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THE RELATIONSHIP BETWEEN THE INSTRUMENTS ADOPTED UNDER THE AUSPICES OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW AND THE EU *ACQUIS*

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Abstract: *The presented article examines the Hague Conference on Private International Law and the instruments adopted under its auspices, with a particular emphasis on their application within the European Union context. Within the scope of the European Union's competence in judicial cooperation in civil and commercial matters, several regulations have been adopted at the Union level, forming a comprehensive framework of Union private international law and procedural law. The Union itself and its Member States are members of the Hague Conference. In situations where both an EU regulation and a Hague convention apply concurrently, it is essential to thoroughly understand the effects of these provisions, their interrelationship, and the resolution of the resulting normative pluralism. The aim of this article is to examine the effects of the Hague conventions within EU law and to analyse how the interrelationships between these legal sources are managed for the practical application of rules in the resolution of disputes involving a foreign element.*

Keywords: *the Hague Conference, Hague conventions, EU acquis, direct effect, international agreements*

INTRODUCTION

Private international law is a branch of law that is gaining in importance as the world experiences varying degrees of integration. Since the early days of international trade, addressing fundamental questions of private international law, such as determining applicable law, jurisdiction, recognizing foreign judgments, and other related matters, has been necessary. In 1893, the first session of the Hague Conference on Private International Law (hereinafter "the Hague Conference" or "the Conference") was held,[1] marking the beginning of its nearly 130-year history of addressing private international law matters worldwide. The European Union is undoubtedly one of the key stakeholders in the international community. Thanks to the degree of economic integration achieved, entities within the EU are increasingly entering into legal relationships with a foreign element. The common market within the EU, characterized by the absence of internal borders, has led to an increase in intra-EU legal relationships with the foreign element, but cooperation and relations between the EU and third-country entities are also extremely widespread.

The Hague Conference has so far adopted a significant number of conventions and instruments that affect the private international law of both the EU Member States and the EU itself. Judicial cooperation in civil matters, including the harmonisation of private international law rules, was not initially an objective of the European Community. The gradual convergence and completion of the internal market have led to an increase in legal

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[1] HCCH, n.d. In: *Hague Conference on Private International Law* [online]. [2023-05-20]. Available at: <https://www.hcch.net/en/about/history>.

relationships with a foreign element and cross-border effects. This necessitated the interconnection of the private international law rules of the Member States.[2] The Maastricht Treaty has made judicial cooperation in civil matters one of the shared competences of the EU and the Member States.[3] In this field, the Union has achieved significant results and harmonised private international law rules in civil and commercial matters through several key regulations. Despite the Union's involvement in private international law, there are parallel unified rules in specific areas at the international level through instruments adopted by the Hague Conference. Following a Council Decision,[4] the EU has been a member of the Hague Conference since 3 April 2007. The possibility for the Regional Economic Integration Organisation (hereinafter as "REIO") to become a member of the Hague Conference is enabled by its Statute under Article 3.[5] The article will be introduced with an overview of the activities of this intergovernmental organisation and its relevance for private international law, particularly in the context of the EU. The presented article aims to identify the effects of the conventions and instruments adopted under the auspices of the Hague Conference in the EU legal order and determine the interrelationship of selected sources. To fulfill this objective, we have chosen several key conventions to be examined in terms of their effects. We will divide them into 3 main categories: conventions to which the EU itself is a party, conventions to which all the Member States are parties but the EU itself is not, and conventions to which only some of the Member States are parties and the EU itself is not. We consider this classification relevant because our partial objective is to identify whether conventions to which the Union per se is not a party are capable of having effects in the Union *acquis*. We have chosen the topic of this article precisely to highlight the fact that in a large number of relationships with a foreign element, it may be one of the Hague conventions that takes precedence in application, even if the theory in the literature on private international law, from our perspective, does not devote sufficient attention to them.

I. CONVENTIONS ADOPTED UNDER THE AUSPICES OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law is celebrating its 130th anniversary. It is a major international intergovernmental organisation aiming to achieve the progressive unification of the private international law.[6] To achieve its stated purpose, the Conference continuously endeavors to find compromises that bring legal rules around the world closer together in the field of private international law, despite the considerable disparities in their legal systems.[7] It is progressively materialising the results of its activities in the

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[2] European Parliament, 2022. In: *European Parliament* [online]. [2023-05-20]. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/154/justicna-spolupraca-v-obcianskych-veciach>.
[3] Art. 4. (2)(j) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] (OJ C 202, 7. 6. 2016, pp. 1–388).
[4] Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law [2006] OJ L 297, 26.10.2006, pp. 1–14.
[5] Art. 3 of the Statute of the Hague Conference on Private International Law.
[6] Art. 1 Ibid.
[7] ŠTEFANKOVÁ, N. et al. *Medzinárodné právo súkromné*. Praha: C. H. Beck, 2011, p. 54.

form of conventions and other instruments.[8] The instruments adopted by the Hague Conference are open for accession not only to members of the Conference but also to States that are not yet members. For this reason, it has already involved more than 150 countries worldwide, although it currently has 90 members in addition to the EU. In addition to legally binding international conventions, the Hague Conference also works on the adoption of other instruments, various protocols, soft law norms, etc.[9]

The Conference itself classifies the adopted conventions and instruments into so-called core, others, and old. For the aim of this article, we have decided to mainly focus on the core ones. From the others, we have selected only a few that, in our opinion, have the most significant effect and influence on the Union's regulations. Of course, with the accession of the EU to other conventions, the legal effects will also change, and we have therefore decided to categorise the conventions for the purposes of the article according to the relationship between the EU and the conventions. Compared to harmonisation at the Union level, we perceive differences in the scope of the instruments and in the interpretative matria. While for the EU, we mainly extract the interpretation of the regulations from the case law of the Court of Justice, in practice, explanatory reports, guides to good practice, and other materials,[10] which may not be available in our language, help us in applying and working with the Hague conventions. We also observe a shortcoming in practice due to the absence of a central adjudicating authority to supplement the vaguer provisions and resolve contentious issues arising from the conventions.

We think that the Conference has achieved a great number of successes in its decades of operation. Particularly in light of the disparities between the legal systems around the world, we consider it a significant achievement to have found compromises on at least partial issues of civil and commercial private international law. However, we believe that the potential of the conference is far greater. Following the example of the EU, we think that other actors in the international community should also be involved in key conventions to ensure a certain standard and unification of private international law worldwide. This would enable private law beneficiaries to find ever more predictability and legal certainty in relations with a foreign element in a globalised world.

The aim of the presented article is to identify the effects of the conventions in the EU legal order. These effects also vary depending on whether the EU itself is a party to the Convention and whether the Convention is capable of creating a direct effect in the Union *acquis*. As mentioned, to achieve this objective, we have divided the analysed conventions into three main categories, depending on whether they bind the Union, all its Member States, or only some of them. The Hague conventions can also be subdivided based on the issues they regulate. Some deal with applicable law and seek compromise settings of determining factors, known as connecting factors, in relation to defined obligations, while others address procedural issues, jurisdiction determination in cross-border disputes, and matters of recognition and enforcement of foreign judg-

8 ŠTEFANKOVÁ, N, SUMKOVÁ, M. *Medzinárodné právo súkromné*. Plzeň: Aleš Černek, 2017, p. 53.
9 HCCH. In: *Hague Conference on Private International Law* [online]. [2023-05-20]. Available at: <https://www.hcch.net/en/about>.
10 Ibid.

ments and recognition of foreign public documents. Further classifications are possible based on *ratione materiae*, into general civil and commercial matters, family law matters, specific scope for certain non-contractual obligations and others. For the purposes of this article, we will only focus on the classification according to the relationship to the European Union.

