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Managing the Risk of Conflict between Private International Law Treaties

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Abstract

Private international law is a field replete with numerous treaties, reflecting the continuing influence of an internationalist perspective on its purposes and methods. It is characteristic of this field that there are repeated treaties on the same, related or neighbouring topics, both because older treaties have been updated with new techniques, and because a sectoral approach is generally adopted to deal with particular problems or subject areas. Given the traditional concerns of private international law with reducing the risk of conflicting (national) regulation, this practice, somewhat ironically, gives rise to a risk of conflict between private international law treaties. The treaties, in response, include a variety of clauses which are intended to address this risk in one of two main ways – first, through rules of interpretation or scope which are designed to avoid a conflict arising, and second, through resolving a conflict in favour of one of the treaties. This article provides a taxonomy of these treaty interaction clauses, and an evaluation of the difficulties and complexities which arise from their application in practice.

1. Introduction

The field of private international law is sometimes considered not to be genuinely international, but rather 'that part of the law of England and Wales [or indeed any other legal system] which deals with cases having a foreign element'.[1] It is, nevertheless, a field replete with numerous treaties, reflecting the continuing influence of an internationalist perspective on the purposes and methods of private international law.[2] Many of these treaties are negotiated under the auspices of the Hague Conference on Private International Law, an international organisation which is a direct inheritor and continuation of the nineteenth century (and earlier) 'internationalist' tradition in private international law.[3] The impact of this tradition is not limited to treaties. For example, private international law rules are often (although not invariably) thought to aspire to systemic goals, such as reducing the risk of a conflict between sovereigns (particularly in the form of conflicting laws or judgments) or increasing the efficient functioning of cross-border economic activity and thus international markets. Sometimes these goals or values are taken into account in purely domestic rules, through an internationally minded approach to their development

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[1] *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 16th edn, 2022), [1-001].

[2] See generally eg Alex Mills, 'Connecting Public and Private International Law', in Veronica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing, 2018); Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009).

[3] See further eg JHA van Loon, 'The Hague Conference on Private International Law: An Introduction', in PJ van Krieken and D McKay (eds), *The Hague: Legal Capital of the World* (TMC Asser Press, 2005).

or application, including considerations of 'comity'.[4] However, internationalist goals in private international law are often (though again this is debated) thought to be best achieved through international harmonisation of private international law rules, in the form of private international law treaties – establishing what is (or at least aspires to be) *truly* international private international law.

Private international law treaties have another characteristic feature which is particularly important for the purposes of this article – the existence of repeated treaties on the same, related or neighbouring topics. This multiplicity of treaties has arisen for two main reasons. The first reason is the evolution of private international law doctrine and techniques, leading to new treaties which replace or supplement earlier ones with 'improved' rules. The second reason is that a sectoral approach is generally adopted to private international law regulation, as specific treaties are drafted to deal with particular problems or subject areas, leading to the gradual emergence of an imperfect patchwork regulatory landscape.[5]

Lest this sound overly critical, it is important to note that there are good reasons for the adoption of a patchwork approach – a patch may be of particular importance, and it may also be all that is possible at a given point in time. But given the traditional concerns of private international law with reducing the risk of conflicting (national) regulation, this practice, somewhat ironically, gives rise to a risk of conflict between private international law treaties. The patchwork metaphor invites us, at least, to inspect the seams to see if there are overlaps, gaps or other discontinuities in design. These concerns also risk undermining legal certainty, which is another traditional aspiration of many private international law rules, and in particular, a common objective of private international law treaty-making.

Public international law includes a number of rules which are designed to address the risk of treaty conflict. These rules, many of which were addressed in depth in a well-known report by the International Law Commission on the 'Fragmentation of International Law',[6] generally adopt one of two techniques. First, treaty conflicts may be *prevented*, through rules which provide for the harmonious interpretation of treaties. Most famously, Article 31(3)(c) of the Vienna Convention of the Law of Treaties 1969[7] (VCLT) provides that in interpreting a treaty account shall be taken of 'any relevant rules of international law applicable in the relations between the parties'. Second, treaty conflicts may be *resolved*, through rules of priority which accept (or assert) the superiority of one treaty over another. In international law it has been recognised, for example, that a more specialised treaty may take priority over a more general one (the *lex specialis* rule), or that a later treaty may take priority over an earlier one (the *lex posterior* rule).[8]

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[4] See further eg Adrian Briggs, 'The Principle of Comity in Private International Law' (2012) 354 Recueil des Cours 1; Joel Paul, 'The Transformation of International Comity' (2008) 71 Law & Contemporary Problems 19.

[5] On this approach see generally eg Matthias Lehmann, 'Incremental International Law-Making: The Hague Jurisdiction Project in Context' (2023) 19 Journal of Private International Law 25.

[6] *Fragmentation of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi* (2006) A/CN.4/L.682.

[7] United Nations Treaty Series, vol. 1155, p. 331.

[8] The *lex posterior* rule is codified in Article 30(3) and (4) of the VCLT.

These general rules are, however, only a default framework for addressing the risks of treaty conflict.[9] The rules are optional, and it is open to state parties to agree on different rules in particular treaties, through clauses addressing the interpretation or priority of the treaty's rules. The effectiveness of these provisions may be a complex question in unusual cases, not least where treaties have conflicting 'conflict management' provisions. For example, it is at least theoretically possible that two treaties could overlap and each assert priority over the other – creating not just a conflict of treaties, but a conflict of treaty conflict management rules. In general, however, such outcomes are uncommon, and effect can and indeed must be given to the intention of the state parties.

