Effective Enforcement of International Commercial Transactions by UK Businesses in a Fragmenting Transnational Institutional Environment

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Abstract

The Thesis addresses aspects of the dispute resolution environment for transactional deals in global trading networks from the perspective of the United Kingdom's fragmenting relationship with the legal order of the European Union. The context in which the transactions between the UK businesses and their cross-border trading partners are occurring is identified and described. Significant aspects of the environment such as the fragmentation events and the systems which are influencing international commercial transactions such as the legal, political and economic systems are analysed. Systems theory developed by Niklas Luhmann is adopted because of its dynamic nature in the analysis which illustrates the impact of fragmentation on the environment of international trade. Luhmann's theory is given an expansive explication and applied to current events such as the exit of the UK from the EU (Brexit) and the Covid-19 Pandemic. The Thesis provides a unique approach and synthesis through application of the systems theory to the above systems of interest, including the system of private international law and international commercial arbitration. The Thesis also addresses fragmentation from the business perspective providing a compact illustration of the impact of the selected fragmenting events on the possibilities regarding international dispute resolution for UK businesses. It is inevitable that the fragmenting events impacted the UK businesses' trade and it is illustrated that even though Brexit impacted application of the EU private international law rules in the UK, there are still possibilities regarding litigation or international commercial arbitration if the UK businesses are well informed and the contractual parties are willing to incorporate dispute resolution clauses in their contracts.

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1. Introduction

The established environment with regards to international trade[1] has been impacted by recent fragmenting geopolitical, economic, and legal events. This Thesis aims to discuss some of the most impactful events related to the political, economic and specifically legal areas of the environment of international trade. In order to provide a succinct and comprehensive analysis, it is necessary to outline this clear structure and identify the anchor points which will support the flow of the arguments.

The original aim of the Thesis was to develop a socio-legal strategy for ensuring an effective dispute resolution environment for transactional deals in global trading networks in the context of the United Kingdom's (the 'UK') fragmenting relationship with the legal order of the European Union (the 'EU'). The specification of the main aim of the Thesis in this form contributed to the establishment of a comprehensive objective and allowed further identification of related secondary aims.

The geographical location of the trading networks was anchored to East Midlands (the 'EM') as the aim was to focus on an economically strong area of the UK where it might be convenient to collect empirical data. Once the geographical location was established, it was necessary to further specify the focus of the research. It was outlined that the target for the data collection and data analysis will consist of EM businesses involved in cross-border trade.

One of the aspects of international trade is the enforcement of the transactions which the parties are involved in. This aspect is crucial both for an effective flow of resources and economic growth. When a dispute arises, it is in the interest of international trade that it gets

[1] International trade and cross-border trade are in this Thesis used interchangeably.

solved promptly, in order for the economic system to further progress in its pursuit of profit. From this perspective there is a clear link between international trade and the available mechanisms of dispute resolution.

The leading mechanisms of dispute resolution available for the parties involved in international trade are cross-border litigation and arbitration as both of these methods, under usual circumstances, generate a binding decision affecting the rights and obligations of the involved parties. As the focus of the Thesis is on commercial transactions, the relevant methods discussed hereby are related to commercial disputes.

International commercial arbitration, due to the relatively global recognition of the New York Convention 1958[2] (the 'NYC 1958'), which provides recognition and enforcement rules in relation to non-domestic arbitral awards, can be viewed as an attractive method of international dispute resolution. Globally, there is effective recognition of lawfully established arbitration tribunals and the parties have a relative flexibility in their choice of arbitral forum, substantive law and procedural rules when submitting their dispute to international commercial arbitration. Apart from the international legal framework, arbitration is generally excluded from the regional systems of private international law.[3] The system is still dependent on national legal systems in order to achieve a successful recognition and enforcement of an award, however, the robust process of resolving disputes within the arbitral system is independent.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.

[3] See for example 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 L351/1, preamble para. 12 and Art. 1(2)(d).

As suggested above, apart from the international commercial arbitration, international commercial disputes are often settled by cross-border litigation. Both systems have their strengths and weaknesses and are discussed in detail in the following chapters of this Thesis. Cross-border litigation is dependent on the system of private international law rules (the 'PIL') which includes three main areas of focus. These areas are applicable law, jurisdiction and the recognition and enforcement of judgements concerning disputes with a foreign element. As the emphasis of this Thesis is on enforcement, the discussion is focused mainly on the rules related to recognition and enforcement of court judgements which corresponds with the rules embedded in the NYC 1958 for the recognition and enforcement of arbitral awards.

Further, since the emphasis of the original aim of the Thesis was on the legal order of the EU, one of the secondary aims of the Thesis was to discuss relevant aspects of the EU private international law rules (the 'EU PIL'). After examining these rules, it is clear that the EU PIL provides a robust system which the parties may enjoy, provided the EU PIL is applicable in their case. The EU PIL creates a system of rules which were developed reflecting societal changes and needs and can be viewed as a 'safety net'. The aspect of the parties' autonomy is substantial in the EU PIL system and, provided the parties do not seek to exercise autonomy beyond the extent permitted by the system, they can rely on EU PIL to validate their own autonomous choices.

A related secondary aim of the Thesis in relation to the EU PIL rules was the discussion of the EU PIL rules ceasing to apply in the UK due to its exit from the EU (the so-called 'Brexit'). This problematic area of the EU PIL rules ceasing to apply and the options for the UK regarding the post-Brexit arrangements was directly linked to the original main aim of the Thesis and

specifically to the socio-legal strategy for the future development of the dispute resolution system for international commercial disputes.

In order to build an effective socio-legal strategy for the EM businesses, the aim of the data collection was to gather data related to the preferred methods for cross-border dispute resolution and the identification of specific challenges in the international institutional framework which could be addressed by the research.

Even though the empirical part of the research was not essential, it was a starting point and tools for the data collection were designed, including invitations to participate in elite interviews and subsequently electronic questionnaires. The utility of these tools was strengthened by the researcher attending meetings of the East Midlands Chamber of Commerce and the promotion of the research at these meetings.

It is not unusual to be unsuccessful with significant data collection in the area of international dispute resolution,[4] therefore, the research project itself was built as having the empirical research as part of an optional pathway. If sufficient data was collected, the empirical perspectives of the EM businesses would form a central part of the Thesis. The details regarding the data collection exercise are discussed in Chapter 3 of this Thesis, however, it is necessary to outline at this point that not enough data was collected. There were various factors influencing this situation, one of them was the focus of the EM businesses on their own post-Brexit arrangements and, therefore, not enough capacity for the businesses to participate in this type of research. As per above, this outcome was one of the anticipated

[4] See for example Drahozal C R and Naimark R W, *Towards a science of international arbitration: collected empirical research* (Kluwer Law International 2005).

possibilities and, after not receiving enough data to pursue the empirical part of the Thesis, the focus was shifted to a more elaborate and theoretically sophisticated approach.

Once it was concluded that the empirical aspect of the research could not be realised, the research methodology required amendments to deliver the research aims by a more theoretical approach. This redesign actually benefited the research aims by widening their focus by including the perspective not only of EM businesses, but also other UK businesses. This approach enabled the research to grasp aspects of the analysis which would not be possible to include if the research was locally tied.

When the term 'UK businesses' is addressed in this Thesis further on, what is meant are the businesses which are impacted by the legal, political and economic system of England and Wales. The same applies when the UK is addressed as a state. The above was selected for better comprehensiveness and flow of the analysis rather than using the terminology of England and Wales, as this would create a less comprehensive and less organic discussion. At times, the legal system of England and Wales is pinpointed in order to emphasise the application of the relevant norms, however, generally, the Thesis uses UK and England and Wales interchangeably.

The emphasis of the research was able to move from the individual experience of local businesses to an evaluation of the functionality of the system of international dispute resolution as a whole. This approach at the same time validated the use of relevant already gathered and publicly accessible empirical data, for example data collected by the EU, arbitration tribunals or higher education institutions.

While addressing the functionality of the legal environment as a whole, it was possible to shift the focus of the aforementioned aspects in a more complex and sophisticated way. It was

possible to support the analysis with the outline of the genesis of the EU PIL rules in the context of their existence within the wider regulatory environment of for example the United Nations or World Trade Organisation and other institutions appearing as actors in the field of international trade.

In the light of the above, the existence of the EU PIL rules was emphasised and discussed with regard to the focus of the Thesis. This meant that recognition and enforcement of the non-domestic judgements could be placed in a wider perspective including the analysis of the aspects of the stability and certainty of the system. These aspects could further be contrasted with the rapid technological development of the phenomenon of globalisation in international trade.

Globalisation, however, cannot be taken only in light of the technological development and building wealth beyond the boundaries of sovereign states. One of the unwanted by-products of globalisation is the impact of the progress on other areas other than international trade. For instance, this impact can be particularly identified within the environment in the context of climatic change. Further, globalisation creates societal pressures such as wealth disparity, insecurity, limited opportunity, conflict, and attendant increased migration.[5]

The above pressures which are created in the global society fuel forces which are directly connected with, perhaps even causative of, fragmentation of the international institutional environment. In the modern history, after the second World War (the 'WW II'), there has been different manifestations of such fragmentation. As the shift of the focus of the Thesis

[5] For more details regarding globalisation the following authors may be of interest: Joseph Stiglitz, *Globalization and Its Discontents* (Penguin 2009), Peadar Kirby, *Vulnerability and Violence: The Impact of Globalisation* (Pluto Press 2006), Thomas L Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Picador 2012), Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, and Democracy Can't Co-Exist* (Oxford University Press 2012) and Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004).

enables sight of the attendant institutional challenges from a more complex perspective than that purely of Brexit and its consequences, it becomes clear that individual manifestations of fragmentation are likely to be interconnected. Brexit, Trumpism, authoritarian nationalism and a desire for societal resilience in the face of the COVID-19 pandemic can all be seen as such manifestations of fragmentation and their occurrence can be perceived as fuelled by societal pressures resulting from globalisation.