At the outset, we consider it necessary to note that the examination of the interrelationship between conventions and acts of secondary law is only of applicative significance in those cases where the scope of both sources is cumulatively fulfilled, thus creating a so-called pluralism of sources.[11] In the case of international treaties, it is not possible to examine the scope solely based on the wording in practice. In the case of each particular State, it is also necessary to take into account the reservations that may limit the scope in certain ways for conventions. These reservations will directly impact the application of specific provisions pertaining to the State in question.[12]

II. HAGUE CONVENTIONS TO WHICH THE EU ITSELF IS A PARTY

A number of conventions and other instruments have been adopted under the auspices of the Hague Conference. The EU itself has ratified some of them. Such instruments must be compatible with Union law, and the Union must have the competence to accede to the treaty in question. Simultaneously, the convention must allow the Union to become a contracting party. Therefore, it was a significant development for the European Union that more recent conventions contain the REIO clause, which allows the Union to accede[13] and thus fully activate its external competence through accession. The accession of the Union to these conventions and the assumption of the obligations arising from them do not undermine the sovereignty of the Union; on the contrary, it realises it in practice.[14] These instruments are the Convention of 30 June 2005 on Choice of Court Agreements (hereinafter "the Choice of Court Convention"), the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter "the Child Support Convention") and the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (hereinafter "the Maintenance Obligations Protocol"). In addition to the above, the Union has also acceded to the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter "the Judgments Convention"), which entered into force on September 1, 2023. At the moment, apart from the EU, the only other contracting parties are Ukraine and Uruguay. In January 2024, the UK also signed the Convention, and we see great potential for the Convention to be applied in practice through its future accession.

In theory, we cannot speak about mixed agreements concerning these conventions, because the EU Member States are bound by them precisely through the Union's accession

[11] PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé*. 2nd edition. Praha: C.H. Beck, 2013, p. 36.

[12] PAUKNEROVÁ, M., ROZEHNALOVÁ, N., ZAVADILOVÁ, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer, 2013, p. 20.

[13] PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé*. 2nd edition. Praha: C.H. Beck, 2013, p. 34.

[14] ŠMIGOVÁ, K. *Princíp komplementarity v medzinárodnom trestnom práve*. Passau-Berlin-Prague: rw&w Science & New Media, 2019, pp. 33–34.

to the Convention, even though this may, at first sight, appear to us as a mixed agreement since judicial cooperation is included among the *numerus clausus* of areas where the Union exercises shared competence[15] with the Member States.

Although judicial cooperation in civil matters is one of the shared competences of the EU and its Member States, the EU acceded to these conventions on the basis of exclusive external competence.[16] Exclusive external competence is conferred on the Union by Article 3(2) TFEU in cases where the conclusion of the treaty is necessary in view of a parallel exercise of internal competence, or where the conclusion of the treaty could affect harmonised Union legislation.[17] This type of exclusive external competence does not automatically exclude the external competence of the Member States in a relevant field.[18] Insofar as there is a risk that certain obligations adopted by the Member States of the Union are capable of affecting the Union *acquis* or of undermining the scope of its provisions, that risk, within the meaning of that Article, renders the Union exclusive external competence in the matter in question, without the provisions of the sources in question having to be fully consistent with each other.[19] Since within the EU, a number of areas of private international law are harmonised in the form of regulations, the Union's external competence falls under the above-mentioned article of the TFEU. Moreover, despite the aforementioned, if the Union proceeds to harmonise a certain area to execute a policy deriving from the founding Treaties, the Member States lose the right to enter into contractual obligations in this area with third countries that could affect these rules[20] even if the obligations in question would not collide with EU law.[21] For this case, the CJEU defined the doctrine of implied powers, the so-called AETR type of exclusive competence.[22] The effects of the analysed conventions in the Union *acquis* are naturally influenced by the fact that the Union itself is a contracting party. „Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States."[23] By the wording of the relevant articles of the TFEU, the Union expresses its respect for the principle of *pacta sunt servada*.[24] In accordance with the case-law of the Court of Justice, the conventions become an integral part of the *acquis communautaire* on the date of their entry into force.[25]

[15] Art. 4(2) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, 7. 6. 2016, pp. 1–388.

[16] See e.g. Proposal for a COUNCIL DECISION on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2021] (COM/2021/388 final).

[17] Art. 3(2) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, 7. 6. 2016, pp. 1–388.

[18] SIMAN, M., SLAŠŤAN, M. *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikaturou)*. Bratislava: Euroiuris, 2012, p. 296.

[19] Opinion of the Court (Grand Chamber) of 14 October 2014, *Adhésion d'États tiers à la convention de La Haye*, Case Opinion 1/13, EU:C:2014:2303, paragraph 71-72.

[20] Judgment of the Court of 31 March 1971, *Commission v Council*, C-22/70, EU:C:1971:32.

[21] Judgment of the Court of 5 november 2002, *Commission v Denmark*, C-467/98, EU:C:2002:625, paragraph 82.

[22] EECKHOUT, P. *External relations of the European union – legal and constitutional foundations.* New York: Oxford University Press, 2004, p. 135.

[23] Art. 216(2) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, 7. 6. 2016, p. 1–388.

[24] CRAIG, P., DE BÚRCA, G. *EU law – text, cases, and materials.* 4th edition, New York: Oxford University Press, 2008, p. 202.

[25] Judgment of the Court of 30 April 1974, *R. & V. Haegeman v Belgian State*, C 181-73, EU:C:1974:41, paragraph 5.

The relationship between the Hague conventions and the Union's secondary law, as several authors have pointed out, cannot be clearly defined from the perspective of general international law.[26] Therefore, we will examine this relationship through the lens of both the Union *acquis* and the conventions.

From the binding nature of these agreements, however, the question of their possible direct effect must be distinguished.[27] Direct effect creates individual rights that national courts must protect[28] and which can be directly invoked by individuals before both national courts and EU institutions. Direct effect must be assessed in the light of EU law, and the granting of direct effect in EU law depends on the Union[29] and its institutions, particularly the Court of Justice, which provides for the interpretation of all of EU law, including international treaties that form part of it.[30] We note here that granting direct effect to a treaty provision does not automatically mean granting direct effect to the provision by all parties to the treaty. Thus, if a Contracting Party which has concluded an agreement with the Union were to grant direct effect to a provision in its legal order, this does not create an obligation for the Union to grant that effect to the provision in the same manner. The Court has held that there would be neither a breach of the principle of reciprocity concerning the implementation of the treaty nor a breach of *bona fide* performance.[31]

The conventions under analysis can have a direct effect not only within the legislation of the Member States but also within the Union law itself. In the traditional sense, a treaty should bind only the parties to the treaty. Nevertheless, the direct effect of international agreements is generally possible simultaneously in the law of the EU and of the Member States.[32] Although the direct effect is one of the distinctive features of the Union law, international agreements do not automatically presume their direct effect.[33] According to the case-law of the Court of Justice, in order to fulfill the requirements for direct effect, it is necessary that the provision of the agreement, as regards its wording, purpose and nature, "contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure".[34] In addition to the objective requirements of precision and unconditionality[35], it is also essential to focus on the subjective requirements and to examine the object, purpose, and the intention of the parties to confer a direct effect to the provisions in question.[36] We are of the opinion that certain