The long and complex history of private international law treaty-making practice has spawned a relatively little-studied[10] but fascinating range of such 'treaty conflict management clauses', and it is these clauses which form the focus of this article. This article does not deal with the possibility of a conflict between private international law treaties and other sources of international law, which is an issue deserving of extensive study in its own right – particularly (but not only) in terms of human rights law.[11] It also does not deal with the complexities arising from the possibility of a conflict between private international law treaties and regional private international law arrangements, which may or may not be in the form of a treaty, an issue which is distinctive and in recent practice has been dealt with through specialised treaty provisions.[12]

The practice of treaty conflict management clauses is too extensive to be examined exhaustively in the scope of this work, but this article illustrates its analysis with representative clauses from more than ten different private international law treaties (largely but not exclusively negotiated under the auspices of the Hague Conference), many of which contain multiple clauses. This practice is of course of great interest to private international lawyers, who are most likely to be concerned with the subject matter of these treaties and the risk of their conflict. It is submitted, however, that this 'body of work' should also be of interest to public international lawyers, as a case study for the development of specialised treaty conflict management techniques. This is not to say that the approaches necessarily present a coherent perspective or framework, or that there is a single identifiable 'private international law approach' to managing the risk of treaty conflict. Indeed, it may be suggested (again without intending to be overly critical) that the development of the law on these questions has been driven more by specific pragmatic

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[9] The status of these rules as default rules is recognised in Article 30(2) of the VCLT, for example, which provides for the possibility and effectiveness of distinctive treaty conflict management clauses.

[10] Notable exceptions are María Blanca Noodt Taquela and Veronica Ruiz Abou-Nigm, 'The draft judgments convention and its relationship with other international instruments' (2018) 19 Yearbook of Private International Law 449; María Blanca Noodt Taquela, 'Applying the most favourable treaty or domestic rules to facilitate private international law co-operation' (2016) 377 *Recueil des Cours* 121; Andrea Schultz, 'The Relationship Between the Judgments Project and Other International Instruments', Prel. Doc. 24, December 2003, Hague Conference on Private International Law; Alexandre Malan, *La concurrence des conventions d'unification des règles de conflit de loi* (Presses Universitaires d'Aix-Marseille (PUAM), 2002); Paul Volken, 'Conflicts between Private International Law Treaties', in W.P. Heere (ed), *International Law and the Hague's 75th Anniversary* (TMC Asser Press, 1999).

[11] See eg James J Fawcett, Máire Ní Shúilleabháin and Sangeeta Shah, *Human Rights and Private International Law* (Oxford University Press, 2016).

[12] See eg Hague Choice of Court Agreement 2005, Article 26(6), deferring in defined circumstances to the rules of a 'Regional Economic Integration Organisation', with the European Union in mind.

problem-solving than by general or consistent theoretical design. Nevertheless, in this practice it is possible to identify and analyse a range of distinct and in certain respects novel techniques, and also to identify some complexities raised and not always satisfactorily addressed by these techniques.

2. Taxonomy of Private International Law Treaty Interaction Clauses

The range of clauses examined in this article can be categorised under two broad headings, already introduced above, under each of which further sub-types can be distinguished.

The first category, addressed in section 3 below, consists of clauses which aim at conflict prevention or avoidance. Two distinct types of these clauses are identified. First, clauses which provide that treaties are to be interpreted with other treaties in mind, so as to avoid conflict – these will be referred to as 'interpretive alignment clauses'. Second, clauses may provide that there is no conflict between two treaties, because their scope of application is in some way mutually exclusive, which is to say that the boundary of application of one treaty is determined by the other. These will be referred to as 'boundary clauses'.

The second category, addressed in section 4 below, consists of clauses which aim at conflict resolution – accepting the existence or at least potential existence of conflicting treaties, but seeking to resolve the conflict through a priority rule. These may be divided into three sub-categories. First, clauses which assert that the treaty of which they form part takes priority over one or more other treaties. Second, clauses which assert that one or more other treaties take priority over the treaty of which they form part. Typically, but not invariably, this will involve a new treaty deferring to a pre-existing treaty (thus reversing the *lex posterior* rule which might apply in default), generally on the basis that the pre-existing treaty is a more specialised instrument (thus codifying or clarifying the operation of the *lex specialis* default rule). Third, a treaty which has different effects (asserting or giving priority) depending on the circumstances, described here as a 'conditional priority clause'. This section also considers a complication raised by the possible effect of a treaty on third states or third parties, which may affect or modify the application of a priority rule.

3. Conflict Avoidance Clauses

This category concerns clauses which seek to affect the meaning of a treaty in order to avoid a conflict with one or more other treaties. These are divided into two sub-categories, each addressed in turn.

3.1. Interpretive alignment clauses

The first type of clause is perhaps the simplest on its face – a clause which expressly aims to align the interpretation of the treaty of which it forms part with one or more other treaties. The Hague Choice of Court Convention 2005,[13] for example, contains in Article 26(1) the following provision:

> This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

An identical provision is found in the Hague Convention on the Recognition and Enforcement of Foreign Judgments 2019,[14] Article 23(1). Although such clauses may appear simple, they may nevertheless raise a number of complications.