The wider perspective of the global society where the international trade occurs altogether with the manifestations of fragmentation allows the research to refocus back to the original aim of the Thesis in reshaped form. The core of the aim stands. There is no need to amend the fundamental essence of it. However, instead of the local focus and the sole manifestation of fragmentation in the form of Brexit, the new environment for the aim is the global trading society with individual UK businesses as individual actors in the performance of international trade. Enforcement of the transactional deals in global trading networks, as per above, remains an un-remodelled necessity. It is the fragmentation which is being analysed in a different way. Instead of investigating a symptom, it is the cause which the investigation focuses on.

Since the cause appears to lie within the global society, it is convenient to adjust the analysis in a way that the societal function can be addressed and analysed. For these purposes and as suggested at the commencement of the research which resulted in this Thesis, the legal system is examined from the perspective of a potential autopoietic system as suggested by Niklas Luhmann.[6] However, only examining the legal system is not sufficient as this would

[6] Niklas Luhmann and others, *Law As A Social System* (Oxford University Press 2009).

result in a one-way analysis without clarity as per the connections between different systems in society.

For these reasons, the legal system is contrasted with the political and economic systems. However, not only are they contrasted as different entities, they are further investigated on different levels of their presumed existence. That is on the global, regional and national level. This contrast is required in order to investigate persistent pressures for fragmentation in society and its potential dysfunctionality.

The system theory possesses tools which are able to illustrate various dynamic tendencies. The concept of an autopoietic system provides a standpoint from which information channels informing the behaviour of the individual systems within their environment can be illustrated.

Once the channels are established, it is possible to link the phenomena occurring in society and in the systems of interest to the individual elements of the concept developed by Luhmann. Here it is where the focus of the Thesis is emphasised yet again. The societal pressures resulting in the manifestation of fragmentation trigger the need for the sovereign states to develop responses and due to the illustration of those responses on the system theory these responses can be grasped within their dynamicity.

In line with the above, the Thesis shifts from exploration of the characteristics of the systems to the investigation of capabilities and institutional requirements for the development of alternatives related to cross-border dispute settlement and commercial debt enforcement. Within the societal context, Luhmann's theory of law as a societal system is one of the most appropriate dynamic theories. Nevertheless, in order to link the analysis to the traditional concept of a legal system, a parallel between Luhmann and other theorists is drawn where appropriate.

One of the core elements of the Thesis is the synthesis of Luhmann's perspective with the systems which are analysed. In order to be able to apply Luhmann's perspective, the systems of interest are being outlined as well as the connections between these systems. As per above, the systems of interest are the legal, political and economic system. However, even though the analysis is focusing on these systems which appear to be autopoietic on certain level, the system of international commercial arbitration is addressed as well. It is unlikely that the system of international commercial arbitration can be seen as autopoietic, however, it is structurally coupled with the legal system and the nature of this connection is addressed. It is also clear that legal, political and economic systems may be seen as autopoietic, however, this will be only visible on certain levels, for example, the economic system may be seen as performing autopoiesis even on a global level while legal and political systems are unlikely to be autopoietic globally.

2. International commercial disputes background

The discussion in this Chapter 2 is focused on the identification of the main contextual elements that are engaged by this Thesis. Trade is perceived as one of the most significant notions as it is the trade environment where the international commercial transactions are occurring. The trade environment is presented primarily from the legal perspective and selected elements on the international, regional and domestic levels of legal systems are identified and discussed.

Further, since for enforcement of international commercial transactions an existence of a binding decision and its recognition and enforceability in the desired state is crucial, different dispute resolution mechanisms are discussed. The purpose of this outline is to acknowledge that there are alternative dispute resolution mechanisms available for the parties, including international commercial arbitration which itself results in a binding decision, yet, it is not usually governed by the general rules of private international law.

Additionally, an element of fragmentation is introduced. For the purposes of this Thesis, one of the main fragmenting events impacting the pertinent transnational institutional environment is Brexit. Chapter 2 includes a brief Brexit timeline and the relevant changes regarding private international law instruments which are further discussed in Chapter 6 with respect to the area of private international law and Chapter 5 which considers the fragmentation itself.

2.1 Trade[7]

For the purposes of this Thesis, trade could be perceived as a one of the centre points which needs to be borne in mind when discussing the fundamental notions of globalisation, societal pressures leading to fragmentation and enforcement of transactional deals in global trading networks. International commercial transactions take place in the environment of international trade. The current international trading environment can be perceived as a highly globalised part of the global economy.[8] The global state of economy which represents the environment for international trade has been achieved through the '*process of rapid economic integration between countries*.'[9] This is further supported by Professor Rodrik who presents the view that the markets and government should not be viewed as substitutes, they should be viewed as complements.[10] Rodrik's view is that markets will be more effective the better governance is dedicated to such markets.[11]

Therefore, the development of cross-border activities has been possible due to the development in other areas of society, one of them being the public sector.[12] Public sector, here in a sense of governance, has allowed the traders to be more protected against risks connected with trade, such as enforcement of transactions or legitimising certain markets.[13] This way the governments minimise an important type of costs which are emphasised by

[7] For the purposes of this section the perspective of Professor Dani Rodrick was adopted. This selection is convenient for the purposes of this Thesis as Rodrik is a high-status economist who focuses upon the interrelationships between economic and political systems and who believes legal institutions are important for, or even constitutive of, markets. This perspective aligns with the Thesis rather than either a classical law and economics perspective, as exemplified by Richard Posner in Richard A Posner, *Overcoming Law* (Harvard University Press 1995), or institutional economists who are primarily concerned with development as exemplified by Daron Acemoglu and James A. Robinson in Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books 2012).
[8] Raymond Torres, *Towards A Socially Sustainable World Economy* (International Labour Office 2001) 8.
[9] Ibid 8.
[10] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012) xvii.
[11] Ibid xvii.
[12] Ibid 16.
[13] Ibid 19.

Rodrik – transaction costs.[14] The problematic point regarding transaction cost and international trade is that since there is no global governmental body to produce the same measures as on domestic or regional levels, the transaction costs are higher in comparison to national and regional levels.[15] In Rodrik's words: '*Governments help reduce transaction costs within national boundaries, but they are a source of friction in trade between nations*.'[16]

Undoubtedly, outside of national boundaries, due to technological progress, progressive dialogues between countries which lead to more liberalisation of the cross-border trade as well as international efforts to reduce transaction costs in the way of establishing inter-governmental organisations, such as the World Trade Organisation, there has been an improvement in transaction costs in international trade.[17] The increase in the efforts to eliminate transaction costs, benefiting from accompanying factors such as technological development, distinguishes the advancement of international trade in the modern era in comparison to the approach of mercantilists or pure laissez-faire theorists. This development, however, does have a contrasting side.

Again, Rodrik's view is useful to illustrate the obstacles of globalisation. When international trade is being discussed, there are numbers of variables. One of the areas of variables are the, economical aspects of trade, specifically the subject matter of transactions. Trade with goods and services may come to mind, as well as trade with intellectual property rights or trade with financial capital and other aspects of international trade. Although Rodrik does include the financial sector in his discussion of globalisation, for the purposes of this Thesis, the focus is

[14] Ibid 13.
[15] Ibid 19.
[16] Ibid 20.
[17] Mervyn Martin, *WTO dispute settlement understanding and development* (Martinus Nijhoff Publishers 2013).

on international economic activities related to international sale of goods and services. Even though the financial sector is not included, general aspects of globalisation are still applicable.

When identifying the issues of globalisation, the point previously mentioned regarding the relationship between the markets and the governments is worth coming back to. According to Rodrik, in order to understand globalisation in its true sense, one needs to bear in mind the lack of an integrated international governmental framework that would assist the markets on the global scale, thus, resulting in the markets generating tension between local institutions.[18] By institutions Rodrik means arrangements which support markets and which can be seen in a form of social arrangements, namely long term networks between traders, systems of belief and enforcement provided by third parties.[19]

The point regarding the relationship between the traders is straightforward, when traders can rely on each other and the terms in their contracts, the transaction costs are likely to decrease. Further, regarding the systems of belief, this relates to moral principles and culture. This may be reflected for example in usual practices in specific industries. The last category of institutions, the enforcement provided by third parties, encompasses elements which are necessary to enforce a transaction, these can be legal regulations imposed by certain sectors of trade or an existence of a legal system providing tools to legally enforce a contract.[20]

Rodrik's point related to the institutions, government power or size and markets is rather clear: '*Markets are most developed and most effective in generating wealth when they are backed by solid governmental institutions.*'[21] This observation is contributing to the findings

[18] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012I) 20.
[19] Ibid 14.
[20] Ibid 16.
[21] Ibid 16.

of this Thesis and even though Rodrik does not consider the political, economic and legal systems separately, his observations confirm the dynamicity and the potential autopoiesis of the systems. One of the reasons for this is that the political system does not exist on the international level, even though the economic system does. This means that, in Rodrik's terms, the economic system experiences tension on the global level as it does not enjoy the similar symbiotic relationship that it does on the national level.