[26] ROZEHNALOVÁ, N. et al. *Nařízení Rím I a Nařízení Rím II. Komentář*. Praha: Wolters Kluwer ČR, 2021, p. 291.
[27] SIMAN, M., JANČO M. Priamy účinok medzinárodných dohôd zaväzujúcich Európsku úniu a jej členské štáty. *Justičná revue*. 2021, Vol. 73, No. 8-9.
[28] Judgment of the Court of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C- 26/62, EU:C:1963:1.
[29] CRAIG P., DE BÚRCA G. *EU law – text, cases, and materials. 4. vyd.* p. 269.
[30] Judgment of the Court of 10 december 2015, *Front Polisario v Council*, T-512/12, EU:T:2015:953, paragraph 89.
[31] Judgment of the Court of 26 October 1982, *Hauptzollamt Mainz v Kupferberg & Cie.*, C-104/81, EU:C:1982:362, paragraph 18.
[32] CRAIG P., DE BÚRCA, G. *EU law – text, cases, and materials. 4. vyd.* p. 206.
[33] SIMAN, M., SLAŠŤAN, M. *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikaturou).* p. 384.
[34] Judgment of the Court of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, C 12/86, EU:C:1987:400, paragraph 14.
[35] SIMAN, M., SLAŠŤAN, M. *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikaturou)*, p. 384.
[36] See e.g. Judgment of the Court of 7 May 1991, *Nakajima All Precision Co. Ltd v Council of the European Communities*, C-69/89, EU:C:1991:186.

provisions of both conventions and the related Protocol and the Judgments Convention, once entered into force, fulfil the conditions for granting direct effect also in the Union law. This position can also be supported by the key case-law of the Court of Justice, according to which a Union act should refer to the agreement in question, and that in the case of the Hague conventions, reference to them is often incorporated into the wording of the relevant regulations.[37] The direct effect of selected provisions of the agreements concluded by the European Union gives them application precedence in the legal order of the European Union over the provisions of the secondary law of the Union, in our case, over regulations covering identical issues, provided that both sources of law have a parallel fulfilled scope of application. In practical application, therefore, this category of conventions would, from the perspective of the Union law, carry an application primacy over the regulations. As some authors rightly point out, we are exclusively discussing the priority of application *in concreto* between the provisions in question in a given case, not the substitution or annulment of an international treaty.[38] In this context, we would like to add that a treaty is binding in its entirety, even if it naturally contains provisions which cannot be granted direct effect and which also have interpretive importance in ensuring a contractually conforming interpretation of the provisions of secondary law in question.[39] Therefore, in the case of provisions of international treaties, we not only consider direct effect but also indirect effect. Indirect effect could be described as an expression of the principle that a norm of lower legal force is to be interpreted in accordance with a norm of higher legal force. In EU law, it is referred to as EU-conforming interpretation, which obliges Member States to ensure that indirect effect is respected.[40] Its importance is also evident in EU law, as regulations that refer to selected provisions of international treaties should, as far as possible, be interpreted in accordance with those treaty provisions, [41] irrespective of the direct effect that gives them primacy of application. At the same time, it should be noted that conferring direct effect and priority has other consequences in Union law, particularly the possibility of examining the validity of a secondary law act with reference to an international treaty and a provision thereof that has been given direct effect.[42]

Although, from an EU law perspective, by conferring direct effect, selected provisions of these treaties could take precedence in application over the Regulation, the interrelationship also needs to be considered in the light of the specific regulations and the conventions themselves. In addition to the case law dealing with the general relationship between international treaties and secondary acts, it is also necessary to take into account the provisions of the regulations themselves. In this case, there is a particular overlap with

[37] Judgment of the Court (Second Chamber) of 7 October 2004, *Commission v France*, C-239/03, EU:C:2004:598, paragraph 26.

[38] LYSINA, P., ĎURIŠ, M., HAŤAPKA, M. et al. *Medzinárodné právo súkromné*. 2nd edition. Bratislava: C.H. Beck, 2016, pp. 96–97.

[39] SIMAN, M., JANČO M. *Priamy účinok medzinárodných dohôd zaväzujúcich Európsku úniu a jej členské štáty.*

[40] SIMAN, M., SLAŠŤAN, M. *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikaturou)*, p. 365.

[41] Judgment of the Court of 1 August 2022, *Sea Watch*, C-14/21, EU:C:2022:604, paragraph 92.

[42] Judgment of the Court of 12 December 1972, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, C-21/72, EU:C:1972:115.

the key Brussels I bis Regulation.[43] Under the principle of sincere cooperation, international treaties with identical content concluded exclusively between Member States yield to Union law.[44] However, the obligations that Member States have towards non-Member States must be accepted by the Union under the conditions laid down in Article 351 TFEU. We fully agree that, in the context of private international law, several authors have pointed out that the application of lex specialis conventions must not lead to results that are less favorable to the proper functioning of the internal market.[45] However, these *lex specialis* conventions do not address the complex relationship with the Hague conventions.

Based on the above-mentioned analysis, even if, by direct effect and consequent priority, these international treaties binding on the Union could be applied in a preferential manner through the lens of Union law, the treaties themselves generally address their relationship to the legal order of the REIO. In the case of the Choice of Court Convention, there is a *renvoi sui generis* for the application of the Brussels I bis regulation in strictly intra-EU cases, and this fact has to be deduced on the basis of the provisions of the Convention. From the perspective of this Convention, intra-union relations cannot be considered to be those where one or more of the parties is domiciled in a Contracting State of the Convention that is not a Member State of the EU. Whether both parties are domiciled within the EU must be interpreted autonomously through the provisions of the Convention and only then can a reference back to the Regulation be accepted.[46] Where this domicile is located has to be assessed directly under the Convention.[47] Thus, in intra-Union cases, the Convention itself seems to limit its scope of application and leaves room for the application of Union regulation. Note that individual conventions may determine an intra-Union case in different ways, as we will point out later in the article.

In order to ensure a higher standard and legal certainty and to facilitate the enforcement and recognition of foreign judgments, where both the court of origin and the requested court are located within the EU Member States, Brussels I bis will also take precedence in this case.[48] The same applies to the latest Judgments Convention, which directly states in Article 23(4) that the Convention does not affect the Brussels I bis Regulation.[49] For the EU, it entered into force on September 1, 2023, together with Ukraine, and to date, it has also been ratified by Uruguay. Gradually, others that have already signed but not yet ratified the Convention should also join.[50] We reiterate that it makes sense to

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[43] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351, 20.12.2012, pp. 1–32. (hereinafter as "the Brussels I bis").

[44] CSACH, K., GREGOVÁ ŠIRICOVÁ, Ľ., JÚDOVÁ, E. *Úvod do štúdia medzinárodného práva súkromného a procesného.* 2nd edition. Bratislava: Wolters Kluwer SR, 2018, p. 79. In: *truni.sk* [online]. [2023-05-20]. Available at: <https://www.truni.sk/sites/default/files/uk/f000314.pdf>.

