction and Judgments Act 1982 stating that their provisions have the force of law. This is a clearer approach to implementation and will replace reliance on the savings provisions for directly effective Treaty rights under section 4 of the European Union (Withdrawal) Act 2018. The section 2(2) ECA regulations, which gave further effect to the Conventions in domestic law, will continue to have effect during and after the end of the TP. No changes are being made to the substantive provisions of the Conventions which will continue to be implemented in domestic law.
9. Implementation of each of the three Hague Conventions engages Article 6 ECHR (access to justice and right to a fair trial) in different ways. For example, each of the Hague Conventions contain provisions on recognition and enforcement of court judgments. The two Hague Conventions which pertain to family law, also contain provisions on recognition and enforcement of decisions of competent authorities. The Conventions include grounds on which recognition or enforcement may be refused, for example Article 23 of the 1996 Hague Convention provides that a decision may not be recognised in certain circumstances where the child did not have the opportunity to be heard. Another ground for refusing recognition or enforcement provided for in the Conventions concerns whether the respondent appeared in the proceedings (see for example, Article 9 of the 2005 Hague Convention and Article 22 of the 2007 Hague Convention). There are also provisions in Article 15 of the 2007 Hague Convention on maintenance relating to free legal assistance for child support applications.
10. The two family law Hague Conventions (1996 and 2007) also engage Article 8 (right to respect for private and family life) because they establish co-operation between national courts authorities dealing with applications for child residence, contact or maintenance orders.
11. However, we do not consider any of the Hague Convention provisions interfere with ECHR rights but instead support enjoyment of those rights. In practice, a clearer approach to implementing the Hague Conventions in domestic law through this Bill should make access to justice and exercise of the right to respect for family life easier for families involved in cross border disputes, by reducing legal complexity and associated legal costs.
12. We also consider that the Bill will have a positive impact on children's rights under the UNCRC, to the extent that a clearer approach to implementing the 1996 and 2007 Hague Conventions in domestic law ensures better respect for those rights which are engaged (as outlined in paragraph 4 above). The 1996 Hague Convention generally supports the specific UNCRC rights concerning the care and protection of children (Article 3), the right for a child not to be separated from its parents against its will (Article 9), and respect for parental responsibility (Article 18). The 2007 Hague Convention on maintenance supports the rights of children to an adequate standard of living (Article 27) by enabling the efficient recovery of child maintenance.
13. As indicated above, the Bill simply means that the provisions of these three Hague Conventions, which are currently directly applicable in UK law (and considered to be

compatible with human rights obligations), can continue to have legal effect in UK law after the end of the TP. No substantive changes are being made to the Convention provisions being implemented.

Ministry of Justice
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