The last point worth mentioning, prior moving to a brief outline of historical development of trade, is that certain socio- economic research revealed a correlation between the size of the public sector and activity of a particular country in international trade.[22] This was outlined by Professor Cameron and confirmed by Rodrik.[23] The role of an effective government regarding markets is not necessarily only to 'threaten' them and intervene as laissez-faire economists may suggest. There is the other side of the coin, undoubtedly, interventions may not be effective at all times, however, the governments also protect the markets and their integrity, legitimacy and their users against risks.[24] The outcome of researching the correlation is that if there is an ambition for a market to expand, government need to expand as well.[25]

From historical perspective, it can be suggested, that 'international' trade has been in existence in global society for centuries even before the existence of the national state in the modern understanding of the notion of nation.[26] A historical example of the roots of

[22] David R. Cameron, 'The Expansion Of The Public Economy: A Comparative Analysis' (1978) 72 American Political Science Review 12.
[23] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012I) 18.
[24] Ibid 19.
[25] Ibid 18.
[26] Raymond Torres, *Towards A Socially Sustainable World Economy* (International Labour Office 2001) 8.

international trade which can be evidenced can be seen in the Assyrian merchant colony in Cappadocia which can be tracked back to 19th century BC.[27]

Further, in more modern history in the era of 17th century mercantilism, the most effective business forms for succeeding in cross-border trade seemed to be companies that were chartered trading monopolies, for example the English East India Company. [28] These companies had to build their own trade infrastructure, they had to mimic such state operations as are demanded in the current trading environment by businesses of governments, for example in terms of logistics and communication infrastructure.[29] In return, these companies were protected by the monopolies which were granted by the states.[30]

In the 18th century, Adam Smith, 'The Father of Economics', identified an absolute advantage principle while stressing the significance of international trade.[31] The thesis of the absolute advantage comprises of an idea that the goods which are the most efficient for a given state to produce should be identified within the state's economy and these goods should be then exported and vice versa - the goods which are least efficiently produced by a given state should be imported.[32] This theory was further developed, amongst others, by the political economist David Ricardo who added the theory of a comparative advantage where the countries should identify the goods which are relatively efficient to produce rather than solely focusing on the absolute advantage.[33] Regarding state interventions, Smith's perspective was

[27] Kahlil Newton, *International Relations And World Politics* (EDTECH 2019) 211.
[28] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012l) 7.
[29] Ibid 11.
[30] Ibid 11.
[31] Adam Smith, *Wealth of Nations* (Viking Penguin 1999) 33.
[32] Michael J. Trebilcock, *Understanding Trade Law* (Edward Elgar Publishing 2011) 1.
[33] David Ricardo, *The Principles Of Political Economy And Taxation* (Dent 1984) 5.

that market should be left free and state interventions eliminated as the above advantages are maximised by competition instead of monopoly.[34]

As the economics theory developed further, there were many other variables introduced and the modern economic theory operates with significantly more complex models.[35] Even though these complex economic models are beyond the scope of this Thesis it is useful to bear in mind that there are many different variables of international trade in different systems of society. Technological development of the late twentieth and twenty-first centuries is amongst these variables which influence globalisation and modern trade.[36] Technological progress is immense, innovations are not only facilitating the trade itself but also impact product changes, process changes and the changes of the whole system of trade which can be altogether perceived as technological change.[37] An example of such change can be substituting labour with technology and thus enabling a higher volume of production.[38] Another example focused on goods could be the way how goods are packed (technological development in packaging) or how are goods paid for (the development of e-commerce).[39]

The motivation of natural persons and legal entities behind trade is often to generate profit which leads to growth of wealth.[40] The above highlights another aspect of international trade which is worth outlining. The trading environment can be seen from different perspectives according to the trader's needs. As above, there are traders who are natural persons and

[34] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012I) 9.
[35] Michael J. Trebilcock, *Understanding Trade Law* (Edward Elgar Publishing 2011) 1.
[36] Paul Krugman, 'The Increasing Returns Revolution In Trade And Geography' <https://www.nobelprize.org/prizes/economic-sciences/2008/krugman/lecture/> accessed 6 April 2021.
[37] Nicholas Askounes Ashford and Ralph P Hall, *Technology, Globalization, And Sustainable Development* (Yale University Press 2011).
[38] Ibid 272.
[39] William H. DeLone and Ephraim R. McLean, 'Measuring E-Commerce Success: Applying The Delone & Mclean Information Systems Success Model' (2004) 9 International Journal of Electronic Commerce 31.
[40] Bjarne S. Jensen, and Wong Kar-yiu, eds. *Dynamics, Economic Growth, and International Trade* (University of Michigan Press1997) 49.

traders who are legal entities including state entities.[41] From the perspective of an economic system, there is no difference in who is the trader, as it is the transaction itself that is the significant element of trade.[42] However, the difference may be significant from the perspective of access to resources and different institutional treatments the traders receive.[43]

The impact of trade on the economic system may be perceived as one of the most significant and is reflected in the global economy as well as in regional or domestic economies.[44] Similarities can be drawn about the impact of trade on the political system. On the global scale, as there is no global government, the impact of trade can be illustrated by significant intergovernmental cooperation regarding international trade (however, the friction caused by the domestic governments should be remembered).[45] The regional level of the political system can, from a European perspective, be seen to be most visible regarding trade in the European Union (the 'EU') and its policies concerning trade.[46] The domestic impact of trade on the domestic political systems is then addressed by policies within the respective states.[47] Finally, trade has an impact on legal systems as legal systems provide rules regulating trade on the global, regional and domestic level.[48]

[41] Ibid 49.
[42] This is further supported by the systems theory of Niklas Luhmann which is discussed in detail in Chapter 4 of this Thesis.
[43] The World Trade Organisation is one example of the difference in treatment as the dispute resolution system is designed to resolve disputes between countries and not other legal entities or individuals. For details see Mervyn Martin, *WTO dispute settlement understanding and development* (Martinus Nijhoff Publishers 2013).
[44] Kemal Sahin, *Measuring The Economy* (Nova Science Publishers 2009) 9.
[45] An example of such cooperation is the World Trade Organisation.
[46] For details see for example *EU Trade Policy At Work* (Publications Office of the European Union 2019).
[47] For details see for example 'Policy Papers And Consultations' (*GOV.UK*, 2020) <https://www.gov.uk/search/policy-papers-and-consultations?page=2&parent=%2Fbusiness-and-industry%2Ftrade-and-investment&topic=ed2ca1f7-5463-4eda-9324-b597e269e242> accessed 17 June 2020.
[48] On the global level there are various international treaties, for example the General Agreement on Tariffs and Trade 1994, the regional level can be represented by the legal instruments issued by the European Union and on domestic level is the impact reflected in respective domestic law.

Position of the participants (the UK business and the UK as a state)

The journey to effective enforcement for the UK businesses is undoubtedly interconnected with all the systems which are being discussed in this Thesis. As the generation of profit and growth in wealth is a strong driving force behind the trade itself, the significance of the economic system is apparent.[49] Equally, the policies which are made by the political system on any level have the potential to influence this journey and its result. This is further confirmed by the discussion regarding Rodrik's view on globalisation – a government open to international trade will try to minimise transaction costs in order to support the expansion of its markets.[50]

However, it is the legal system which must be investigated in a greater detail. The reason is that the legal system provides the rules which ensure recognition and enforcement of decisions in international commercial disputes. This direction is not one which is taken by Rodrik, and it does not need to be. A detailed analysis of the legal system is a mere expansion of evaluation regarding the institutions of international trade.

Inevitably, the journey to enforcement from the perspective of a UK business has to start with trade. Without trade between the UK business and its cross-border trading partners, there would be no international commercial transaction. At this point, it is necessary to emphasise that the commercial transactions on which the Thesis is focused encompass transactions between two traders. It is convenient, therefore, to distinguish a trader from a consumer. There are different legal instruments, frameworks and networks related to consumer

[49] Bjarne S. Jensen, and Wong Kar-yiu, eds. *Dynamics, Economic Growth, and International Trade* (University of Michigan Press1997) 49.
[50] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012I) 19.

protection on international, regional and domestic levels,[51] however, since the perspective hereby is the UK business, the UK national consumer laws are applied to outline the difference.

The relevant legislation from the perspective of UK general contract law is the Consumer Rights Act 2015 (the 'CRA 2015') which defines both consumers and traders and reflects the EU rules regarding consumer's protection.[52] Consumer is for the purposes of CRA 2015 defined as '*an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.*'[53] In comparison, trader is defined as '*a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.*'[54] This test may be problematic when it is not clear according to the situation under which category an individual can be subsumed (for example an individual, a sole trader buying a kettle to use both at home and in their business), however, for the purposes of this Thesis the UK business will be viewed as a legal entity rather than an individual and, furthermore, the trade of the UK business in question will be assumed to be between the UK business and a non-consumer cross-border trading partner.

With the above in mind, it is convenient to outline examples of the regulations applicable to international trade from the global, regional and domestic perspective in order to achieve

[51] For example: 'Protecting Consumers Worldwide | ICPEN' (*Icpen.org*, 2021) <https://icpen.org/protecting-consumers-worldwide> accessed 8 April 2021;
'United Nations Guidelines On Consumer Protection | UNCTAD' (*Unctad.org*, 2021) <https://unctad.org/topic/competition-and-consumer-protection/un-guidelines-on-consumer-protection> accessed 8 April 2021;
Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12;
Consumer Rights Act 2015.

[52] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12, further dicussed below.

[53] Consumer Rights Act 2015 s. 2(3).

[54] Ibid s. 2(2).

better understanding of the environment in which the systems theory of Luhmann is then applied.[55]

Further, it needs to be borne in mind that the regulations which are to be discussed, have different significance depending on the perspective of the person or entity to be impacted by it. From the state's perspective, the significance of the regulation can be either on the state as a participant in trade or by the state creating trade regulation. On the global level this will be subject to negotiations with other sovereign states in order to achieve a certain compromise. Further, as a trader the state could be subject to a different system of rules (for example the World Trade Organisation). This can be illustrated by Brexit as the UK has to negotiate the trading access terms with other states post Brexit, and therefore the UK finds itself on the 'creationist' level.

On the other hand, UK businesses are mainly in the participant position of being impacted by the regulation.[56] Therefore, even though the state perception is being discussed at relevant parts of the Thesis, it is important to stress the fact that the perception of the UK business as traders is of a great significance hereby.