[45] VALDHANS, J., DRLIČKOVÁ, K. *Rozhodování Soudního dvora dvora EU ve věcech uznání a výkonu cizího soudního rozhodnutí: Analýza rozhodnutí dle Nařízení Brusel I bis.* Brno: Masarykova univerzita, Právnická fakulta, 2015, p. 271.

[46] HARTLEY, T., DOGAUCHI, M. *Explanatory Report - Convention of 30 June 2005 on Choice of Court Agreements.* Hague: Hague Conference on Private International Law, Permanent Bureau, 2013.

[47] Art. 4(2) of the Choice of Court Convention.

[48] HARTLEY, T., DOGAUCHI, M. *Explanatory Report - Convention of 30 June 2005 on Choice of Court Agreements.*

[49] Art. 23 (4a) of the Judgments Convention.

[50] HCCH, 2023. In: *Hague Conference on Private International Law* [online]. [2023-05-20]. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>.

examine the interrelationship of these conventions with the Brussels I bis Regulation only under the cumulative fulfillment of the scope of both sources. As we have indicated, despite the notional priority through the lens of Union law, the conventions limit their scope in intra-Union cases and leave the primacy of application to the Union's regulations.[51] Nevertheless, if the Union regulation does not have fulfilled scope and the Convention does, there is no need to examine the interrelationship, and the Convention will apply.

As regards the Child Support Convention and the related Maintenance Obligations Protocol, a possible conflict arises with the parallel regulation in the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[52] (hereinafter as "Regulation on maintenance"). The Regulation itself even refers to these instruments explicitly, e.g. in Article 15 it refers to the determination of the applicable law under the Maintenance Obligations Protocol regime.[53] The Explanatory Report to the Child Support Convention similarly mentions as a basic principle leaving purely intra-EU situations under a regional instrument, which is precisely this Regulation. In this case, the intra-EU cases are slightly differently defined; they are cases where there is no impact on another State Party to the Convention, which is not an EU Member State.[54] The Convention even establishes "the most effective rule" principle, which gives preference to more favourable regulation in the case of other international legal instruments[55] in order to increase protection in maintenance cases and make proceedings more efficient. Should there be more favourable rules, even the Regulation does not prevent the application of such rules in this respect.[56] Overall, the Regulation corresponds to and does not contradict the provisions of this Convention and the Protocol, and we think that it should also be applied preferentially in intra-union cases while respecting the possibility of an exception in the case of a more favourable regulation in the sense of the Convention's "most effective rule".

There may even be a collision between the Hague conventions themselves, but there again we need to draw on the rules of international law and, in particular, Article 30 of the Vienna Convention on the Law of Treaties. In some cases, this article is not sufficient to coordinate the existing instruments, and we subsequently analyse the interrelationship with the *materia* of the Explanatory Reports and the wording of the conventions *per se*. The Maintenance Regulation establishes that it reflects both the Convention in question and the Protocol adopted at the Hague Conference.[57]

As we have shown in this chapter, despite the primacy of the certain directly effective provisions of conventions to which the EU is a party over the secondary law of the Union

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[51] ROZEHNALOVÁ, N. et al. *Nařízení Řím I a Nařízení Řím II. Komentář*. Praha: Wolters Kluwer ČR, 2021 p. 291.
[52] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7, 10.1.2009, pp. 1–79.
[53] Art. 15 of the Regulation on maintenance.
[54] BORRÁS, A., DEGELING, J., n.d. *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*. In: *assets.hcch.net* [online]. 23. 11. 2007 [2023-05-20]. Available at: <https://assets.hcch.net/docs/09cfaa7e-30c4-4262-84d3-daf9af6c2a84.pdf>.
[55] Art. 52 of the Child Support Convention.
[56] Recital 40 of Preamble to the Regulation on maintenance.
[57] Recital 8 of Preamble to the Regulation on maintenance.

in the perspective of the EU *acquis*, the conventions *per se* establish a kind of *renvoi sui generis*, which provides the primacy of the EU regulations in strictly intra-EU situations. This relationship can only be examined when the scope of Regulation and a Convention or Protocol is fulfilled in parallel. We consider that it corresponds to a rational ordering of the matter, increased protection, as well as to the principle of legal certainty and legitimate expectations if, in practice, it is the EU Regulation that is applied in intra-EU cases. What the Convention considers to be an intra-union case is usually specified in the text itself or in the Explanatory Report. In our view, this is particularly the case in situations where all parties to the relationship are domiciled in EU Member States or, for some, if the relationship has no other nexus to a contracting state that is not an EU Member State.

It is important to assess the Union dimension of the legal relationship under analysis autonomously in the light of the Convention in question and only then to adopt a reference back to the Regulation. In practice, we are of the opinion that we will mostly see the the Choice of Court Convention taking precedence, in the context of Brexit, by the fact that domicile in the UK is a popular option for businesses from the Member States. It is therefore conceivable that this Convention will provide a better basis for cooperation between the EU and the UK in the field of judicial cooperation in civil matters.[58] For the Judgments Convention, the only application priority over the Regulation in practice will be in relation to Ukraine and Uruguay, as other states have not yet ratified the Convention. In the following chapters, we will examine the conventions to which the EU is not a contracting party.

III. HAGUE CONFERENCE CONVENTIONS RATIFIED BY ALL THE EU MEMBER STATES

Another category of conventions adopted at the Hague Conference are those which have been ratified by all the Member States of the EU, but not by the union itself. By default, these are conventions to which the Union itself cannot be a party, as they do not allow regional economic integration organisations to become a contracting party.[59] Nevertheless, as we have mentioned, although according to some conventions, the EU cannot contract a Convention, the Union's external competence can, if necessary, be exercised through the Member States.[60] Although the Union is not a contracting party, these conventions may have a direct effect within the EU Member States' legislation, *per* the rules of international law instead of the EU law. But we will examine what effects they may have in Union law. First and foremost, it should be stressed that among the fundamental principles of public international law is the principle of *pacta tertiis nec nocent nec pro-*

[58] European Parliament, 2023. In: *European Parliament* [online]. [2024-04-04]. Available at: <https://www.europarl.europa.eu/factsheets/en/sheet/154/judicial-cooperation-in-civil-matters#:~:text=PIL%20has%20a%20direct%20influence,rules%20set%20out%20in%20PIL>.

[59] See e.g. recital 8 of Preamble to the Proposal for a Council Decision authorising Croatia, the Netherlands, Portugal and Romania to accept, in the interest of the European Union, the accession of San Marino to the 1980 Hague Convention on the Civil Aspects of International Child Abduction [2017] (COM/2017/0359 final - 2017/0149 (NLE).

[60] Opinion of the Court of 19 March 1993, *Convention nº 170 de l'OIT*, Opinion 2/91, EU:C:1993:106, paragraph 5.

sunt.[61] However, these conventions have an exceptional status in the sense that they concern an area regulated by the Union and which, at the same time, bind all its Member States. Since this is an area harmonized at the Union level, Member States are paralyzed from acting individually or collectively to enter into international commitments within this area.[62] Therefore, it is necessary for the Union to provide them with the competence to do so.

