Briefing for Peers
Private International Law (Implementation of Agreements) Bill

About us

The Bar Council is the representative body for the Bar of England and Wales, representing approximately 16,500 barristers. The independent Bar plays a crucial role in upholding and realising the constitutional principles of government accountability under law and vindication of legal rights through the courts. It provides a pool of talent, from increasingly diverse backgrounds, from which a significant proportion of the judiciary is drawn, and on whose independence the rule of law and our democratic way of life depends.

Summary

The Bar Council welcomes the Government's intention to pursue and foster cooperation in the field of private international law through ratifying international conventions. The Private International Law Bill is, in principle, an important and pragmatic piece of legislation designed to simplify the implementation of international agreements.

The Bar Council is, however, concerned about the breadth of the powers that it gives to enact delegated legislation across a wide field (arguably extending beyond traditional areas of private international law) and the lack of sufficient safeguards if decisions are made: (a) subsequently to review declarations made as to the ambit of a convention or to modify its provisions; or (b) to extend and/or adapt that legislation to intra-United Kingdom situations.

Background

The field of private international law covers important questions as to the regulation of cross-border agreements, disputes and questions of status. It covers (amongst other things): the scope and limit of the courts' jurisdiction; the system of law to govern cross-border disputes; and the recognition and enforcement of foreign judgments.

These issues are of profound everyday importance. For example, the choice of United Kingdom courts and the law of a part of the United Kingdom by parties to govern their agreements is of great significance to the United Kingdom economy and its legal system. Private international law also deals with questions ranging from international child abduction, adoption and recognition of foreign divorces, to cross-border insolvency and restructuring of international companies and to service of documents and obtaining evidence for proceedings overseas.

Presently, much or most of the field is governed by EU legislation, which, where there is a conflict, typically (although not invariably) prevails over any international convention

covering the same field. Whilst a significant amount of this EU law will be retained as domestic law pursuant to the EU (Withdrawal) Act 2018 (as amended), much of it will not be because the legislation deals with initiatives between Member States that require reciprocity. This includes rules on jurisdiction, recognition and enforcement of judgments overseas, cross-border insolvency and a wide range of family law issues.

Against this background, existing and future international conventions in the field are likely to take on greater importance in the United Kingdom. Indeed, the United Kingdom Negotiating Mandate of 28 February 2020 recognises this (Part II, para 64).

A number of international conventions have been concluded (primarily, through the Hague Conference on Private International Law) to which the United Kingdom is, or may wish to, become party. In some cases, the United Kingdom is presently bound by those conventions as a result of the European Union's accession and, in order to continue to benefit from them, will need to become a Contracting State in its own right at the end of the transition period.

The Bar Council welcomes the maintenance and enhancing of international cooperation in the field of private international law. This helps to ensure uniform solutions for businesses and individuals throughout the Contracting States, enabling them to trade and travel across borders more confidently.

The Bill

Against this background, the primary purposes of the Bill are twofold:

(a) To address (in section 1) the implementation of existing international conventions in the field of private international law to which the United Kingdom is party by virtue of the European Union's accession and which the United Kingdom will re-join as an independent Contracting State at the end of the transition period.

(b) To provide (in section 2) a mechanism to incorporate and implement new international conventions and Model Laws to which the United Kingdom may become party into domestic law using delegated powers. The Bill will not affect legislative scrutiny as to whether the United Kingdom should ratify an international convention in the first place.

In the Bar Council's view, the overarching purpose of the Bill is expedient in seeking to ensure the prompt implementation of international agreements to which the United Kingdom is, or has decided to be, bound. There are, however, important questions about the scope and drafting of the Bill and the need for safeguards to ensure adequate consultation.

Section 1 amends the principal legislation in the United Kingdom on cross-border jurisdiction and recognition and enforcement of judgments in civil matters, the Civil Jurisdiction and Judgments Act 1982, by giving the force of law to international conventions to which the United Kingdom is party. Strictly speaking, it is doubtful that this is necessary as this would be secured by section 4 of the EU (Withdrawal) Act 2018 (as amended by the European Union Withdrawal Agreement) Act 2020 but it is helpful to make things clearer by amending the primary legislation.