A first question which arises is how this provision relates to Article 31(3)(c) of the VCLT, which (as noted above) provides that in interpreting a treaty account shall be taken of 'any relevant rules of international law applicable in the relations between the parties'. The Hague Convention clauses are evidently narrower in one respect, in that they are limited to treaties rather than 'any relevant rules of international law', which might also include rules of customary international law or general principles of international law. This reflects the fact that the Hague Convention clauses are intended to function as a treaty interaction clause rather than a general interpretive provision. But it is unclear whether the intention of these clauses is to derogate from the VCLT interpretive rules, or to reaffirm them in part. Does the presence of Article 26(1) of the Hague Choice of Court Convention 2005, for example, exclude (by omission) the possibility of interpreting the Convention in light of rules of customary international law or general principles of international law?[15] In a different respect, the Hague Convention clauses are potentially broader than the VCLT rule, because they clearly allow for the interpretation of the treaty to be affected by other treaties concluded *after* the relevant Hague Convention, which is uncertain under the VCLT and related to the equally contentious question of the dynamic interpretation of treaties.[16]

A second related question is what 'Contracting States' means for the purposes of this rule. Under the VCLT rule, the question of what rules of international law might be relevant to the interpretation of a treaty has sometimes been contentious. If the issue is the interpretation of a treaty in line with customary international law, the position is relatively clear – rules of customary international law bind all states (perhaps absent the theoretical position of a persistent objector), and are therefore automatically 'applicable in the relations between the parties'.[17] But more complex questions arise concerning when the meaning of a multilateral treaty should be affected by other treaties. Here a tension may arise between the desire to avoid a treaty conflict, and the coherence of the treaty itself.

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[13] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.
[14] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments.
[15] Such a question might arise, for example, in relation to Article 2(6) of the Convention, which preserves the privileges and immunities of States and international organisations, although in that case recourse to systemic interpretation rules is perhaps unnecessary as the text itself invites interpretation aligned with any applicable rules of international law.
[16] See eg Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 316ff; Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP, 2024).
[17] As in the well known decision of the International Court of Justice in *Case concerning Oil Platforms* (Iran v United States) [2003] ICJ Reports 161 – although the application of the principle in this case was controversial.

One option, for example, would be to say that any treaty is relevant if it binds *some* parties – that if, for example, the Hague Choice of Court Convention 2005 binds states A, B and C, the meaning of the obligations which apply between states A and B may be affected by a different bilateral treaty between states A and B. (It is generally accepted that any modification to the meaning would not affect the obligations of state C, as this would violate the basic principle of privity of treaties.) But this would create a situation where the meaning of the treaty could be different for different states, which would frequently be problematic – it would seem, for example, to contradict the object and purpose of a treaty harmonising private international law rules. Indeed, such an interpretation would arguably be contrary to Article 23 of the Hague Choice of Court Convention 2005 (and similarly Article 20 of the Hague Judgments Convention 2019), which provides that:

> In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

To avoid this possibility, the clause could be interpreted more narrowly, to say that the Hague Choice of Court Convention 2005 should be interpreted only in line with those treaties to which *all* Hague Convention state parties are also parties – that is to say, if the parties to the Hague Convention are states A, B and C, another treaty is only relevant to its interpretation if states A, B and C are all parties to that treaty as well (accepting that the other treaty may have additional parties). But for a multilateral treaty with many state parties, this significantly reduces how useful the interpretive alignment clause actually is, as it may be very unusual for all state parties to be party to another treaty. In addition, this still leaves open some further complexities. For example, what if state D subsequently joins the Hague Convention, but is not a party to the other treaty – does the accession of state D potentially change the meaning of the Convention for all its existing states? Or if state A were subsequently to cease being a party to the other treaty – would that potentially affect the meaning of the Hague Convention? The point here is not to suggest that an easy solution exists to these difficulties, but rather to highlight that this form of clause is likely to have only limited application, and replicates many of the complexities which are well known to exist in the literature on Article 31(3)(c) of the VCLT.[18] While these difficulties may not always lead to practical problems for the interpretation of private international law treaties, it is in any event important to recognise the complexities which may arise if these clauses are to be considered as a potential 'model' in other areas of international law. Interpretive alignment clauses may well facilitate avoiding a conflict with other treaties in certain cases, but the price paid may be the risk of introducing additional uncertainty and unpredictability into the interpretative process.

3.2. Boundary clauses

A second way in which private international law treaties may seek to avoid a conflict with another treaty is not directly through aligning the interpretation of their terms, but through defining the scope or boundary of a treaty by reference to another treaty. The intention

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[18] See, eg, Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279, 313ff; see further Campbell McLachlan, *The Principle of Systemic Integration in International Law* (OUP, 2024).

here is that in treaties dealing with potentially related subject matters, the scope of each treaty should be interpreted in a way which is mutually exclusive, which is to say, that only one treaty should apply to a particular issue.

An example of such a clause may be found in Article 50 of the Hague Child Support Convention 2007,[19] which provides that:

> This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

The language 'does not affect' in this context is intended to capture the idea that issues addressed in the two other named treaties are beyond the scope of this Convention. It articulates a boundary between issues addressed in this Convention, and issues addressed by other treaties.

