



Response from the Faculty of Advocates

to

Consultation on the Private International Law (Implementation of Agreements) Act 2020

- 1. Do you think that the powers the Secretary of State has to make regulations for the purposes of implementing private international law agreements contained in Section 2 of the PILA should be extended for five years from 13th Dec 2025? Please give reasons for your answer.*

As a general proposition, we do not favour the use of subordinate legislation to make significant changes to domestic law. Private international law instruments can have a significant and wide-ranging impact on the private lives of individuals and/or the commercial interests of businesses. They alter the substantive law in a manner which would, ordinarily, justify the scrutiny which is applied to primary legislation.

Notwithstanding these general reservations, we do not object to the specific powers contained in section 2 of the Private International Law (Implementation of Agreements) Act 2020 ("2020 Act") being extended for a further five years. We recognise that, in the context of the exercise of these powers, the substantive issues as regards the contents of the relevant rules will have been resolved in the negotiation of the treaties in question, and that, at the implementation stage, the issues will be inherently technical in nature.

This view is predicated on the assumption that the UK Government will participate fully in the negotiation of such instruments, notably at the Hague Conference on Private International Law ("HCCH"). It is predicated also on the assumption that the UK Government will take full account of, and consult with, relevant interests in all three jurisdictions of the UK (and specifically Scotland) when formulating its negotiating position.

Private international law is an aspect of Scots private law. It will generally be a devolved matter, and, accordingly, it will normally be for the Scottish Government (accountable to the Scottish Parliament) to determine policy in that regard. That is

reflected in the 2020 Act by requiring the consent of Scottish Ministers for any exercise of the regulation-making powers of the Secretary of State in relation to Scotland.

In any event, Scottish legal practitioners and academics with expertise in private international law should be consulted and/or involved at the highest possible level in framing the UK's negotiating position at the HCCH and other relevant institutions, so that any relevant Scots law considerations are properly taken into account.

There is precedent for instruments of the HCCH to be implemented in Scots law without the participation of other constituent parts of the UK. In terms of the UK's declaration under Article 55 of the Hague Convention of 13 January 2000 on the International Protection of Adults, that Convention only applies to Scotland.

2. *Do you think the powers the Scottish Ministers have under Section 2 of the PILA to make regulations or to agree that the Secretary of State may make regulations on their behalf should be extended for Scotland for 5 years from 13th Dec 2025? Please give reasons for your answer.*

For the reasons we have stated above, we do not object to the relevant powers contained in section 2 of the Private International Law (Implementation of Agreements) Act 2020 (the "2020 Act") being extended in respect of the Scottish Government for a further five years. Indeed, as we have observed, the Scottish Government will usually have policy primacy in relation to Scots private international law, and it will be for that Government (accountable to the Scottish Parliament) to consider whether an instrument should be implemented for Scots law by a UK-wide instrument made by the Secretary of State or an instrument specific to Scots law made by the Scottish Ministers. We reiterate our view that Scottish legal practitioners and academics should be given the greatest possible opportunity to input into the relevant implementing legislation.

3. *Do you think the powers a Northern Ireland Department has under Section 2 of the PILA to make regulations or to agree that the Secretary of State may make regulations on its behalf should be extended for Northern Ireland for 5 years from 13th Dec 2025? Please give reasons for your answer.*

Beyond noting that it is appropriate that there is a uniform approach across the UK regarding the respective powers of the devolved administrations, we do not think it would be appropriate for us to comment on matters relating to Northern Ireland.

4. *Would you foresee any intra-UK considerations if the power to make regulations under Section 2 of the PILA was to be extended in only certain parts of the UK? Please give reasons for your answer.*

The legal systems of the UK are distinct and jurisdictionally separate. There may well be differences in approach, including in the context of private international law. At the level of principle, it would be possible to have an approach which required implementation by primary legislation for one part of the UK but permitted implementation by subordinate legislation in another. However, such a position could result in undesirable consequences, for example if there were to be a significant time lag in the progress of relevant legislation in different parts of the UK, particularly as regards provisions “stepping down” the provisions of international treaties for application as between the component jurisdictions of the UK.