The legislation does not seek to address the important subject of declarations that the United Kingdom might make in ratifying international conventions limiting its ambit (or, indeed, other modifications that it might wish to make when giving effect to such conventions in domestic law). For instance, the Hague Choice of Court Convention 2005 is an important instrument for protecting the parties' choice of United Kingdom courts to resolve their disputes. The European Union chose to exclude insurance contracts when ratifying the agreement. The Memorandum on Use of Delegated Powers accompanying the Bill suggests (para 22) that the United Kingdom will continue to exclude such contracts. This is an important policy decision; one which excludes most insurance contracts containing a choice of United Kingdom courts in them from the protection of the Convention (without putting any other legislative safeguards in place). The effect of such a decision is to deprive court judgments based on such excluded contracts of the right to be enforced under the Convention. In the Bar Council's view, a commitment is needed to ensure that there is widespread consultation with experts in the field of private international law and the insurance sector. The same point arises more generally about ensuring that there is sufficient scrutiny of all declarations and modifications to the text of existing international conventions before they are given the force of law in the United Kingdom as an independent Contracting State.

The Bar Council is also somewhat concerned that the power in section 2 to proceed by delegated legislation is very broad. For instance, it enables the appropriate national authority (as defined in section 2(7)) to make regulations *"for the purpose of, or in connection with, implementing any international agreement…"* relating to private international law (section 2(1)). This includes regulations for applying that agreement *"with or without modifications, as between different jurisdictions within the United Kingdom"* (section 2(2)) and provisions to extend to arrangements between the United Kingdom and a relevant territory (section 2(3); *"relevant territory"* is defined in section 2(7)).

Moreover, whilst there is a helpful definition of *"private international law"* in section 2(7), the Bill and Explanatory Notes envisage that the delegated power could extend to matters not normally considered to form part of the subject, including increasing penalties for criminal offences (para 24 of the Explanatory Memorandum; and schedule 6, para 3(c)) and legal aid (section 2(5)(c) of the Bill). Furthermore, it is not clear how far the legislation may be used to implement initiatives relating to an *"arbitral award"* (section 2(7)(b)(i)) by delegated legislation, a field which is only partly concerned with private international law.

It is also uncertain whether the proposed procedure (as modified in section 2(8)) is apt to deal with Model Laws (which are not international conventions importing rights and duties between Contracting States but agreed "soft law" provisions which are often modified substantially before being given effect in domestic law). There would need to be sufficient scrutiny of such a process.

This gives rise to a wider concern about the need for adequate protection in the Bill to ensure proper scrutiny and consultation. Schedule 6 of the Bill seeks to ensure procedural safeguards in relation to the application of the power in section 2. In particular, schedule 6, para 3 (2)(a) ensures that the affirmative procedure will apply *"for the purpose of implementing or applying,*

in relation to the United Kingdom or a particular part of the United Kingdom, any relevant international agreement that has not previously been the subject of any such provision…".

There are, however, two major gaps in this provision:

(a) It does not make provision for the affirmative procedure to be used other than at the point of first implementing an international convention. If the United Kingdom were to wish to add, amend or remove a declaration limiting the scope of an international convention in the United Kingdom (for example, subsequently removing the exclusion of insurance contracts in the implementation of the Hague Choice of Court Convention 2005), or otherwise modify the implementation of an international convention, this would not expressly trigger the affirmatory procedure under the Bill;

(b) Schedule 6 provides protection where a decision is made to apply an international convention in relation to "*a particular part of the United Kingdom"* e.g. if it were to be given effect in Scotland but not elsewhere in the United Kingdom. The question, however, whether to apply an international convention's rules *between* parts of the United Kingdom is often a very difficult one. Where it is to be applied, extensive amendments to that convention are often appropriate (an example being the provisions in the Civil Jurisdiction and Judgments Act 1982, which apply a substantially modified form of the European Union rules to intra-United Kingdom cases). The Bar Council is concerned that schedule 6 does not provide sufficient safeguards in this respect and considers that it should be amended to provide the requisite clarification.

Broader implications

This leads to a more fundamental point. At the end of the transition period, the wide body of EU legislation will cease to be applicable in this field (and, as explained above, much of it will not be incorporated into domestic law, as it is contingent on reciprocal treatment by Member States). Notwithstanding the number of international conventions concluded in private international law, there is still no international convention in many or most areas. Moreover, it remains unclear if the European Union will give its consent to the United Kingdom joining the Lugano Convention on jurisdiction and the recognition and enforcement of judgments as a separate Contracting State after exit day (the agreement of all current Contracting Parties is required).