Another example of such a clause comes from Article 23 of the Hague Convention on Law Applicable to Contracts for the International Sale of Goods 1986,[20] which provides that:

> This Convention does not prejudice the application -
>
> a) of the United Nations Convention on contracts for the international sale of goods (Vienna, 11 April 1980);
>
> b) of the Convention on the limitation period in the international sale of goods (New York, 14 June 1974), or the Protocol amending that Convention (Vienna, 11 April 1980).

The language used in this clause, that the Convention 'does not prejudice the application' of the other treaties, may in certain respects at least appear to give priority to the other two treaties (and thus be an example of a 'deference clause', examined in section 4.2 below) – this is particularly the case in relation to the CISG and the rules therein governing its scope of application. At least in large part, however, this clause is arguably rather about drawing a boundary between the Hague Convention (which provides choice of law rules to determine which national substantive law applies) and the two other named treaties (which provide for the harmonisation of certain national rules of substantive law[21]).

One feature of this type of clause, which distinguishes it from the 'interpretive alignment' clauses discussed above, is that it applies regardless of whether states are party to the other treaty (or treaties). It thus avoids some of the complexity raised by interpretive alignment clauses, as noted above, but at the price of potentially restricting the effect of a Convention even if there is no other treaty actually in force governing the affected issues. To put this another way, the scope of a Convention may be reduced to avoid potential conflict with another treaty, even if that other treaty does not actually apply to the affected states (and

[19] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support.
[20] Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=61 (not in force).
[21] Whether limitation periods are viewed as 'procedural' or 'substantive' is perhaps slightly controversial, but in any case they are distinguishable from the conflict of laws rules provided by the Hague Convention.

thus the conflict could not in fact arise). Another difficulty with this type of clause is that the scope of the other treaty may not always be clear, and thus applying this clause may simply relocate the problem – instead of simply having to interpret the scope of the treaty at hand, that scope may now be determined indirectly through an equally difficult task of interpretation in relation to a second treaty.

4. Conflict Resolution Clauses

The second main form of conflict management clause, described in this article as a 'conflict resolution clause', adopts a different approach. Instead of affecting the meaning of a treaty (through modifying the interpretation of its terms or its scope), it affects the application of the treaty. It does not seek to avoid a conflict arising through interpretive rules, but rather directly affects the application of one or more treaties, through the assertion that one treaty has priority over another, either generally or subject to particular conditions. This section also discusses the issue of how these clauses may seek to preserve the rights of third states or third parties under treaties which would otherwise be disapplied.

4.1. Priority asserting clauses

The first category of clause here is perhaps the most obvious – a clause which asserts that the treaty in which that clause is found has priority over other treaties. Most commonly, of course, this will be a new treaty asserting priority over one or more older treaties, as it is considered to represent more advanced rules. Such a provision may be viewed as a codified confirmation of the *lex posterior* rule. It is notable, however, that in private international law treaties there is a wide variety of different ways in which such clauses are drafted.

One example is from the New York Convention 1958,[22] Article VII(2) of which provides that:

> The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

The earlier treaties 'cease to have effect' between Contracting States – it is perhaps not entirely clear if this is the same thing as saying that they are terminated as a matter of the law of treaties, though the impact is undoubtedly similar in this context where one instrument is intended to replace another entirely.

Slightly more complex language can be found in the Hague Child Support Convention 2007, Article 48 of which (headed 'Co-ordination with prior Hague Maintenance Conventions') provides that:

> In relations between the Contracting States, this Convention replaces, subject to Article 56(2), the Hague Convention of 2 October 1973 on the Recognition and

[22] United Nations Treaty Series, vol. 330, p. 3.

> Enforcement of Decisions Relating to Maintenance Obligations and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

The 2007 Convention is described as 'replacing' the earlier treaties, but only in so far as their 'scope of application … coincides'. The effect of such a provision is more clearly not a termination of the earlier treaties, but rather a partial suspension or replacement of them, with the earlier treaties continuing to operate to the extent that they cover matters outside the scope of the new treaty.

The 2007 Convention contains another very similar clause in Article 49 in relation to another treaty, providing that:

> In relations between the Contracting States, this Convention replaces the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.

Another variation of this type of clause is found in the Hague Child Abduction Convention 1980.[23] The first part[24] of Article 34 of this Convention provides that:

> This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions.

This clause does not seem to purport to terminate or suspend the earlier treaty, but rather simply declares that the Convention 'shall take priority' in regard to the specified matters (and, implicitly, not otherwise). This provision seems to fall therefore more evidently into the category of priority rules recognised in international law, such as the *lex posterior* rule, which equally do not seek to affect the interpretation or validity of other rules, but rather simply to resolve what would otherwise be a potential conflict.

Other treaties have more complex arrangements for dealing with the effect of a new treaty on earlier treaties. For example, Article 22 of the Hague Service Convention 1965[25] provides that:

> Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

The new Convention thus 'replaces' only specific Articles of the earlier treaties, suggesting that otherwise the earlier treaties would continue to apply. However, Article 23 goes on to provide that:

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[23] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction.
[24] The remainder is discussed in section 4.3 below.
[25] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/service.

> The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.
>
> These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

This preserves the application of particular Articles of the earlier treaties, but subject to a substantive condition. Although it is not made clear, implicitly it would seem that the other Articles of the two mentioned earlier treaties (ie those not mentioned in Articles 22 or 23 of the 1965 Convention) continue to apply, without condition.