Member States subsequently conclude these treaties in the interests of the EU, and they are therefore capable of producing effects in Union law. As pointed out by Rozehnalová et al., this is a complicated relationship where, from a public international law perspective, the Union is not a party per se, and treaty implementation needs to be ensured by the Member States as contracting parties. On the other hand, within the framework of Union law, several authors agree that they are part of Union law. From our point of view, we can therefore attribute to them the same effects in EU law as to treaties concluded by the Union.[63] This is also supported by the case law of the Court of Justice, which has indeed accepted that a direct reference to the application of a provision of an international treaty in a binding source of EU law can produce effects identical to those of the source in question.[64] By analogy, it therefore follows, in our opinion, that whether or not the Union is a party to the agreement in question, the fact that a directly effective provision of Union law contained in a regulation refers to the application of an article of a treaty means that de facto direct effect could also be given to that provision of the treaty. Equally, if we accept that they are part of EU law, we should also accept their indirect effect.

We take the Child Abduction Convention[65] as a model example. The interpretation given above, because the Union regulates the matter and the risk that international obligations accepted by the Member States will affect the common rules of the Union, makes the exclusive external jurisdiction of the Union extend to the entire 1980 Hague Convention. The Union also has exclusive competence in this case to accept the accession of a third State to the Hague Convention.[66] The Union actively supports the accession of third countries to the Convention.[67] The basic source of the Union law in the area concerned is the Brussels II ter Regulation.[68] Concerning intra-union cases, it complements the application of the provisions of the Convention.[69] Overall, the wording of the Regulation is alig-

[61] BROWNLIE, I. *Princípy medzinárodného verejného práva.* Bratislava: Eurokódex, s.r.o. a Paneurópska vysoká škola, 2013, p. 678.
[62] DE BAERE, G. *Constitutional Principles of EU External Relations.* New York: Oxford University Press, 2008, p. 93.
[63] ROZEHNALOVÁ, N. et al. *Nařízení Řím I a Nařízení Řím II. Komentář*, p. 292.
[64] Judgment of the Court of 27 February 2024, *EUIPO v The KaiKai Company Jaeger Wichmann*, C-382/21, EU:C:2024:172, paragraphs 59-63.
[65] The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter as "the Child Abduction Convention").
[66] Opinion of the Court (Grand Chamber) of 14 October 2014, *Adhésion d'États tiers à la convention de La Haye*, Case Opinion 1/13, EU:C:2014:2303, paragraphs 58 and 90.
[67] Proposal for a Council Decision authorising Croatia, the Netherlands, Portugal and Romania to accept, in the interest of the European Union, the accession of San Marino to the 1980 Hague Convention on the Civil Aspects of International Child Abduction [2017] (COM/2017/0359 final - 2017/0149 (NLE).
[68] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L 178, 2. 7. 2019, pp. 1–115. (hereinafter as „the Brussels II ter").
[69] Recital 17 of Preamble to the Brussels II ter.

ned with the Hague conventions, it does not restrict them but may extend their application in cases strictly between EU Member States. The Regulation extensively refers to the provisions of the Convention in various sections. The Regulation, as a binding and generally applicable act of secondary EU law,[70] does have direct effect. Therefore, in our opinion, it provides *de facto* direct effect to the Convention within EU law. At the same time, the references in the Regulation itself confirm that the Regulation will also have to be interpreted in light of the relevant provisions of the Convention, so the indirect effect cannot be called into question.[71]

This is confirmed by the case law, in which the Court of Justice points out, for selected provisions, that it is essentially the direct application of the Regulation by the *forum* in the Member States and not the provisions of the Convention to which the Regulation refers.[72] In our view, therefore, the interrelationship must always be examined in the light of EU law in the case of a specific provision of a treaty compared to a specific provision of a regulation.

The Regulation addresses the interrelationship between itself and the Convention by referring to the application of the Convention and, in addition, to the application of the additional provisions under the Regulation.[73] The Regulation will prevail over the Convention insofar as they they cover the same matters. However, by referencing the Convention, priority will be given to the complementary provisions of the Regulation and, furthermore, to the Convention *per se*.[74] Naturally, this interrelationship can only be assessed when both the Regulation and the Convention have overlapping scopes, which typically occurs only in intra-union cases.

Another such instrument is the Child Protection Convention,[75] to which all the EU Member States are contracting parties. In the decision by which the Council authorised certain States to ratify the Convention on behalf of the EU, it stressed that it is a valuable instrument for ensuring the protection of children at the international level. The Convention does not enable the Union as such to accede and therefore the Union has authorised the ratification of Member States that are not yet parties to the Convention. As the Convention does not encompass all aspects of EU law, this matter falls under shared competence.[76] The main difference in the analysed regimes is the fact that the Conven-

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70 Art. 288 of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, 7. 6. 2016, pp. 1–388.

71 SIMAN, M., JANČO M. *Priamy účinok medzinárodných dohôd zaväzujúcich Európsku úniu a jej členské štáty.*

72 Judgment of the Court of 22 December 2010, *Mercredi*, C-497/10, EU:C:2010:829, paragraph 63.

73 Art. 96 of the Brussels II ter.

74 European Commission, Directorate-General for Justice 2016. *Practice guide for the application of the Brussels IIa Regulation.* Publications Office, 2016. In: *European Union* [online]. [2023-05-20]. Available at: <https://data.europa.eu/doi/10.2838/28781>.

75 Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

76 Recital 2, 3 and 6 to the Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law - Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children [2008] OJ L 151, 11.6.2008, pp. 36–48.

tion also regulates the issue of applicable law. Within the framework of the Brussels II ter Regulation, the Convention prioritizes the application of the Regulation.[77] The Brussels II ter Regulation refers to the Convention in this case and does not interfere with it, which is logical given that all Member States are contracting parties to the Convention and we are therefore relying on the interpretation given for the previous Convention. Also in the case of this Convention, the Regulation directly references its application in determining the law applicable to parental responsibility,[78] thereby incorporating the reference to the Convention directly into the Regulation, which has a direct effect *per se*. Also in this case, we find ourselves in a situation where strictly Union cases will be governed by the Regulation, which refers to the Convention in selected parts. Cases that also involve a non-Member State party to the Convention will automatically adhere to the Convention. In this case, however, the Regulation grants itself priority of application not only if the child is habitually resident in a Member State, but even if the child is habitually resident in a third State that is a Contracting Party to the Convention, when the enforcement and recognition of a decision between two Member States is at issue.[79] However, if the scope of both instruments is fulfilled, not only *ratione materiae* but also territorial, temporal and personal, again the Regulation would take precedence within the EU.[80]

As for the private international law on family law issues, we would also like to point out the Adoption Convention,[81] which falls under the category of treaties binding for all EU Member States. Unlike the previous two instruments, the Convention does not, from our point of view, create effects in the EU law. The Union has the competence to adopt measures in the field of adoption within the context of judicial cooperation, however, there is currently no EU legislation in this area. The Brussels II ter Regulation also excludes these matters from its scope. The only related *nexus* is ensuring the free movement of persons within the EU. From its position, the Union encourages Member States to adhere to the guarantees enshrined in the Convention. It also recommends the adoption of a Regulation on the cross-border recognition of judgments on adoption.[82]

An important Convention binding for all the Member States is the Apostille Convention.[83] In order to support the EU's internal market, the Union *acquis* includes Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union,[84] which also mentions this Convention in its pre-

[77] HCCH, 2018. Haag: HCCH Stále byro, 2018. In: *European Commission, Hague Conference on Private International Law* [online]. [2023-05-20]. Available at: <https://assets.hcch.net/docs/7063058e-edba-4dc9-b5f3-5defca9367f6.pdf>.