World perspective

The global level of international trade regulations can be perceived as the 'top' level. The shape of the international regulations of trade depends on various influencing factors, amongst others the cooperation between governments and non-governmental organisations which often contributes to creation of new legal instruments.[57] There are numerous treaties

[55] For details see the systems theory of Niklas Luhmann which is discussed in detail in Chapter 4 and 5 of this Thesis.
[56] The UK business can be also in the position to influence the 'creationist' when member of various focus groups which have impact on the government decision-making.
[57] An example of one of the most discussed intergovernmental organisations is the United Nations Commission on International Trade Law (UNCITRAL) which contributes to harmonisation and unification of the international trade law.

which are legally binding if ratified[58] and there is a mass of soft law which is not binding and could be used for example as terms in contracts by trading partners or model law by individual states.[59] The international instruments available also differ in their functionality. There are conventions which govern contractual terms for a range of transnational contracts including the sale of goods[60] and carriage of goods[61] contracts as well as other conventions that regulate recognition and enforcement of binding decisions in international commercial dispute resolution.[62]

As suggested above, the international legal instruments impact different aspects of the trade at a different stage, however, it can be suggested, that one of the most important stages of international trade is contract formation. Therefore, it is not surprising that many of the international legal instruments are concerned with contract formation and contractual terms. An example of a legally binding instrument is the United Nations Convention on Contracts for the International Sale of Goods (the 'CISG').[63] As of June 2020 the CISG has 93 contracting parties which signifies its importance as an international legal instrument.[64] The purpose of the CISG is to contribute to the unification of the rules governing sale of goods contracts, to

[58] For example the United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.
[59] For example the *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 18 June 2020.
[60] For example the United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.
[61] For example the Convention on the Contract for the International Carriage of Goods by Road (CMR) (adopted 19 May 1956, entered into force 2 July 1961) 189 UNTS 399.
[62] For example the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[63] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.
[64] 'UNTC' (2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en> accessed 18 June 2020.

promote international trade and to contribute to the dismantling of legal barriers to a free international trading environment.[65]

According to its Article 4 the CISG '[…] *governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract*.'[66] The convention is not concerned with validity of the contract or its effect on property in the goods being sold.[67] Despite the fact that the CISG is not applicable beyond the contract formation and the rights and obligations of the sellers and buyers, it is apparent that due to the significant number of the contracting parties it is an impactful convention, especially bearing in mind the usual reluctance of states to agree on the text of binding legal instruments.[68]

A factor which impacts the effectiveness of a binding legal instrument, especially in the area of the international trade, is the economic strength of the contracting states. The UK, although one of the strongest economies in the world, is not a contracting party to the CISG.[69] It is not a convenient situation for the contracting parties to the CISG to have the UK as an absentee considering the economic importance of the UK and the significance of English law for international trade.[70] The reasons presented by the UK against ratification of the CISG were various, one of them being a perceived low level of importance of the CISG to UK businesses.[71]

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[65] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 Preamble.
[66] Ibid Art. 4.
[67] Ibid Art 4.
[68] This fact is evidenced by the usual lengthy negotiation between countries on international legal instruments of a binding character, for example the Hague Convention 2005 negotiations, for details see Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 5.
[69] 'UNTC' (2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en> accessed 18 June 2020.
[70] 'Principal Global Indicators' (2020) <https://www.principalglobalindicators.org/?sk=E30FAADE-77D0-4F8E-953C-C48DD9D14735&sId=1420495318386> accessed 18 June 2020.
[71] Sally Moss, 'Why the United Kingdom has not ratified the CISG' (2005-2006) 25 Journal of Law and Commerce 483.

The above contributes to the impression that the UK is not willing to be part of a binding international legal instrument regarding contract law when there are certain significant differences between the common law and civil law doctrines of contract.[72] Even though the UK is not a contracting party to the CISG, there has not been any major inconveniences on the UK side regarding this and, therefore, the motivation for ratifying the CISG may not have been high.[73] What, on the other hand, could be perceived as a motivating factor for the future is that there are common law jurisdictions, such as US or Australia, whose membership amongst the CISG contracting parties has not threatened the position of their own contract law principles.[74]

The UK view may change in light of the impact of Brexit on future development of the UK trading relationships with other states. A potentially strong reason could be that most of the EU member states are contracting parties to the CISG.[75] Therefore, there is at least a one significant impulse for the UK to reconsider its position.[76]

Further, as per above, despite the availability of binding legal instruments, the international trade environment is influenced by various non-binding instruments which are often created by independent organisations or by other subjects. An example of a non-binding mass of such rules could be lex mercatoria originating as a medieval system of rules developed by traders.[77] Lex mercatoria in modern terms is a heterogenous assortment of various rules affecting all

[72] An example could be doctrine of consideration or promissory estoppel which do not have direct equivalent in the civil law doctrine.
[73] Sally Moss, 'Why the United Kingdom has not ratified the CISG' (2005-2006) 25 Journal of Law and Commerce 483.
[74] E.g. the USA, see e.g. *Cedar Petrochemicals inc. v. Dongbu Hannong Chemical Ltd* [2013] 06 Civ. 3972 (LTS)(JCF) or Australia, see e.g. *Summit Chemicals Pty Ltd v Vetrotex Espana SA* [2003] WASC 182.
[75] 'UNTC' (2016) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&lang=en> accessed 18 June 2020.
[76] Benjamin Hayward, Bruno Zeller and Camilla Baasch Andersen, 'The CISG and the United Kingdom—Exploring Coherency and Private International Law' (2018) 67 International and Comparative Law Quarterly 617.
[77] Volkmar Gessner, *Contractual Certainty In International Trade* (Hart Publishing 2009) 50.

areas of international trade.[78] Further, there are principles created by international cooperation, either on an intergovernmental level or on a non-governmental level.[79] It is beyond the scope of this Thesis to investigate the above in great detail, however, it is convenient to illustrate the nature of these rules by a few examples.

Amongst the most significant instruments regarding international commercial contracts could be seen to be the principles assembled by International Institute for the Unification of Private Law (the 'UNIDROIT'). The UNIDROIT Principles of International Commercial Contracts (the 'UPICC') can be viewed as an effective body of contract law rules, even though non-binding, which the parties have to choose expressly.[80] At a fourth edition of 2016, the UPICC are being reviewed on a general basis to ensure their conformity with the trend developments in the international trade environment.[81] The UPICC represent a structured contractual framework for traders compliant with the freedom of contract requirement of international trade.[82]

The International Chamber of Commerce (the 'ICC') contributes to the pool of soft laws of international trade with International Commercial Terms (INCOTERMS) for the transnational sale and purchase of goods. Similarly to the UPICC, INCOTERMS are reviewed on a regular basis in order to follow the international trade environment development with the latest edition being that of 2020.[83] Rather than being an instrument resembling a codification, INCOTERMS provide traders with specific terms regarding for example the division of costs between the seller and the buyer. An example of such a term can be EXW (Ex Works) which

[78] Ibid, even though the focus on the thesis is on sale of goods and services and not on financial markets, it is convenient to note that lex mercatoria has significant aspects relating to the finance of international trade, such as the use of bills of lading for security, bills of exchange, letters of credit or several aspects of shipping law, see for example J. H. Dalhuisen, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria' (2006) 24 Berkeley J Int'l L 138.
[79] As an example could be the UNIDROIT principles discussed below.
[80] UNIDROIT, *UNIDROIT Principles Of International Commercial Contracts* (UNIDROIT 2016) Preamble.
[81] Ibid vii.
[82] Ibid Art 1.1.
[83] *Incoterms 2020* (ICC, International chamber of commerce 2020).

means that the buyer pays all costs from factory to final destination, or CIP (cost insurance paid) where it is the seller who pays all costs up to final destination.[84] As the INCOTERMS are of the soft law nature, similarly to the UPICC, they must be expressly incorporated in the contract.[85]

The above is a brief outline of examples of rules which are part of the legal environment of international trade. These instruments were selected as they are often being used by traders as the principles of choice for international commercial contracts in cases when the rules of national laws are not used, or are used in tandem with these transnational rules.[86] The volume of available rules, including both binding legal instruments and soft law, highlights the volume of international commercial transactions. Without it the need for the development of such a complex network of rules would not be necessary.

Regional perspective

In order to secure consistency in this analysis it is necessary to discuss certain aspects of the legal environment which can be found on a regional level. With regard to the area of interest of this Thesis, the regional level discussed is the European level. The reason for this is the geographical position of the UK and the interests of the UK businesses. At the same time, since there are regional changes occurring in the European area, Brexit being perhaps the most significant from the EU perspective, it is a convenient choice to discuss examples of rules which impact the regional trade of Europe and consequently UK traders trading with traders in the EU.

[84] Ibid, EXW and CIF.
[85] Indira Carr and Peter Stone, *International Trade Law* (Routledge Ltd - MUA 2013) 6.
[86] G. Cuniberti 'Three Theories of Lex Mercatoria' (2013-2014) 52 Columbia Journal of Transnational Law 401.

The rules which function as model laws in the contract law field in the region of the European Union Member States are the Principles of European Contract Law (the 'PECL').[87] These principles appear to be in accord with the previously mentioned UPICC.[88] Similarly to the soft law principles discussed at the international level, if the parties decide to use PECL as their guiding principles for their contracts, they need to ensure their explicit incorporation in the contract.[89]

When considering the legal instruments within the legal system of the EU concerned with trade, there are several areas to consider. One of the pillars the EU establishment is standing on is the existence of a free internal market.[90] These principles connected to the freedom of trade are embedded in the Treaty on the Functioning of the European Union (the 'TFEU')[91] which together with the Treaty on European Union (the 'TEU')[92] form the constitutional frame of the EU.