The situation is complicated still further by Article 24 of the 1965 Convention, which provides that:

> Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

The effect of this provision is to preserve 'supplementary agreements', which would themselves likely be treaties, modifying the effect of the 1905 and 1954 Conventions. But it is not entirely clear when this ought to apply. It would seem odd, for example, to preserve a supplementary agreement which relates to one of Articles 1 to 7 of the 1905 or 1954 Conventions, but at the same time (pursuant to Article 22) 'replace' those earlier provisions. It is perhaps likely that the intention here is that the supplementary agreements are only preserved to the extent that they remain practically relevant because they relate to provisions which are themselves preserved.

One complexity which arises from this practice, and the variety of terminology which is used, is how these provisions relate to the rules on the termination or suspension of treaties under the VCLT. If a clause in one treaty states that its provisions 'replace' another treaty, or 'take priority' over it, or that the other treaty 'ceases to take effect', it is unclear what (if anything) this means for the legal status of the other treaty. Is the earlier treaty still a valid treaty, which is merely presently disapplied by virtue of the later treaty, or has it been terminated? This might be particularly important if the later treaty is terminated. Does the earlier treaty then resume application, or is this impossible because the earlier treaty was itself terminated at the time the later treaty was entered into?

This issue is one of the many legal complexities which has arisen in the aftermath of the UK departure from the European Union ('Brexit'). Prior to the UK becoming a member of the European Union (and its predecessor organisations), bilateral treaties on the recognition and enforcement of foreign judgments existed between the UK and various EU Member States, including Austria, Belgium, France, Germany, Italy and the Netherlands. These were given effect in UK domestic law through regulations – for example, through the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1973.[26] At the time of the UK's accession to the European Union, the relevant EU private international law rules were, as is well known, in a separate treaty – the Brussels Convention

[26] SI 1894/1973.

1968.[27] Article 55 of the Brussels Convention set out its relationship with a list of other (generally bilateral) treaties, providing that 'this Convention shall, for the States which are parties to it, supersede the following conventions'. The UK became a party to the Brussels Convention pursuant to a 1978 Accession Agreement, and as part of that Agreement the bilateral treaty between the UK and Italy was added to the list of treaties subject to the rule in Article 55 of the Brussels Convention.[28] For the duration of the UK membership of the European Union, the UK-Italy bilateral treaty was therefore expressly 'superseded' by EU rules.

It is not entirely clear what legal effect this 'superseding' had, but it certainly appears that the intent was not to terminate the listed treaties, because Article 56 of the Brussels Convention further provided that:

> The Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters to which this Convention does not apply.

Matters falling outside the temporal, territorial or subject-matter scope of the Brussels Convention could thus remain governed by a pre-existing bilateral treaty, suggesting very clearly that no termination of these instruments was envisaged. The Brussels Convention was itself, of course, superseded by the Brussels I Regulation[29] in 2001, and the Recast Brussels I Regulation[30] in 2012, but each contained similar provisions allowing pre-existing bilateral treaties to continue to the extent that they covered matters not addressed under the respective Regulation.[31] The same was true in relation to the Lugano Convention,[32] extending broadly similar rules to European Free Trade Area states.[33] With the United Kingdom's membership of the European Union and European Free Trade Area ceasing at the end of 2020, a question has arisen concerning the status of the bilateral treaties that historically covered recognition and enforcement of judgments as between the UK and EU/EFTA Member States. When these treaties were 'superseded', did that in effect partially terminate them, or did it merely temporarily displace their application for so long as that effect continued? Can the bilateral treaty be 'revived'?

The answer to this question is not self-evident as a matter of treaty law. As a matter of practice, an indication of the thinking of the UK government on these questions comes from a 2020 agreement entered into with Norway (an EFTA State with whom the UK had entered into a bilateral treaty on recognition and enforcement of judgments in 1961), setting out the consequences of Brexit for that bilateral relationship. The 2020 agreement provides that the 1961 treaty 'shall continue to apply' as between the two states, subject to certain amendments,[34] perhaps suggesting that the UK position is that the treaty was never (wholly or partially) terminated, only temporarily disapplied. The position in relation to

[27] OJ L 299, 31.12.1972, p.32 (Consolidated Version).
[28] OJ L 304, 30.10.1978, p.1, Art.24.
[29] Council Regulation (EC) No 44/2001 of 22 December 2000, OJ L 012, 16/01/2001, p.1.
[30] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012, OJ L 351, 20.12.2012, p.1.
[31] Article 70 of both the Brussels I Regulation and Recast Brussels I Regulation
[32] OJ L 339, 21.12.2007, p.3.
[33] See Lugano Convention 2007, Articles 65 and 66.
[34] 2020 UK-Norway Agreement on the Continued Application of the Convention on Recognition and Enforcement of Judgments 1961, Article 1.

other states is, however, unclear, and it does not appear likely to be resolvable on a bilateral basis given EU external competence in the field, leaving the issue for the moment in an unsatisfactory state of uncertainty. While the situation involved is unusual – perhaps unique – there is a more general lesson regarding the desirability of adopting clear language in such clauses which clarifies the precise legal effect of one treaty on another.

4.2. Deference clauses

A second and contrasting category of treaty conflict resolution clause comprises those clauses which seek to give one or more other treaties priority over the treaty in which the clause is found. Such clauses are somewhat comparable to boundary clauses, in the sense that they restrict a treaty in light of and in favour of other treaties, but they do so using a distinct technique – not modifying the scope of the treaty, but through a rule which disapplies the treaty in defined circumstances.