[78] Recital 92 of Preamble to the Brussels II ter.

[79] Art. 97 (1) of the Brussels II ter.

[80] European Commission, Directorate-General for Justice 2016. *Practice guide for the application of the Brussels IIa Regulation.* Publications Office, 2016. In: *European Union* [online]. [2023-05-20]. Available at: <https://data.europa.eu/doi/10.2838/28781>.

[81] Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

[82] European Parliament resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions (2015/2086(INL) [2018] OJ C 252, 18. 7. 2018, pp. 14–25.

[83] Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (hereinafter as "the Apostille Convention").

amble, and also the fact that the Regulation goes beyond in simplifying the circulation of certain public documents and their certified copies in intra-union cases. This Regulation is a separate instrument from the Convention. This, in our opinion, limits the Convention's effects within EU law, but it is certainly capable of having a direct effect in the Member States. The recognition system under the Regulation does not require an apostille, but it is possible for a party to apply for an apostille within the EU. In this case, however, the party should be informed that no apostille is required within the EU under the Regulation.[85] Art. 19 deals with the interrelationship in the sense that in intra-EU cases, where the Regulation and the Convention are cumulatively in scope, the Regulation will have precedence of application.[86] The Convention permits simplification of the procedure and does not explicitly prevent States from going beyond in simplifying the authentication requirements.[87]

The Service Convention,[88] to which all the Member States are parties, is of a corresponding nature. The most recent accession among the Member States was that of Austria, where the Convention entered into force in 2020.[89] The Union has expressed an interest in all the Member States being bound by the Convention, as the Convention does not allow the Union itself to accede. This is a shared competence, as Member States retain their competence to the extent that the Convention does not affect the Union *acquis*.[90] The parallel rules on the service of documents are laid down in the Regulation on the service of documents.[91] The Regulation clearly defines its primacy over the Convention in intra-union cases.[92] In this context, some authors draw attention to exceptions in favor of enhanced cooperation,[93] as it allows Member States to conclude agreements in favor of deeper cooperation, speeding up and simplifying the service of documents, but, of course, only if this regime is compatible with the Regulation.[94]

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[84] Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [2016] OJ L 200, 26. 7. 2016, pp. 1–136.

[85] Recital 5 of Preamble to Ibid.

[86] Art. 19 of the Apostille Convention.

[87] HCCH, 2023. *Apostille Handbook – Practical Handbook on the Operation of the Apostille Convention.* Hague: HCCH – Permanent Bureau, 2023. In: *assets.hcch.net* [online]. [2023-05-20]. Available at: <https://assets.hcch.net/docs/a19ae90b-27bf-4596-b5ee-0140858abeaa.pdf>.

[88] Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

[89] HCCH, 2024. *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.* In: *hcch.net* [online]. [2024-05-16]. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>.

[90] Council Decision (EU) 2016/414 of 10 March 2016 authorising the Republic of Austria to sign and ratify, and Malta to accede to, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, in the interest of the European Union [2016] OJ L 75, 22. 3. 2016, pp. 1–2.

[91] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) (hereinafter as "the Regulation on the service of documents") No 1348/2000 [2007] OJ L 324, 10. 12. 2007, pp. 79–120.

[92] Recital 23 of Preamble and article 20 of the Regulation on the service of documents.

[93] LYSINA, P., ĎURIŠ, M., HAŤAPKA, M. et al. *Medzinárodné právo súkromné,* p. 98.

[94] Art. 20 (2) of the Regulation on the service of documents.

As we have demonstrated in this section, the effects of the Hague Conference conventions, to which all the Member States are parties, are not unambiguous. In the case of some conventions, references have been incorporated in the EU Regulations, whereby the reference to the application of the Convention comes from the directly applicable Union act, the Regulation. However, some of the conventions are not explicitly included in the wording of the Regulations, and although the Union has encouraged the ratification of these conventions by the Member States, they do not have an effect within the EU *acquis*. As mentioned, this is also linked to the fact that some conventions do not fall under the exclusive competence of the Union. The third category of conventions under analysis concerns those which have been ratified by only some of the Member States.

IV. CONVENTIONS BINDING ONLY SOME OF THE MEMBER STATES

The last category of agreements concluded under the Hague Conference in relation to the EU Member States are those to which only some of the Member States are contracting parties so far. Again, these agreements are not part of the EU *acquis* and therefore cannot produce direct effects in the EU law. Direct effect in relation to the legislation of the Member States is possible, but only in relation to those that are contracting parties, in accordance with the principle of *pacta tertiis nec nocent nec prosunt*.[95] This direct effect will again be determined according to the principles of public international law.

The aim of this article is to analyse the effects of the Hague conventions in Union law and the interrelation between the sources of Union law and these conventions. As far as effects are concerned, as we have mentioned, this category of conventions does not have a direct effect in EU law. However, the interrelationship with the relevant Union regulations cannot be defined in a straightforward manner. From the above-mentioned article, we can draw the hypothesis that Union law should not affect the obligations arising from international treaties which the Member States have in relation to third parties, and in particular those which they ratified prior to accession to the Union.[96] The relationship to these conventions is set out directly by the legislators in the wording of the relevant regulations. Among all the instruments, we have selected several conventions from this category to ensure that the widest possible range of substantive scopes is represented. In practice, we consider it essential to clearly define the scope of relevant regulation or convention in terms of material, territorial, temporal, and personal scope before applying it. Only when the scope of the two sources has been fulfilled in parallel can we examine their interrelation and address the question of priority.

The first convention analysed is the Protection of Adults Convention,[97] which determines the jurisdiction, applicable law, and conditions for the enforcement and recognition of decisions in cross-border situations in which adults, because of their limited personal capacity, are unable to protect their interests adequately.[98] The Union, from its position,

[95] Art. 34 of the Vienna Convention on the Law of Treaties.
[96] Art. 351 (1) TFEU.
[97] Convention of 13 January 2000 on the International Protection of Adults (hereinafter as „the Protection of Adults Convention").
[98] Art. 1 of the Protection of Adults Convention.

invites the Member States to accede this Convention.[99] The Convention does not only cover personal status, which to a certain extent Union law leaves to the national regulation of the Member States, but also, for example, the protection of the property of the persons concerned. It is important to note that the Convention is aimed at enhancing the protection of certain persons and regulates only a specific range of matters which are not covered by the *lex specialis* provision of Union law and therefore we do not think that there is a direct conflict with Union law, but rather with national law, over which it takes precedence under Article 27 of the Vienna Convention.[100]

Another private international law convention from the family law sphere is the Divorce Convention,[101] containing *lex specialis* provisions on the recognition of divorce and legal separation. In practice, there is a potential collision with the Brussels II ter Regulation, but the Regulation itself states in article 95 that the Regulation will clearly prevail[102] within the limits in which the scope of the Convention and the Regulation would be fulfilled in parallel.[103]

A further potentially conflicting regime is the Regulation on matters of succession[104] and the Form of Wills Convention,[105] the *ratione materiae* of which overlap on the issue of determining the applicable law. The Regulation proclaims compliance with the Convention in its preamble and states that a Member State has the option of continuing to apply a provision of the Convention instead of the Regulation. The relationship with conventions is clearly defined in the Regulation; if the Convention were to apply exclusively between the Member States, the Regulation would prevail. The Convention does not concern only the Member States and thus has a priority of application confirmed by the Regulation.[106]