Following the starting point of the free market which is established through the legislative framework of the main EU treaties, there is an enormous volume of binding laws and soft laws which directly or indirectly influence the EU trading environment.[93] Additionally, there are numerous initiatives influencing the creation of legal instruments.[94]

[87] The Commission and others, *Principles of European Contract Law: Part 3* (Ole Lando, Eric Clive and Andre Prum eds, Kluwer Law International 2003).
[88] Ole Lando, 'Principles of European Contract Law and Unidroit/principles: Moving from Harmonisation to Unification?' (2003) 8 Uniform Law Review - Revue de droit uniforme 129.
[89] The Commission and others, *Principles of European Contract Law: Part 3* (Ole Lando, Eric Clive and Andre Prum eds, Kluwer Law International 2003) Art 1:101.
[90] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 Art 26.
[91] Ibid Art 26.
[92] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[93] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge University Press 2019).
[94] As one of such initiatives can be seen the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [2011] COM/2011/0635 2011/0284/COD.

In the previous section the CISG was discussed as one of the binding legal instruments impacting the international trade environment.[95] On the regional level of the EU there is no direct equivalent to the CISG available. There are various initiatives, for example the initiatives regarding the codification of national contract law throughout the EU.[96] It is uncertain if there is a bright future for such initiatives resulting in tangible outcomes as it appears that either a specific institution needs to be established, or the EU will simply leave further codification to the member states. [97]

Even though, the area of contract law does not seem to have a specific framework within the EU legislation and it appears that traders use either the above international instruments or national laws, there are other segments of trade where strict rules exist, for example in EU competition law. In contrast to contract law, there are strict rules established in order to protect the functioning of the internal market.[98]

The rules regarding the protection of healthy competition are incorporated in the TFEU.[99] From the perspective of traders which are enjoying trade in the EU internal market, this is one set of rules limiting the freedom of trade.[100] The EU competition law is focused on antitrust rules, cartels, merger control and state aid control.[101] Within the TFEU the most significant limitations regarding unfair competition are outlined in Articles 101 and 102 TFEU. While Article 101 emphasises prohibition in multilateral behaviour, Article 102 focuses on unilateral

[95] Subject to ratification.
[96] As per above, for example the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [2011] COM/2011/0635 2011/0284/COD.
[97] Ljiljana Biukovic 'Anatomy of an Experiment: Consolidation of EU Contract Law.' (2008) 41 U.B.C. Law Review 278.
[98] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 Art 26 (1).
[99] Ibid starting at Article 101.
[100] Amongst other as for example various requirements regarding health and safety or for example consumer protection, e.g. Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance) [2019] OJ L 328/7.
[101] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 Art 101-107.

behaviour. The enforcement of such rules is secured by the EU Commission, courts and National Competition Authorities.[102]

It is apparent from the above, that on the regional level of the EU despite various initiatives, there is not a unified framework regarding contract law. There are various factors influencing the EU trade law environment, however, it can be suggested that the national law and international legal instruments such as the principles of lex mercatoria for example provide a variety of rules for the traders to choose from.

The failure of the EU to develop a harmonised system of contract law may suggest either a lack of demand for such a reform or a failure of the EU legal system to respond to the problem in an effective manner.[103] There may be such urgency in the future, however, as for now it appears that the EU emphasises the free market and protection of such and relies on the autonomy of the traders regarding their contractual arrangements. Although, as will be seen in the next section this EU restraint has not extended to consumer protections as an aspect of contract law.

Domestic perspective

The domestic level of the trade is perhaps the most complex regarding detailed legislation impacting trade. One of the reasons behind this is undoubtedly the fact that the sovereign states do not face the same obstacles at the domestic level of regulation in comparison to the regional or international level as they are constitutionally armed with an authority to create legislation.

[102] Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1.
[103] For detailed discussion about the nature and links between systems in society see Chapter 4 and 5 of this Thesis.

One of the most significant areas of law impacting the traders is undoubtedly contract law. Amongst the main principles of contract law is the principle of freedom of contract.[104] Freedom of contract as an umbrella principle of contract law is common in most jurisdictions worldwide with civil law jurisdictions generally codifying the principle in civil law legislation.[105] An example of codification of freedom of contract can be the Czech Civil Code and its section 1725 which states that the contractual parties are free to enter into a contract and determine its contents within the limits of the legal order.[106] The common law jurisdictions, even though generally not having the principle codified, also incorporate express limitations of the equivalent common law principle, such limitations often having developed more recently due to increased demand for protection of certain categories of individuals, as for example the consumers.[107]

The UK's Consumer Rights Act 2015 (the 'CRA') brought extensive amendments to the legal environment in the UK strengthening consumers' protection and brought UK consumer law into alignment with the EU laws in this area.[108] Furthermore, as suggested above, the CRA 2015 also brought a succinct definition of a trader and a consumer.[109] The identification enhanced legal certainty when distinguishing business to business contracts from consumer contracts as the contracts between a trade and a consumer are now governed by the CRA 2015 rather than the Sales of Goods Act 1979 (the 'SGA').[110]

[104] Edwin Peel and G. H Treitel, *The Law Of Contract* (Sweet & Maxwell 2015) 240.
[105] For example the Czech Republic in its Act No. 89/2012 Coll. (Civil Code).
[106] Act No. 89/2012 Coll. (Civil Code) s. 1725.
[107] As illustrated for example in the UK's Consumer Rights Act 2015.
[108] For example the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304/64 or Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.
[109] Consumer Rights Act 2015 s. 2.
[110] Ibid s.61.

The provisions of the SGA are applicable in case of contracts for the sale of goods between traders and if there is an additional service included the relevant statute is the Supply of Goods and Services Act 1982 (the 'SGSA'). The impact of the SGA (or the SGSA) on the trading environment is significant as there are various limitations and rules which must be followed by the traders and thus limiting the freedom of contract principle. An example of such limitation can be the implied term of satisfactory quality of goods which is incorporated in the contract by the statute and if this term is breached, strict liability for such arises.[111]

Although, there is a possibility to exclude or limit the liability arising in connection with breach of the implied terms, which balances the limitation of the parties' autonomy. However, the attempts to exclude or limit the liability in a form of exclusion/limitation clauses[112] must undergo a test in common law concluded with a test of passing the statutory requirements in the Unfair Contract Terms Act 1977 (the 'UCTA').[113] Apart from the statutory requirement, the common law requires the exclusion clause to pass the test of incorporation and construction.[114]

Firstly, the clause must be incorporated in the contract either by signature, notice or previous course of dealing.[115] After the clause is found to be incorporated, the courts assess if the clause can be construed in a way to cover the liability in question.[116] In the above example, regarding the clauses which aim to exclude or limit liability for breach of the implied terms as for example the implied term that goods need to be of a satisfactory quality as per the s. 14 SGA, the courts asses if the clause can be interpreted in such way to cover the mandatory

[111] Sale of Goods Act s. 14.
[112] Hereby referred to as exclusion clauses which implies the limitation clauses as well.
[113] In case of a consumer contract, the statutory requirements are provided by the CRA. However, as the Thesis is concerned with relations between business, the CRA requirements are not docussed.
[114] Edwin Peel and G. H Treitel, *The Law Of Contract* (Sweet & Maxwell 2015) 472.
[115] Ibid 472.
[116] Ibid 472.

obligation in question.[117] The clauses are construed using the *contra proferentem* rule which signify that any ambiguity in the clause must be interpreted against the party trying to rely on the clause to exclude or limit liability.[118] Generally, outside the scope of mandatory consumer protection, the courts are more benevolent regarding liability limitation clauses rather than clauses trying to exclude liability entirely.[119]

Further, rules concerning exclusion or limitation liability for negligence are amended by the *Canada Steamship Lines Ltd v The King*[120] where certain criteria must be fulfilled in order for the clause to be enforceable. Generally, if the clause does not expressly refer to negligence, however the wording is wide enough to cover negligence, in case of no other possible head of liability, the clause could be enforceable (subject to passing the test of statutory requirements).[121] When there is a possibility of another head of liability arising, for example strict liability, the clause will only cover the non-negligent liability (further subject to passing the test of statutory requirements).[122]

The last stage to test the enforceability is to assess if the clause passes the statutory requirements, in business contracts imposed by the UCTA. If the common law test is passed regarding any type of liability, generally, except for liability for death or personal injury resulting from negligence, the clause must pass the test of reasonableness incorporated in section 11 of the UCTA. The test of reasonableness provides that for the enforceability of the terms in question, the '*term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the*

[117] Ibid 472.
[118] Ibid 473.
[119] Ibid 473.
[120] *Canada Steamship Lines Ltd v The King* [1952] A.C. 192.
[121] Ibid.
[122] *White v John Warwick & Co Ltd* [1953] 1 W.L.R. 128.

contemplation of the parties when the contract was made.'[123] Schedule 2 of UCTA further provides guidelines on how the courts should determine the reasonableness of the term.[124] The courts will for example assess '*the strength of the bargaining positions of the parties relative to each other* […].'[125] If on the balance the term seems reasonable, it is likely that the courts hold it enforceable.

It is apparent from the above, that even though freedom of contract has been a principle which has been honoured by the authorities for decades,[126] there are limitations which are imposed by the legal system which restrict the autonomy of the parties regarding the content of their contracts. The above example of the exclusion clauses in common law illustrates how the system mitigates possible unbalanced trading conditions.