An example of such a clause is Article 25 of the Hague Service Convention 1965, which provides that:

> Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Although the meaning of this provision could perhaps be clearer, it at least ostensibly does not limit the scope or interpretation of the 1965 Convention, but simply defers to other treaties in case of a conflict. It thus avoids some of the complexities arising from interpretive alignment clauses, as discussed in section 3.1 above – there is no question as to whether the meaning of the treaty should be changed for all parties or only for those parties affected by the risk of conflict, as here the treaty *meaning* is unchanged even if its legal *effect* may vary depending on state party status to other treaties.

This provision is perhaps unusual in expressly deferring to both existing and future treaties. In relation to future treaties, this could be viewed as a codification of the international law *lex posterior* priority rule. This rule is, however, not invariably applied, and questions might therefore be raised about whether such blanket deference is appropriate (given lack of knowledge about future treaties), necessary (given that such treaties may themselves include clauses to resolve any potential conflict, and will do so from a position which is better informed about such potential) or desirable (given that a future treaty might equally defer to existing agreements, creating a conflict of conflict resolution clauses).

Perhaps for these reasons, deference clauses are sometimes limited to existing treaties. For example, Article 51 of the Hague Child Support Convention 2007 provides (in part – the remainder to be discussed below) that:

> (1) This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

Article 52 of the Hague Child Protection Convention 1996[35] similarly, but more flexibly, provides that:

> (1) This Convention does not affect any international instrument to which Contracting States are Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

In each case, this particular deference rule addresses only pre-existing treaties, although both treaties also contain separate rules addressing the possibility of later treaty-making. Article 52(2) of the Hague Child Protection Convention 1996, for example, provides that:

> (2) This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of children habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

The distinctiveness of the issues which may arise in relation to potential conflicts involving existing or future treaties leads to the adoption of separate rules dealing separately with each issue in many other treaties. Article 23 of the Hague Judgments Convention 2019, for example, provides in part that:

> 2. This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention.
>
> 3. This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. […]

The remainder of Article 23(3) is discussed further below.

The deference clauses addressed above are expressed in general terms, although it is also possible that such clauses are more narrowly defined. Section 4.3 below addresses one such limitation, where the deference is subject to conditions. Another such limitation is that deference may only arise in respect of a sub-category of treaties. The most common example of such a provision is a clause which provides that a convention defers to other treaties, but only where they are more specialised than the convention. This is, in effect, a codification of the general public international law *lex specialis* rule.

Article 22 of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986, for example, provides that:

> (2) This Convention does not prevail over any international convention to which a Contracting State is, or becomes, a Party, regulating the choice of law in regard to any particular category of contracts of sale within the scope of this Convention.

Similar, Article 57 of the European Union's Brussels Convention provides that:

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[35] Available at https://www.hcch.net/en/instruments/conventions/specialised-sections/child-protection.

> This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction and the recognition and enforcement of judgments.

A slightly more complex *lex specialis* rule is set out in Article 26 of the Hague Choice of Court Convention 2005, which provides that:

> (5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

This provision provides for the possibility that priority might be given to a more specific treaty as a matter of *lex specialis*, but attaches a condition – that the state must make a declaration to that effect. This is, therefore, not so much a codification of the general international law *lex specialis* rule, but a modification of it to attach a procedural condition for it to apply. In the absence of compliance with the procedural condition (a declaration), the *lex specialis* rule would in effect be overridden by this provision.

4.3. Conditional priority clauses

Some clauses in private international law treaties seek to resolve conflict in a more complex way – through conceptualising the underlying purpose of the treaty in a way which leaves open how it relates to other treaties, depending on the circumstances. This form of clause establishes a priority rule which can work either as an assertion of priority or as deference, depending on the circumstances.

A well-known example of such a clause is Article VII of the New York Convention 1958, which provides that:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

This clause has two distinct parts. The first, regarding the 'validity' of multilateral or bilateral agreements, clarifies that the New York Convention 1958 does not terminate existing agreements between state parties. This creates the circumstances under which a treaty conflict can potentially arise. The second part of the clause responds to this risk, by providing that the Convention does not deprive a party of any rights under other treaties or national law. (Setting aside the national law element, for this clause to have any treaty effect it will therefore be necessary for the states concerned to also be party to another treaty which creates such rights – unlike some of the other conflict techniques discussed in this article, which may apply regardless of party status.) This clause is known as the 'more-favourable-right provision', and its clear intention is to ensure that a party seeking to enforce an arbitral award can rely either on the New York Convention 1958 or on any alternative mechanism available under domestic law or another treaty. It does not, however, allow a party seeking to *resist* enforcement of an arbitral award to rely on defences which may arise under other treaties.

The assumption behind this clause is that it is desirable for arbitral awards to be enforced to the maximum extent possible – it is a prominent example of what is sometimes referred to as a 'maximum effectiveness' clause.[36] Two outcomes are thus possible, where states have entered into another treaty alongside the Convention – either the other treaty is more favourable to the enforcement of an arbitral award, in which case the Convention gives way to it, or the other treaty is less favourable, in which case the Convention effectively prevails over it. Whether a party can 'pick and choose' elements from different treaties or laws is a matter of discussion in the arbitration literature,[37] although it is submitted that this may be a step too far, as such a clause could then facilitate enforcement in circumstances not envisaged by any individual treaty.