The situation in the case of the Trusts Convention[107] is specific since 16 of the Member States indicated that no trusts are governed by their legislations. Some Member States follow their own legislation, some are bound by the Convention and some have no regulation under national law.[108] The Convention applies between the Contracting Parties and there is no conflict with the Union *acquis*. Even if we were to search for a general regulation and use the Rome I Regulation, we cannot, because trusts are excluded from the material scope of this general regime.[109]

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99 European Parliament, 2012. The Hague Convention of 13 January 2000 on the International Protection of Adults. In: *European Parliament* [online]. [2023-05-20]. Available at: <https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58310/20121219ATT58310EN.pdf>.
100 Art. 27 of the Vienna Convention on the Law of Treaties.
101 Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.
102 Art. 95 of the Brussels II ter Regulation.
103 LYSINA, Peter, ĎURIŠ, Michal, HAŤAPKA, Miloš et al. 2016. *Medzinárodné právo súkromné*, p. 97.
104 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201, 27. 7.2012, pp. 107–134. (hereinafter as “the Regulation on matters of succession”).
105 Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.
106 Recital 52 and 73 of Preamble and art. 75 of the the Regulation on matters of succession.
107 Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.
108 Report from the commission to the European parliament and the Council assessing whether Member States have duly identified and made subject to the obligations of Directive (EU) 2015/849 all trusts and similar legal arrangements governed under their laws [2020] COM/2020/560 final.
109 Art. 1 (2) of the Rome I Regulation.

Another convention in this category is the Evidence Convention,[110] which is capable of potentially conflicting in application practice through its parallel effect with Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence). The Regulation itself clearly defines the relationship with the Convention and states that in the relationship between the Member States and accordingly, assuming that the scope of the Regulation and the Convention are fulfilled simultaneously, the Regulation will take precedence over the Convention.[111] However, if the concurrent scope was not fulfilled and it was, for example, Denmark, which is not bound by the Regulation because it used the opt-out clause, the Convention would apply.[112] The same would be the case if two other Contracting States to the Convention were involved, one of which is not an EU Member State. This is because the Regulation would not have fulfilled its scope, whereas the Convention does, and thus priority would not be afforded by virtue of priority. If two Member States which are also Contracting Parties to the Convention were involved, we would apply the Regulation and this would be by virtue of precedence of application.

Last but not least Convention that we have selected from this category for the purpose of dealing with the chosen topic is the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents. This Convention may potentially conflict with the EU's Rome II Regulation,[113] which addresses the issue of applicable law as *lex generalis* for non-contractual obligations. Again, the interrelationship is to be addressed in the wording of the Regulation, which states that the Regulation will not affect the application of conventions to which Member States were parties at the time of adoption of the Regulation and which overlap in scope with the Regulation.[114] This again essentially transposes the aforementioned Article 351 TFEU in order to achieve harmony between the relations governed by Rome II and the relations that Member States have with third parties.[115]

We are therefore interested not only in who the Contracting Parties are but also in the moment of accession to the relevant agreement. On the basis of this article, if the scope is cumulatively fulfilled, the Convention would take the application precedence in the Member States that are Contracting Parties. Among the Member States that are not party to the Convention, Rome II is applied not by virtue of primacy of application, but because the Convention would not have fulfilled its territorial scope. A number of authors have pointed out that the disparity between Member States in conflict-of-law

[110] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

[111] Art. 29 of the Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2020] OJ L 405, 2. 12. 2020, pp. 1–39.

[112] E-justice, 2022. *Taking evidence*. In: *European e-justice* [online]. [2023-05-20]. Available at: <https://e-justice.europa.eu/374/SK/taking_evidence>.

[113] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199, 31.7.2007, p. 40-49. (hereinafter as "the Rome II Regulation").

[114] Art. 28(1) of the Rome II Regulation.

[115] MAGNUS, U., MANKOWSKI, P. *European Commentaries on Private International Law: Commentary, Rome II Regulation*. Koln: Verlag Dr. Otto Schmidt, 2019, pp. 696–697.

rules in traffic accidents may undermine legal certainty and directly affect forum shopping.[116]

Anyway, from these examples, we can see that it is indeed not possible to define the relationship unambiguously, and it must always be examined *ad hoc* with concrete legal sources. There are a number of instruments adopted under the auspices of the Hague Conference that bind EU Member States. For the purposes of this article, we have chosen at least some of them in order to demonstrate that the relationship between them and EU *acquis* cannot be clearly defined. This relationship is also depends on the wording of the relevant Regulation itself, based on the competing rules between the various legal sources.[117] As we have shown in the foregoing example, while for some key conventions, the relationship is explicitly defined in the Regulations, for others we have to rely on the general provisions that deal with the relationship between the conventions and the Regulation. In general, however, we can say that conventions that would be binding exclusively between certain Member States would give place to Regulations in application practice. In particular, we are talking about agreements that have been signed by Member States in the past, because today, in practice, we cannot imagine that such agreements would be concluded anew in the context of conflict-of-law rules. This is because the conflict of laws regime is almost completely covered by the general regime in civil and commercial matters, under the Rome I and Rome II Regulations and also by other *lex specialis* Union acts. There are exceptions in selected areas of judicial cooperation, such as the execution of evidence or the aforementioned recognition, which do not preclude the Member States from going beyond the scope of an international agreement and simplifying the even more unified regime within the EU internal market.[118]

We conclude this section by reiterating that in the case of conventions which also impose obligations on Member States *vis-à-vis* third countries we must consider the effects in the national law of individual Member States solely through the lens of public international law. We must be able to clearly identify the relationship between these conventions and the relevant regulations and address the question of application precedence. As mentioned, for some conventions, the Regulation is clearly retained in intra-union situations, in some cases the Regulations themselves refer to the application of the Convention, and in others, we have to rely on the general rules in which the legislator deals with the relationship with the conventions. These general rules in the Regulations are influenced, from our point of view, by two basic factors. The first factor is the aforementioned scope of the Contracting States to the Convention, whether it applies exclusively within the Member States or also to third States. Within the EU, in practice, in our opinion, there is a wide scope for the application of the conventions precisely when the scope of the Regulation is not fulfilled, both in relation to Denmark in relation to the opt-out clauses used, and also in relation to the UK after Brexit. Another determining factor is the timing of the adoption of the Regulation and the entry into force of the agreement in question. If the Con-

[116] Ibid.

[117] CSACH, K., GREGOVÁ ŠIRICOVÁ, Ľ., JÚDOVÁ, E. *Úvod do štúdia medzinárodného práva súkromného a procesného*, p. 79.