All this means that the default rules of private international law applicable in the United Kingdom after exit day are of great importance. In this connection, a number of statutory instruments were adopted in 2018 and 2019 to legislate in this field pursuant to the EU (Withdrawal) Act 2018. These represent, in many cases, the most significant United Kingdom legislation in the field for a generation. The Bar Council is concerned that: (a) these instruments make important substantive changes, upon which it was not consulted and in respect of which there appears to have been little consultation more generally; and (b) some of those changes may not be in the best interests of the United Kingdom.

To take an example, in the field of jurisdiction and the enforcement of judgments in civil matters, the Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 have been enacted ("Hague Choice of Court Regulations"). These go beyond routine matters dealing with the consequences of the United Kingdom becoming a party to the legislation in its own right.

Those Regulations, in tandem with The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 ("CJJA Regulations") regulate the crucial question as to how the (presumably, millions of) existing contracts around the world containing agreements to resolve disputes in United Kingdom courts should be dealt with after exit day. Prior to this, such clauses have largely been given effect automatically in the United Kingdom for over thirty years pursuant to European Union legislation which is revoked by the CJJA Regulations. There is also a streamlined procedure under the EU legislation for starting claims in such cases without needing the court's permission to serve a claim form overseas. In the Bar Council's view, this approach is strongly in the United Kingdom's interests. The CJJA Regulations 2019 do not, however, ensure that such clauses will continue to be given effect automatically if they were valid under that regime on exit day. There is also an inconsistent approach between clauses currently regulated by the European Union rules (which constitute the vast majority of clauses which are not safeguarded by the CJJA Regulations) and those falling under the Hague Choice of Court Regulations (which are protected), as well as in the procedures for starting claims where the defendant is overseas in each case, creating further risk of confusion and uncertainty. These issues may have significant adverse consequences. Indeed, some three years ago, the House of Lords European Union Committee 17th Report of Session 2016–17 *"Brexit: justice for families, individuals and businesses?"* concluded:

> *"54. We are concerned by the Law Society of England and Wales' evidence that the current uncertainty surrounding Brexit is already having an impact on the UK's market for legal services and commercial litigation, and on the choices businesses are making as to whether or not to select English contract law as the law governing their commercial relationships."*

In the Bar Council's view, a concerted strategy is needed to give confidence to those who have chosen the United Kingdom courts to resolve their disputes by agreement; and to those who may be considering doing so in future.

Equally, although the European Union rules on jurisdiction will cease to apply on exit day, the CJJA Regulations 2019 make a significant substantive choice to re-enact some limited EU rules into domestic law and to superimpose them onto the default common law regime that would otherwise apply. This is an important policy decision. The European Union and common law jurisdiction rules are of a fundamentally different nature. The former is founded on fixed rules, built around a central principle that a defendant should typically be sued in the state of its domicile. The latter is an inherently more discretionary and flexible regime. The CJJA Regulations re-enact the European Union rules in respect of consumer and employment contracts (which form a derogation from the central rules in the Regulation by offering a more generous choice to consumers and employees as to where to litigate). This means that, on the one hand, UK law will no longer contain the central EU Regulation principles of jurisdiction; whilst on the other, certain limited derogations from those central EU principles will be

enacted into UK law. The CJJA Regulations also give rise to other issues (for instance, the transitional rules are ostensibly inconsistent with Article 67 of the Withdrawal Agreement).

There are various other examples of statutory instruments enacted in 2018 and 2019 (including e.g. on cross-border insolvency, family law, service of documents overseas and obtaining evidence abroad). The Bar Council was not consulted on these and none was apparently subject to a widespread consultation process.

Of course, views may differ as to the substance of the policies contained in these statutory instruments. The Bar Council is, however, seriously concerned about this secondary legislation (which makes significant substantive changes to the law in the United Kingdom) entering into force on exit day without further consultation and, if appropriate, revisions. This recent experience relating to the use of statutory instruments, in turn, increases the Bar Council's concern that the broad delegated powers in section 2 of the Bill, considered above, should be clearly circumscribed.

Conclusion

We are entering a momentous period of decision making as to the future of United Kingdom private international law, both nationally and internationally. The Bill is an important part of that step. It must, however, be seen as part of a wider strategy, along with ongoing negotiations at the international level and the statutory instruments enacted in 2018 and 2019, which make important amendments to United Kingdom private international law on exit day.

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.