A similar conditional priority clause is found in the Hague Child Abduction Convention 1980. Article 34 of this Convention provides, in part,[38] that:

> … the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

The overriding purpose here is the return of (and providing access to) abducted children; the clause seeks to maximise this objective by providing that the Convention does not restrict other available mechanisms for the return of (or access to) a child, whether under treaty or domestic law. The Convention thus prevails over another treaty between state parties, unless that treaty is more favourable to the return of (or access to) a child, in which case the Convention defers to the other treaty.

Another similar clause is found in the Hague Choice of Court Convention 2005, Article 26(4) of which provides that:

> This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

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[36] See eg María Blanca Noodt Taquela and Veronica Ruiz Abou-Nigm, 'The draft judgments convention and its relationship with other international instruments' (2018) 19 Yearbook of Private International Law 449.

[37] See eg Emmanuel Gaillard, 'The Relationship of the New York Convention with other Treaties and with Domestic Law', in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008); Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer, 1981).

[38] The effect of the other part is discussed in section 4.1 above.

Perhaps even more clearly, this provision evidently aims to ensure that judgments based on choice of court agreements are enforced to the maximum extent possible. Priority is then, in effect, given to the treaty which provides for greater enforcement of such judgments. The Hague Choice of Court Convention thereby acts as a floor but not a ceiling for the enforcement of judgments based on exclusive jurisdiction agreements.

One challenge with this technique is that it is not always possible to characterise a treaty as having a single overriding purpose in this way. Many treaties will seek to balance different interests, and this will be reflected in the rules and exceptions provided for in the treaty. A treaty with, for example, greater provision for enforcement of judgments would not obviously align with the purpose of such a treaty, because it would be striking a different balance. In such cases, clauses seeking to provide for conditional priority may need to be more complex. For example, Article 15 of the Hague Judgments Convention 2019 provides that:

> Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

Although this provision refers to national law – and indeed has important effects in that respect, if a state unilaterally provides for more expansive rules on the recognition and enforcement of judgments – it could also indirectly operate to give effect to another treaty providing for greater enforcement of judgments, where that treaty has been implemented domestically. This effect is, however, subject to Article 6 of the Convention, which provides a limitation on the rules on recognition and enforcement – that "a judgment that ruled on rights in rem in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin". The effect of Article 15 is that treaties which provide for greater enforcement of judgments are only given effect where they do not contradict this limitation – it does not simply give priority to the treaty which has more expansive enforcement rules, but only does so under the condition that Article 6 does not apply.

Another example of this complexity comes from the Hague Child Support Convention 2007. In case of a potential conflict of treaties, Article 52 of the Convention, headed 'Most effective rule', clearly aims to give priority to whichever treaty maximises effective recognition of maintenance decisions – although has several different conceptions of what that might mean:

> (1) This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a reciprocity arrangement in force in the requested State that provides for –
> a) broader bases for recognition of maintenance decisions […];
> b) simplified, more expeditious procedures on an application for recognition or recognition and enforcement of maintenance decisions;
> c) more beneficial legal assistance than that provided for under Articles 14 to 17; […]

If we move to subsection (2) of this Article, however, there are important qualifications to this priority rule.

> (2) This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1 a) to c). However, as regards simplified, more expeditious procedures referred to in paragraph 1 b), they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.

This condition reflects the fact that the Convention is not simply trying to maximise recognition of maintenance decisions, but to do so in a way which balances the interests of an applicant with the interests of a defendant, in particular in connection with requirements of procedural fairness. Another treaty which provides for simplified, more expeditious procedures would thus take priority only where those procedures are compatible with the procedural fairness standards set out in the Convention.

4.4. Managing third state/third party effects

Where a treaty defers to another treaty, either wholesale (as addressed in section 4.2) or subject to particular conditions (as addressed in section 4.3), this may raise additional questions concerning what impact this has on other treaty parties. If treaty 1 has three state parties, A, B and C, and priority is given to treaty 2 between states A and B, what impact does this have on the relationship between state A and C, or between state B and C? If treaty 2 is given priority over treaty 1, does that mean that treaty 1 does not apply at all?

Ordinarily we would not expect this to be the case, because a treaty entered into by states A and B should not be able to affect their obligations in relation to state C,[39] but the issue is not always clear from the terms in which priority clauses themselves are expressed. For this reason, some clauses add further provisions, by way of clarifying that the priority given to another Convention is limited to relations between the parties to that Convention. For example, it was noted in section 4.2 above that Article 52(1) and (2) of the Hague Child Protection Convention 1996 defers to other treaties made by state parties in certain defined circumstances. Article 52(3) clarifies that although such treaties are effective as between those state parties:

> (3) Agreements to be concluded by one or more Contracting States on matters within the scope of this Convention do not affect, in the relationship of such States with other Contracting States, the application of the provisions of this Convention.

This provision is about limiting the effect of a deference clause – other treaties are recognised as valid, but only *inter partes*. A comparable provision may be adopted in relation to priority asserting clauses, as for example under Article 26(3) of the Hague Choice of Court Convention 2005, which provides (in relevant part)[40] that:

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[39] See eg VCLT Article 30(4) and Article 34.

[40] Article 26(3) further provides that 'This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.'