In comparison to the above, the Czech legal system by adopting the new Czech Civil Code (the 'CCC')[127] in 2012 fused the old Civil Code[128] and Commercial Code[129] into one codification, resulting in a fusion of the provisions regarding all types of contracts together (including consumer contracts). This includes exclusion of liability in contracts. For the consumer contracts, the rules are straightforward and consumer rights arising from a defective performance are protected as stipulations to exclude or limit such rights are prohibited, which is reflection of the EU rules regarding consumer's protection.[130] The provisions regarding consumer protection in the CCC are special to the general provisions for contracts, however, the general contracts provisions operate on the similar principle. Rather than excluding

[123] Unfair Contract Terms Act 1977 s. 11(1).
[124] Ibid Schedule 2.
[125] Ibid Schedule 2 (a).
[126] *Printing and Numerical Registering Co v Sampson* [1875] 3 WLUK 22.
[127] Act No. 89/2012 Coll. (Civil Code).
[128] Act No. 40/1964 Coll. (Civil Code).
[129] Act No. 513/1991 Coll. (Commercial Code).
[130] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

liability for defective performance (including defective products), there is a possibility for the party receiving the goods or services to waive her or his rights arising from the defective performance.[131] However, if this is the case, a written form is required for such a stipulation.[132] Further, such a stipulation is not permitted in case of specific goods but only for goods determined by kind (equivalent to unascertained goods in English law).[133] This last requirement is not embedded in the CCC, however, this interpretation was established by the Highest Court of the Czech Republic (the 'CR').[134] Even though the case law is not legally binding in the Czech legal system, it can be suggested that the Highest Court of the CR is perceived as one of the authority regarding interpretation of the written law and its decisions are used accordingly in legal argumentation.

From the above it is apparent, that the uncodified and codified legal systems do share similarities which is understandable as both types of system function in a society and there is a need for specific tools which facilitate the resolution of potential conflicts within each of them. Each system responds to the societal needs in their own way and according to their legal culture. It can be observed that the development of society with similar cultural backgrounds is influenced by similar elements to which the norms of the legal systems react alike. This may be either on national level or on transnational level, depending on the position of the person observing the systems. Here it is worth to recall Rodrik's outline of institutions supporting markets, specifically the belief system and the third-party enforcement.[135] It appears that the belief system which may be similar in similar cultural environments, as it

[131] Act No. 89/2012 Coll. (Civil Code) s. 1916.
[132] Ibid s. 1916.
[133] Decision of the Highest Court of the Czech Republic made on 24 October 2013 No. 33 Cdo 2641/2012.
[134] Ibid.
[135] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012) 14.

may send impulses to, and further influence the third party enforcement institutions, and, thus, the legal system which can be perceived as a part of the institutional category of third party enforcement.[136]

The purpose of the above is to illustrate how the trading environment is influenced by the legal system and what tools are available on the domestic legal system level of the trading environment. For the common law legal systems, it is the development of the legal principles established in the case law within a supporting network of statutes and other legal instruments as illustrated by the three stage test regarding exclusion clauses. In the case of the civil law jurisdictions it is the written law, often extensively codified, however, and the decisions of the courts, particularly the highest courts, are generally viewed simply as a guidance as to how the written law should be interpreted: although they are nowadays perceived as a valuable tool by lawyers for usage in their legal argumentation.

2.2 Dispute resolution mechanisms (including ADR)

In order to map the successful journey to enforcement of legal rights by the UK businesses, one of the crucial areas of discussion is the area of dispute resolution mechanisms. This stage, even though at this point having an illustrative function, is vital for the journey to enforcement. The initial starting point of the journey is an occurrence of a conflict between a UK business and its cross-border trading partner. The perspective of this Thesis emphasises is mostly from the UK business' side when the UK business seeks to enforce its claims.[137] Therefore, even though it is clear that cross-border trading partners may often find themselves in the situation of seeking the enforcement of their claims against a UK business,

[136] Ibid 16.
[137] With the occasions of taking the perspective of the UK as a legal system.

this position, despite some discussion, is not the main focus of this Thesis. In Chapter 6, however, common rules governing the enforcement of foreign judgements are outlined, as it is necessary to illustrate how the national rules are able to make the matter significantly more complex than they would be under shared regional or international instruments.[138]

This section should be viewed as an introduction to the options that are available in the area of international dispute resolution. Further, in light of the fragmentation, which is crucial for the core of the investigation in this Thesis, the emphasis is put on arbitration as an alternative to litigation which may be one of the most convenient options for UK businesses in the future. In the subsections below, there is a part of a discussion dedicated to a brief familiarisation of the dispute resolution mechanisms available and main highlights of these methods as suggested by the practice and academic scholarship.[139]

Even though a certain specified number of dispute resolution methods are discussed below, it needs to be emphasised that the list is not exhaustive. Often there are additional methods available which can be perceived as a combination of the mechanisms listed below. An example could be a combination of mediation and conciliation (mediative conciliation) or a combination of litigation and conciliation.[140] The methods which are included below could be divided into two categories, according to the style in which the method is being conducted. These two categories are adjudication and bargaining.[141] While in case of adjudication there is a neutral third party (assuming a dispute between two parties) responsible for a binding decision, the bargaining category emphasises bargaining between the parties subjecting their

[138] For more details, please see Chapter 6.
[139] For the outline of the topic see Chapter 1 of this Thesis where the approach to the dispute resolution mechanisms' discussion is introduced.
[140] See for example Tim Ifeanyi Anago, 'Mediative conciliation' (2000) AACE International Transactions or Felix Steffek and Hannes Unberath (eds), *Regulating dispute resolution: ADR and access to justice at the crossroads* (Hart Publishing 2014).
[141] Julia Hörnle, *Cross-border internet dispute resolution* (Cambridge University Press 2009) 49.

dispute to this particular category of mechanisms.[142] From the list below, the adjudication category includes arbitration and litigation and the bargaining category includes negotiation, mediation, conciliation.[143] Expert determination could be seen as a hybrid between the two as it results in a binding decision, however, in order to enforce the decision, an action for breach of a contract must be submitted.[144]

Negotiation

Negotiation can be seen as an informal method of a dispute resolution without a stable set of rules and generally would depend on the willingness of the parties to subject themselves to a negotiation process, usually with their legal representatives.[145] Negotiation is not an isolated method and can be present together with other methods due to the general nature of this mechanism. The problematic point regarding negotiation is the lack of a prescribed structure and the success of this process depends on the parties willingness to bargain.[146] The informality may result in an unsuccessful attempt and the parties may need to proceed further to other, more formal, methods of dispute resolution.[147] On the other hand, when negotiation is successful, the parties have a significant chance of an unspoiled future trading relationship.[148] Generally, negotiation could be viewed as a starting point after all the more informal methods fail to facilitate the resolution of the occurring conflict.[149]

[142] Ibid 49.
[143] Ibid 49.
[144] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 18.
[145] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, (3rd edn, Thomson West, USA, 2008) 18.
[146] Alex J. Hurder 'Discovering Agreement: Setting Procedural Goals in Legal Negotiation' (2010) 56 Loy. L. Rev. 591.
[147] Ibid 617.
[148] Ibid 617.
[149] These methods may include for example a direct communication between the parties with the aim to resolve the conflict at hand.

Mediation

Mediation is becoming more popular as a mechanism of dispute resolution when parties are experiencing a conflict which they are unable to resolve themselves.[150] Mediation is a method of dispute resolution which includes a third party, an independent mediator, who subsequently facilitates the negotiations between the parties, yet does not result in a binding decision.[151] The result of mediation is often a contract between the concerned parties which indicates an arrangement of the parties' future rights and obligations.[152] The process is more informal than other methods listed below as the rules of mediation are chosen by the parties as well as the outcome of the process.[153]

Similar to negotiation, which is more informal, one of the advantages of mediation is the parties' future relationship has a better chance to survive rather than after using more formal methods of dispute resolution.[154] However, with the above there is a clear disadvantage that the parties must be willing to subject their dispute to mediation. Furthermore, if one party breaches any contract that the mediation might result in, the other party may then have to seek an alternative mechanism which results in a binding decision.

Mediation can benefit from the Model Law which is provided by the United Nations Commission on International Trade Law (the 'UNCITRAL').[155] The Model Law provides states with a framework (hence the Model Law indication) which the states may incorporate into their legal systems and, therefore, provide the parties whose disputes end up in the

[150] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 6.
[151] Ibid 6.
[152] Julia Hörnle, *Cross-border internet dispute resolution* (Cambridge University Press 2009) 51.
[153] Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution*, (3rd edn Thomson West 2008) 76.
[154] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 6.
[155] *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (United Nations Publications 2018).

respective jurisdictions with a predictable set of rules. The Model Law provides rules regarding mediation procedure, including the conduct of mediation and also provides rules incorporating a requirement of confidentiality. The incorporation of the Model Law is likely to bring more certainty for the users, being the parties to a dispute using mediation as a method of its resolution.