[118] Ibid.

vention was already in force at the time of the adoption of the Rome I and Rome II Regulations and a non-Member State would have been a Contracting Party, as fundamental and *lex generalis* sources of determining the applicable law in civil and commercial matters, the Convention prevails.[119]

A different formula is found in the lex generalis regime for determining jurisdiction in civil and commercial matters under the Brussels I bis. Article 71 allows the Member States to apply the Convention, which deals with specific matters.[120] From our vantage point, the interpretation of the concept of specific matters is not clear and must be considered in the context of the objectives of the Regulation and the Convention and their *ratione materiae*. We fully agree with what several authors have pointed out in the context of private international law, that the application of lex specialis conventions must not lead to results that are less favorable to the proper functioning of the internal market.[121]

Some conventions may evoke by their wording their application to general civil and commercial matters, but on examining the negative definition of their material scope we find that in practice they can only be applied to a limited group of legal relations, which would de facto bring us under the dimension of a specific matter within the meaning of the Regulation. As an example, we would point to the aforementioned Choice of Court Convention, which, although it is positively defined for civil and commercial matters, once we exclude all situations from the negative scope, we find that in practice it will only apply to international commercial disputes in cases where the contracting parties have agreed on the exclusive jurisdiction of the court.[122] This fact, as we see it, is capable of fulfilling the condition for the specific matters governed by the Union Regulations.

Moreover, Brussels I bis seems to leave room for discretion to the Member State when it states that it can always establish jurisdiction under the Regulation. Thus, it depends subsequently on the wording of the specific Convention whether it allows a return under the REIO regime, and the court then decides on the appropriateness of accepting such a *sui generis renvoi*. The chapter devoted to this category of Hague Conference conventions concludes the body of the present article, and the most significant outcomes are summarized in our conclusion.

CONCLUSION

The presented article addresses the effects of the conventions adopted under the auspices of the Hague Conference within the EU *acquis* and the interrelation between the sources of the EU law and these conventions. Judicial cooperation in civil matters is defined by the founding treaties as a shared competence of the Union and the Member States. However, the exercise of competence is shifted to a position of exclusive competence in the

[119] Art. 25 of the Rome I Regulation and art. 28 of the Rome II Regulation.
[120] Art. 71 of the Brussels I bis Regulation.
[121] VALDHANS, J., DRLIČKOVÁ, K. *Rozhodování Soudního dvora dvora EU ve věcech uznání a výkonu cizího soudního rozhodnutí: Analýza rozhodnutí dle Nařízení Brusel I bis.*, p. 271.
[122] EUR-Lex, 2017. *Právna istota v medzinárodnom obchode pre podniky EÚ, ktoré uplatňujú dohody o voľbe súdu.* In: *European Union Law* [online]. [2023-05-20]. Available at: <https://eur- lex.europa.eu/SK/legal-content/summary/legal-certainty-in-international- trade-for-eu-businesses-using-choice-of-court-agreements.html>.

light of the theory of implied powers, under Article 3(2) of the TFEU.[123] A number of Regulations of a general and *lex specialis* nature have been adopted at the Union level in this field. Simultaneously, several key instruments have been adopted at the Hague Conference.

As we have mentioned, for the purposes of the article it was necessary to classify Hague conventions into three categories. The first category includes the conventions to which the Union itself is a contracting party. As we have proved in the article, certain provisions of these conventions are directly effective within EU law, take application primacy over the secondary acts of the EU *acquis*, and should take the application precedence over the regulations from the perspective of the EU law. These conventions, as part of Union law, also have an indirect effect in ensuring a contractually conforming interpretation. However, these conventions also address the interrelationship in their wording and refer to the applicability of the Regulations in strictly intra-EU cases. Whether the case extends beyond the borders of the EU Member States must be analysed in the light of the autonomous interpretation of the relevant Convention. If this intra-union element is satisfied, the court hearing the case should, in our opinion, accept such a *sui generis renvoi* to the Union law, as this enhances the legal certainty of Union subjects and the rational ordering of matters. With this purpose in mind, the following "REIO give-way" rules[124] are incorporated into the text of the conventions.

The second category comprises the conventions which bind all the Member States but not the Union *per se*. This is most often due to the fact that the Convention in question does not enable the REIO to accede as a contracting party. Nevertheless, the Union has often invited Member States to accede and frequently refers to these conventions in its legal acts. Insofar as these conventions fall within the exclusive competence of the Union and have been concluded by the Member States on the basis of a power conferred on them by the Union in its interest, as we have noted, several authors agree that they form part of EU law and can therefore produce effects in EU law identical to those of conventions to which the Union is a party. In addition to these, there are also conventions that do not fall under the exclusive competence of the Union, but which the Union has encouraged Member States to conclude. As the Union as such is not bound by them, these conventions do not have a direct effect in Union law, but a direct effect in the legislation of the Member States is possible and should be examined from the point of view of public international law. Some conventions and their specific provisions are directly incorporated into Regulations, which have a direct effect themselves. Thus, in practice, selected provisions of the conventions become directly effective in EU law through their incorporation into Regulations.

The third category comprises conventions that bind only some of the Member States. *Pacta tertiis nec nocent nec prosunt*, therefore, other Member States are not affected by them, nor can they produce effects in European Union law, only in the legislation of the

[123] Art. 3(2) of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, 7. 6. 2016, pp. 1–388.

[124] PERTEGÁS, M. *The Brussels I Regulation and the Hague Convention on Choice of Court Agreements*. In: *ResearchGate* [online]. [2024-04-04]. Available at: <https://www.researchgate.net/publication/225366342_The_Brussels_I_Regulation_and_the_Hague_Convention_on_Choice_of_Court_Agreements>.

Member States that are bound by them. As regards the interrelationship, we distinguish two situations. If the Regulation *per se* addresses the question of the relationship with the particular Convention under consideration, that relationship is clearly defined. If the Regulation does not address the relationship with that particular Convention, we must follow the general provisions laid down in the Regulation which address the relationship with existing conventions. Most of the regulations have common features in that if the Convention were concluded exclusively between the Member States, the Regulation would prevail. Where non-Member States are concerned, which is the case with the Hague Conference conventions in particular, the relationship to the Regulation is more complicated. We have shown in the article that it is mostly affected by whether it was concluded at the time the Regulation was adopted. It is not possible to define this relationship unambiguously, and therefore we always analyse it *ad hoc* and *in concreto* in the relationship between one concrete Convention and the relevant Union Regulation.

In each case, the crucial issue for defining the interrelationship is determining the scope of application, encompassing subject matter, temporal, territorial, and personal scope. We can only examine the interrelationship if both a source of international law, a Convention, and a Regulation of the Union *acquis* have parallel fulfilled scopes because without a fulfilled scope, the source in question cannot be used. The application of a source that has a fulfilled scope over a source that does not have it fulfilled is not, of course, by virtue of its precedence. If we have cumulatively fulfilled the full scope of both sources, only then do we address the question of their relationship and identify which one carries application priority. In practice, a situation may arise where one of the sources under consideration has a broader scope, dealing with more matters, for example, both jurisdiction and applicable law, while the other one addresses only one aspect of the subject matter. Naturally, the interrelation is resolved only in the field where their *ratione materiae* overlap, and the remaining part of the source with broader regulation can be applied as if no conflict exists.

Having summarised the outcomes of our article, we would like to express our support for the activities of the Hague Conference on Private International Law. Its activities contribute to increasing legal certainty for the beneficiaries of these legal instruments. Similarly, in the context of Union judicial cooperation in civil and commercial matters, the constant deepening of harmonisation is necessary for the effective functioning of the EU internal market. The accession of the Union and of states around the world to the conventions adopted under the auspices of the Hague Conference has ensured a certain standard of judicial cooperation in civil and commercial matters worldwide. Therefore, we believe that cooperation will continue to deepen both at the Union level and within the Hague Conference.