> (3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State.

Although drafted in terms of deference, this provision in fact implicitly asserts priority over earlier treaty obligations, but again only *inter partes*, as to do otherwise would potentially create an inconsistency in treaty obligations owed to third states.

A similar but slightly more complex provision is found in Article 23(3) of the Hague Judgments Convention 2019, which provides that:

> 3. This Convention shall not affect the application by a Contracting State of a treaty concluded after this Convention as concerns the recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other treaty shall affect the obligations under Article 6 towards Contracting States that are not Parties to that treaty.

The first part of this section, already noted above, defers to later treaties entered into by Contracting States, again to avoid the risk of conflicting obligations. However, this is qualified by the second part, which recognises in effect that Contracting States to the Judgments Convention have, under Article 6, a right for judgments *in rem* relating to immovable property located in their territory not to be capable of recognition and enforcement in other states. Such rights cannot be modified by another treaty unless the state concerned is a party to that treaty. This means, for example, that if states A, B and C are party to the Hague Judgments Convention, and state A enters into a new treaty with state B, that treaty cannot provide for the enforcement of judgments *in rem* relating to immovable property located in state C. It recognises that the effects of a treaty may in some case impinge upon third party states, even if the treaty does not bind them, as it may affect *property* located in their territory.

An even more novel provision is found in Article 26(2) of the Hague Choice of Court Convention 2005, which provides that:

> (2) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, in cases where none of the parties is resident in a Contracting State that is not a Party to the treaty.

This provision defers to another treaty, but only on condition that it does not affect a *party* who is resident in a Contracting State other than the states who have entered into the treaty. The effect of this provision is to allow two states to enter into specialised arrangements, but to provide that those arrangements are not effective in relation to individuals who are not resident in those states. This provision, in effect, views the Hague Choice of Court Convention 2005 as conferring rights on parties who are resident in Contracting States. Those rights cannot be taken away by states other than the state of residence of those parties. It thus provides an additional limitation on the operation of the deference clause, which rather innovatively makes the question of the effectiveness of another treaty dependent on the residence of private parties who may seek to assert rights derived from the treaty.

A final example of a qualified deference clause may be found in Article 51(2) of the Hague Child Support Convention 2007, which provides that:

> (2) Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

This clause combines a number of the effects examined above – it gives permission to Contracting States to enter into later agreements between themselves, but only on the condition that they 'improve' the application of the Convention, are consistent with its objects and purpose, do not affect relations with other Contracting States, and comply with a procedural condition that such an agreement be notified to the Convention depositary. By attaching such conditions this treaty makes it clear that it is seeking to limit the powers of states to enter into subsequent agreements, departing from the usual *lex posterior* rule. Entering into a later treaty which sought to reduce obligations under the Convention would, in itself, appear to be viewed as a breach of the Convention, and would (at least according to this rule) potentially be invalidated on that basis. Whether indeed such a clause could invalidate a later treaty is a difficult question, potentially giving rise to a conflict of priority rules, but certainly it is clear that the intention of this provision is that the Hague Child Support Convention 2007 would not defer to any such treaty, ensuring that the original obligations (without reduction) would continue to apply.

5. Conclusions

This article has set out a taxonomy of treaty clauses which seek, in some way, to manage the potential for conflict between private international law treaties. It has distinguished between clauses which seek to avoid conflict, through interpretive rules or limitation on scope, and clauses which seek to resolve conflict, through asserting priority or deferring to other treaties. The taxonomy is itself perhaps the most significant contribution of this article, and may be of most interest outside the realm of private international law treaties. However, four particular characteristics of the private international law treaty practice may be noted by way of conclusion.

First, even among conventions which have been largely developed at a single international organisation (the Hague Conference on Private International Law), there is a notably wide variety of different techniques which have been adopted. Indeed, multiple techniques are often found in single instruments, and many of these techniques depart from the general rules of international law rather than simply codifying them. The problems raised, and the practices developed to respond to them, are complex.

Second, the effectiveness of some provisions may be queried – for example, interpretive alignment clauses under which it is not clear which sources may be relied on to modify the interpretation of a treaty, or clauses under which a treaty asserts priority over future treaties, potentially giving rise to a conflict of priority rules. In respect of at least interpretive alignment clauses, there would perhaps be greater opportunity for those drafting private international law treaties to reflect on the problems and analysis developed as a matter of general public international law in applying the interpretive rules under the VCLT.

Third, there is some significant innovation in the range of rules which have been developed. Rules which provide for conditional priority, for example, potentially allow for conflict resolution rules to be attentive to the content of the respective treaties – giving way to another treaty only if it further advances the object and purpose of a particular convention, or subject to conditions which protect rights under the convention. In this innovative practice, it is submitted that those analysing or addressing treaty conflicts as a matter of general public international law might particularly learn from the private international law experience.

Fourth and finally, there is not only a variety of techniques identified here, but also a variety of ways that clauses adopting particular techniques are drafted in different treaties. To some extent, this may be challenged as undesirable. In this variety there is a missed opportunity for private international law treaty-makers to develop a specialised body of knowledge and experience which could be drawn on in future instruments, increasing legal certainty over time. It is, however, also to some extent a reflection of the complexity and particularity of the problems raised in managing the risk of conflicts between private international law treaties – the necessity for careful and thoughtful customisation of clauses for the specific needs and contexts of each particular treaty.