Conciliation

There are certain similarities between mediation and conciliation as neither methods of dispute resolution result in a binding decision.[156] Conciliation can be seen as a more formal process than meditation, since mediation could be seen effectively simply as a complex form of negotiation.[157] While negotiation and mediation and their successful outcome is mostly dependent on the parties themselves, a conciliator is more actively involved in the settlement than any third party in the former methods.[158]Even though some authors suggest little to no difference between mediation and conciliation, the active role of the neutral third party may be the core to distinguish between the two methods. [159] The role of the neutral third party in conciliation is more authoritative in comparison to mediation and a conciliator generally provides recommendation if the ADR method is unsuccessful.[160] Conciliation can be, thus, perceived as a middle ground between mediation and arbitration.[161]

If parties decide to use conciliation in order to solve their dispute they can further benefit from the UNCITRAL Conciliation Rules provided these rules are incorporated in their

[156] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 5.
[157] John Graham Merrills, *International Dispute Settlement* (Cambridge University Press 2007) 64.
[158] Tim Anago Ifeanyi, 'Mediative conciliation' (2000) AACE International Transactions R12.2.
[159] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 9.
[160] Ibid 9.
[161] J. G. Merrills, *International Dispute Settlement* (6th edn Cambridge University Press 20017) 62.

contract.[162] Additionally, amongst other benefits, the parties may rely on the requirement of confidentiality embedded in Article 14 of the UNCITRAL Conciliation rules.[163]

Even though this method of a dispute resolution does not result in a binding decision it could be more convenient for those parties who might need an independent third party to be more active in guiding their dispute settlement process. This may be a convenient option for parties who do not want to depend on themselves or do not want to be proactive in the negotiation, however, do not want to opt for more formal methods that could result in a binding decision. Both mediation and conciliation are generally offered by the most popular arbitration centres worldwide which may be convenient for parties who might eventually seek a binding decision.[164] In some cases this arrangement may encourage the concerned parties to try to resolve their dispute using more amicable methods of dispute resolution prior to subjecting their conflict to arbitration or litigation. The clear disadvantage is the lack of enforceability of a binding decision as there is not a binding decision present, however, the arrangement provided by mediation or conciliation may be a satisfying result for the concerned parties which contributes to a better future trading relationship.[165]

Expert Determination

Expert determination is mostly a straightforward process where an expert is appointed in order to determine value or asses a specific issue.[166] The expert is appointed by the parties for her or his expertise concerning the issue which the parties need to resolve.[167] The

[162] *UNCITRAL Conciliation Rules of the United Nations Commission on International Trade Law* (United Nations Publications 1980) Art. 1(1).
[163] Ibid Art 14.
[164] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 5.
[165] Ibid 5.
[166] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 18.
[167] John Kendall, Clive Freedman and James Farrell, *Expert Determination* (Sweet & Maxwell/Thomson Reuters 2015) 1.1-1.

popularity of this method is on the price as it is less costly in comparison to other mechanisms and, therefore, is often used for general disputes rather than only for value determination.[168] One of the main advantages of expert determination is speed as it normally takes less time than arbitration or litigation.[169] Further, similar comments could be said about costs, even though there is generally not a formal control over expert's fees.[170] The allocation of the costs of expert determination depends on an agreement of the parties, however, it is common to share the costs stipulating this in the expert determination clause.[171] On the other hand, possibly the most significant disadvantage for dispute resolution is that there is not a stable framework for international enforcement of expert decisions in comparison to arbitration or litigation.[172] As suggested above, if the decision is not being followed, the other party has the possibility to pursue an action by litigation or arbitration (but only when the parties have agreed to refer the dispute to arbitration) for breach of a contract.[173] Nevertheless, it is convenient to outline the option of an expert determination as for some niche disputes this may be the perfect mechanism for all the concerned parties.

Arbitration

As arbitration is discussed in detail in Chapter 7 of this Thesis, the role of this discussion is simply to set arbitration in the context of dispute resolution and highlight often outlined characteristics of the nature of arbitration as a mechanism for dispute resolution. According to the categorisation above, arbitration as a method of dispute resolution could be subsumed

[168] Ibid 1.1-1.
[169] Ibid 6.11-1.
[170] Ibid 6.11-2.
[171] Ibid 6.11-2.
[172] Ibid 6.11-9.
[173] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 18.

in the adjudication category, however, it is of a private nature in comparison to litigation.[174] Similarly to litigation, however, arbitration results in a binding decision which distinguishes arbitration from the other methods of alternative dispute resolution.[175] On the other hand, the right to appeal the arbitral award is limited and often not available for the parties, subject to exceptions, highlighting the finality of the award.[176] Furthermore, the third party deciding the dispute in case of arbitration, the arbitrator, is independent of the state and the process is private while in case of litigation the court proceedings are within the domain of the state and, generally, public.[177] If the parties wish to subject their dispute to arbitration, they need to express their will in a form of an arbitration agreement, a clause which is usually incorporated into, but remains distinct from, their trading contract, and usually specifies the arbitration institution or the seat of arbitration and other details which impact the future dispute resolution process.[178]

The fact that the parties need to agree on submitting their dispute to arbitration, may be perceived as a drawback as this may be problematic in multi-party disputes.[179] This fact may create difficulties for the parties, as in order to be able to resolve a dispute by one arbitration, all the relevant parties must be a part of an arbitration agreement and if this is not fulfilled, there may be arbitration or arbitrations in place as well as for example litigation if a party does not consent to have a particular dispute to be resolved by an arbitration.[180]

[174] Margaret L Moses, *The principles and practice of international commercial arbitration* (Cambridge University Press 2012) 1.
[175] Ibid 3.
[176] Ibid 3.
[177] Ibid 3.
[178] Ibid 3.
[179] Thomas J Stipanowich, 'Arbitration and the Multiparty Dispute: The Search for Workable Solutions' (1987) 72 Iowa L Rev 476.
[180] Ibid 528.

As the arbitration is an alternative mechanism which is generally independent of the state when it comes to generation of a binding decision, there is a separate legal framework provided by the state which is designated as the seat of arbitration and the domestic law of that particular state governs the arbitration process and often also includes provisions regarding enforceability of non-domestic awards.[181] When considering the categories of law which are involved in arbitration, the seat of arbitration plays a rather significant role, as it can be perceived as the juridical place of arbitration.[182] The seat does not change if the parties decide to hold the hearings in different states.[183] *Lex arbitri*, which is one of the categories of law involved in arbitration, can be outlined as a set of mandatory rules '*applicable to arbitration at the seat of arbitration*.'[184] Further, there is the category of procedural or curial law which is governing the arbitration procedure.[185] The above categories are often distinguished from applicable law which the parties chose '*in order to determine the merits of the dispute*,' therefore the substantive law.[186]

A point which is necessary to outline while introducing arbitration is that the system of international commercial arbitration benefits from the existence of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958 (the 'NYC') ratified by 169 countries.[187] The NYC is an instrument ensuring enforceability of non-domestic arbitral awards, protecting them from any possible discrimination.[188]

[181] For example Section 100 of the Arbitration Act 1996.
[182] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 233.
[183] Ibid 235.
[184] Ibid 233.
[185] Ibid 233.
[186] Ibid 221.
[187] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3; as of March 2022.
[188] Ibid Art I.

Apart from the enforceability itself the NYC also outlines rules regarding the arbitration agreement and requirements on its content.[189] If the arbitration agreement does not include the necessary requirements, there is a possibility that courts may find such an agreement to be null and void.[190] There are certain exceptions, as for example a situation when the parties decide to subject their dispute to an ad hoc arbitration, which can be advantageous with regard to lower costs and greater flexibility.[191] The current trend, however, is that courts try to honour the will of the parties and there are certain circumstances when courts have found the agreement valid even if missing certain important information.[192] If, however, the courts find the agreement null and void, the dispute will usually be resolved by litigation.[193]

Litigation

Litigation can be seen as the final link in the chain of dispute resolution methods. It can be seen as a '*guarantor of final justice*.'[194] Often for inexperienced businesses litigation may seem as the only option they have in order to enforce their rights. At times litigation would be more beneficial, as for example legal certainty is undoubtedly strong in jurisdictions with a traditionally robust legal culture. This is supported by the legal framework provided by the sovereign state and by the fact that the parties are usually able to appeal the decision of the courts, while the arbitral award is generally final.[195]

[189] Ibid Art II.
[190] Ibid Art II (3).
[191] Giuditta Cordero-Moss, *International Commercial Arbitration, Different Forms And Their Features* (Cambridge University Press 2013) 69.
[192] For example *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5 where in the arbitration clause it was stated that the arbitration institution which would deal with the dispute is an 'Arbitration Committee at Singapore' while there is no such committee in existence.
[193] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3 Art II (3).
[194] Yun Zhao, *Dispute resolution in electronic commerce* (Brill Academic Publishers 2005) 90.
[195] Margaret L Moses, *The principles and practice of international commercial arbitration* (Cambridge University Press 2012) 3.

In international commercial litigation there are issues of private international law (the 'PIL') which need to be resolved. These matters are given a more thorough treatment in Chapter 6. Firstly, the question of jurisdiction needs to be clarified and it needs to be determined which courts are the competent ones to resolve the dispute.[196] Further, it needs to be determined what the applicable law is and lastly, the enforceability of the decision needs to be ensured.[197] These issues regarding recognition and enforceability are presented further in Chapter 6, however, it is convenient to bear the above in mind throughout consideration of this Thesis.

The above Section 2.2 outlines the existence of different methods of dispute resolution, however, the list is not by any means exhaustive. The selected methods were briefly identified in order to illustrate that there are more options than simply the traditional litigation procedures available to UK businesses for the resolution of their disputes with their cross-border trading partners. These alternative dispute resolution procedures, which can be seen as alternative to litigation and thus include arbitration, are generally independent of the state and the bargaining category provides the parties with 'softer' methods should they wish to try resolve their dispute amicably. There is a different level of involvement of the independent third party, if present, and the parties can find the one which is the most suitable for them. If there is a necessity of a binding decision, the parties may select arbitration if it is more convenient for their dispute. However, it is possible that if the parties are not well orientated in the different types of dispute resolution mechanisms available, litigation as the '*guarantor of final justice*' is picked as the level of legal certainty could be seen as comforting in the context of traditional legal systems.[198]

[196] Yun Zhao, *Dispute resolution in electronic commerce* (Brill Academic Publishers 2005) 90.
[197] Ibid 90.
[198] Ibid 90.

2.3 Brexit

The date of 23rd June 2016 will be remembered as a significant milestone in the UK's modern history as on this date the majority of UK voters expressed interest, in a nationwide referendum, in departing the UK from the EU. The circumstances surrounding this divorce from the lengthy marriage, lasting since 1973, have perhaps been of even more substantial complexity than the officials eventually responsible for drafting the divorce settlement agreement might have naturally anticipated. Due to the dynamicity of current events occurring in the political, legal and economic international affairs, the evaluation of the current development and the potential future development is conducted cautiously, manifesting the awareness of the uncertainty which is now affected even by the Covid-19 pandemic.

