



Briefing for Committee Stage of the Private International Law (Implementation of Agreements) Bill

Following its briefing for Peers ahead of Second Reading, the Bar Council has been following the amendments to the Bill carefully. The purpose of this document is to set out the Bar Council's view on certain proposed amendments and to raise a wider concern as to the relationship between the Bill and certain statutory instruments which it amends.

In our initial briefing, we expressed the view that *"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."* However, we then went on to express very considerable concerns regarding the provision in Section 2 (s.2) of the Bill for the use of statutory instruments to implement international agreements to which the United Kingdom (UK) may become party, and as to the breadth of that power.

Upon consideration, we believe that the only international agreement that would be suitable for implementation via the procedure set out in s.2 of the Bill would be the Lugano Convention. This is on the basis that it already forms part of the UK's system of private international law; and has done for many years. Furthermore, there may be an obvious time pressure to implement the Lugano Convention before exit day, not least because any decision whether the UK may join the Convention as an independent Party may not be made until towards the end of the year. This makes s.2 an appropriate mechanism for the implementation of the provisions of the Lugano Convention. We therefore support amendments 1, 4 and 5.

If, contrary to the Bar Council's preference, s.2 were not to be confined to a power to implement the Lugano Convention (as suggested above), we consider that the power should in any event be restricted to instruments exclusively concerned with matters of private international law; so that the power could not be used in respect of individual provisions on, for instance, jurisdiction and recognition and enforcement of foreign judgment in conventions otherwise concerned with other areas of law (such as the Warsaw Convention) and so support amendment 2.

We also consider that the power in s.2 should not apply to the issues set out in s.2(2) and s.2(3) of the Bill (relating to the application of an international convention in or between parts of the UK or a "relevant territory" (as defined in s.2(7)) and so support amendment 3.

In our initial briefing, we stated that we were *"also somewhat concerned that the power in section 2 to proceed by delegated legislation is very broad"* and made a number of suggestions for making its ambit both clearer and narrower. Many of these are closely reflected in amendments 6, 9-13, 16 and 19 as seeking to clarify the definition of "private international law", and address (amongst other things) concerns about:

- the extension of the s.2 power to arbitral award limit (amendment 11);
- the power to make provisions concerning legal aid (amendment 6);
- the use of the power in respect of model laws (amendment 16);

- and the power to make certain provisions in respect of criminal penalties (amendment 19).

We also support amendments 9, 10, 12 and 13 as providing greater clarity as to the scope and limits of the s.2 powers.

Amendment 18 identifies a number of important lacunae where schedule 6 does not currently provide sufficient procedural safeguards. The Bar Council expressed its concerns as to these issues in its initial briefing. Amendment 18 seeks to ensure that the s.2 power may not be used where it is proposed:

- a) to apply an international convention *between* parts of the UK (as opposed to the decision whether to apply it *in* one or more parts of the UK, which is dealt with in schedule 6, para 3);
- b) to apply an international convention between the UK and a relevant territory; and
- c) to amend, extend, adapt or revoke any declaration made at the time of ratification (for instance, if the UK decides to exclude most insurance contracts when ratifying the 2005 Hague Convention, as the European Union has done, and were subsequently to consider removing that declaration. This potential scenario is contemplated in the Memorandum concerning the Delegated Powers in the Bill (para 22)).

These are important issues which should not, in our opinion, be the subject of the s.2 power and the Bar Council supports amendment 18 in its entirety.

We oppose amendment 17 in that it extends the s.2 power to the Isle of Man. As explained in our briefing, s.2 is flawed and already of too wide an ambit; and therefore any extension of its ambit would be unwelcome.

Finally, although no relevant amendment has been tabled, we note that schedule 5 of the Bill makes important changes to a number of very significant statutory instruments that were made pursuant to the European Union (Withdrawal) Act 2018, including the Hague Choice of Court Regulations 2018 (see schedule 5, para 3 of the Bill). Those Regulations are very important in determining the protection to be provided to jurisdiction clauses in favour of UK courts in future.

As stated in our initial briefing, the various statutory instruments on private international law that have been enacted will (save in the relatively limited areas covered by international agreement) determine the UK's rules of private international law upon exit day. We remain concerned that these statutory instruments have not been the subject of proper scrutiny (indeed, this past experience fuels the Bar Council's concerns about the scope of the s.2 powers in the Bill). For immediate purposes, we note the difficulty of seeking in the Bill to amend provisions in statutory instruments that have themselves not been scrutinised and again call for these statutory instruments to be reviewed carefully and, if appropriate, revised as a matter of urgency given the short time available to address these matters before exit day.

The Bar Council
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