For a more effective illustration of the impact in question it is useful to outline a few of the most important dates in the Brexit 'timeline':

i. **23rd June 2016** – the Brexit referendum is held resulting in the majority of 51.9% voting to leave versus 48.1% voting to remain;[199]

ii. **29th March 2017** – Theresa May, the UK Prime Minister, triggers Article 50 of the Treaty on European Union;[200]

iii. **19th June 2017** – the first round of the Brexit negotiations between the UK and the EU begins;[201]

[199] Nigel Walker, 'Brexit Timeline: Events Leading To The UK'S Exit From The European Union' (House of Commons Library 2019) 6.
[200] Ibid 12.
[201] Ibid 16.

iv. **8th December 2017** – the first round of negotiations is concluded resulting in the Joint Report[202] presented by the EU and the UK representatives;[203]

v. **14th November 2018** – publication of the Withdrawal Agreement;[204]

vi. **15th January 2019** – a historic defeat for the government in the UK Parliament's 'Meaningful Vote' on the Theresa Mays' BREXIT deal (202 votes in favour; 432 against);[205]

vii. **29th January 2019** – Theresa May presents a 'Plan B' for re-opening the Withdrawal Agreement in her negotiations with the EU;[206]

viii. **29th March 2019** – the first prospective date when the UK was supposed to leave the EU;

ix. **7th June – 23rd July 2019** – Conservative Party leadership election in which Boris Johnson wins the election enabling him to succeed Theresa May as a Prime Minister;[207]

x. **31st October 2019** – the extended prospective date when the UK was supposed to leave the EU;[208]

[202] The Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union available at https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf .
[203] Nigel Walker, 'Brexit Timeline: Events Leading To The UK'S Exit From The European Union' (House of Commons Library 2019) 23.
[204] Ibid 35-36.
[205] Ibid 40.
[206] Ibid 43.
[207] 'New Conservative Leader And PM Is Announced' (*BBC News*, 2021) <https://www.bbc.co.uk/news/av/uk-politics-49084447> accessed 10 April 2021.
[208] 'Prime Minister's Statement After Article 50 Extended To 31 October 2019 - News From Parliament' (*UK Parliament*, 2019) <https://www.parliament.uk/business/news/2019/april/prime-ministers-statement-after-article-50-extended-to-31-october-2019/> accessed 24 April 2019.

xi. **12th December 2019** – Conservative Party wins majority in the UK Parliament allowing Boris Johnson to put forward the suggested Withdrawal Agreement;[209]

xii. **1st February 2020** – Entry into force of the UK-EU Withdrawal Agreement;[210]

xiii. **31st January 2020** – the UK leaves the EU;

xiv. **24th December 2020** – The EU and the UK agree on a Trade and Cooperation Agreement provisionally applicable from 1st January 2021 (the 'TCA');[211]

xv. **31st December 2020** – the end of the transition period according to Article 126 of the Withdrawal Agreement.[212]

From the timeline above it is clear that there has been a lengthy process regarding the arrangement of the UK's exit. Since the transition period has ended and with the Covid-19 pandemic being the priority, the further approach of the UK with regard to its relationship with the EU has not crystalised yet in full. The approach of the UK towards the cooperation with the EU needs to be detailed and this may take many years to form into a settled pattern. There are and undoubtedly will be many suggested directions for the UK to follow. One such example is the 24th Report of Session 2019-21 of the European Union Committee of the Parliament published by the Authority of the House of Lord on 25th March 2021 with a title

[209] 'Election Results 2019: Boris Johnson Returns To Power With Big Majority' (*BBC News*, 2021) <https://www.bbc.co.uk/news/election-2019-50765773> accessed 10 April 2021.
[210] 'The EU-UK Withdrawal Agreement' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/relations-united-kingdom/eu-uk-withdrawal-agreement_en> accessed 10 April 2021.
[211] 'The EU-UK Trade And Cooperation Agreement' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en> accessed 4 April 2021.
[212] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C384 I/1; the UK has further decided not to extent the transition period.

'Beyond Brexit: trade in goods' (the 'Report').[213] This Report suggests that the TCA is far from being an example of a frictionless trade agreement and that the UK should be ambitious regarding future cooperation with the EU.[214] It further suggests implementation of the TCA should be done with as little disruption as possible and that the UK should aim for a smoother trading relationship with the EU.[215] This is, however, contrasting with the possibility that the EU itself may not be willing to aim for such smoother cooperation and thus may compel the UK to not having any other choice than to be a classic third party state and less able to negotiate further relaxations of trade barriers which would benefit businesses. One of such examples is the recent recommendation of the EU Commission not to consent for the UK to become a party to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Lugano Convention 2007'),[216] which is considered by the EU Commission to be not convenient for the future cooperation of the EU with the UK (this point is in depth discussed in Chapter 6 regarding private international law).[217]

Section 2.3 serves as an introduction to those issues which are and will be impacted by Brexit regarding the methods of dispute resolution and related legal frameworks. Particularly the PIL rules of the EU, regarding cross-border recognition and enforcement, which the UK businesses are no longer be able to rely on now that the transition period has expired and the

[213] 'Beyond Brexit: Trade In Goods' (*Committees.parliament.uk*, 2021) <https://committees.parliament.uk/publications/5247/documents/52587/default/> accessed 8 April 2021.
[214] Ibid 59.
[215] Ibid 59.
[216] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.
[217] 'Communication - Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) .<https://ec.europa.eu/info/files/communication-assessment-application-united-kingdom-great-britain-and-northern-ireland-accede-2007-lugano-convention_en> accessed 10 May 2021.

TCA is being provisionally implemented. Nevertheless, it is convenient at this juncture to outline why the PIL rules are significant for the purposes of this Thesis.

Engagement in international trade across national boundaries with different legal systems can pose challenges that the traders must deal with when it comes to dispute resolution and enforcement of judgements. As suggested above, one of these challenges is determining the applicable law in their case. Another challenge is agreeing which court will have jurisdiction in their case. Further, the parties need to address if the decision they obtain through the dispute resolution mechanism is recognised and enforced in the country in which enforcement will be preferred by the judgment creditor. This is an important matter as the parties should agree on the dispute resolution mechanisms at the time when the contract is made, should they wish to subject their possible future dispute to a specific dispute resolution mechanism and enforce the order in a specific jurisdiction, as at the time when a dispute arises, the claimant may find itself unable to sue in any jurisdiction in which the judgment might effectively be enforced.[218]

The current EU PIL regime addresses all the mentioned challenges. The applicable law is determined by the Rome regimes[219] and the jurisdiction is determined by the Brussels regime [220] which also provides rules for recognition and enforcement of foreign judgements.[221] If the parties decide to choose arbitration, the legislative frameworks for

[218] The parties can agree on submission to a certain method of discupte resolution even after the dispute arises, but this perhaps should not be relied on as the relationship may not be ideal for such agreement when a dispute arises.
[219] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6; 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 L199/40.
[220] 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 L351/1.
[221] Ibid Chapter III.

arbitration also address the issues of applicable law, jurisdiction and enforcement accordingly.[222]

After the end of the transition period, the EU jurisdiction and recognition rules in force in the UK prior the end of transition period ceased to be applicable. Regarding the applicable law, the EU rules have been retained in the UK as they do not require reciprocity between states and may be unilaterally incorporated in the national law.[223] However, it is uncertain to what extent, and in what detailed complexity, the matters concerning the removal of the EU PIL regime will be negotiated between the UK and the EU in the future. It has been predicted that these issues will not be of a top priority on the UK Government's list.[224] There were numerous policy papers being issued by the UK government, with two future partnership papers of August 2017 concerning enforcement and dispute resolution and cross-border judicial cooperation which attempted to outline the aims and objectives of the future post-Brexit establishment.[225] According to the cross-border judicial cooperation paper, the future arrangement is aiming to be based on '*comprehensive cross-border civil judicial cooperation on a reciprocal basis*'.[226] The nature of the prosperous future cooperation is, however, still uncertain.

There are certain indicators of the possible direction of the future arrangements between the UK and the EU regarding PIL. Firstly, in the uncertain times that followed publication of the

[222] For detailed discussion please see Chapter 2 and Chapter 17 of Gary B Born's *International Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2016) .
[223] Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.
[224] Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' (2016) 12(2) Journal of Private International Law 209.
[225] For details see the Enforcement and dispute resolution - a future partnership paper (Department for Exiting the European Union 23.08.2017) and Providing a cross-border civil judicial cooperation framework - a future partnership paper (Department for Exiting the European Union 22.08.2017).
[226] Providing a cross-border civil judicial cooperation framework - a future partnership paper (Department for Exiting the European Union 22.08.2017) para 19.

first proposed withdrawal agreement and, for the case of no deal Brexit, on 28th December 2018 the UK deposited an instrument of accession to the Hague Convention 2005 on Choice of Court Agreements within the Kingdom of the Netherlands, as depositary of the treaty (the 'Instrument of Accession').[227] The Instrument of Accession declared that in the event that there is a no-deal Brexit, the Hague Convention 2005 would enter into force on 1st April 2019. After this date passed and the prospective Brexit date was extended, the effect of the Instrument of Accession was accordingly suspended to the 1st November 2019.[228] Eventually, with the Brexit date confirmed, the UK withdrew the Instrument of Accession and related documents with the effective date of 31st January 2020.[229]

Another Instrument of Accession was deposited on 28th of September 2020 and was followed by a requirement to implement the Hague Convention 2005 in a form of Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018/1124 and sealed by the implementation legislation in a form of the Private International Law (Implementation of Agreements) Act 2020.[230]

The Hague Convention 2005 aims to facilitate international judicial cooperation by providing a set of rules governing jurisdiction agreements and recognition and enforcement of judgements based on these agreements.[231] The importance of uniform PIL rules was stressed above. Without these rules trading partners from different countries would have far less certainty (and potentially much more inconvenience) in subjecting their disputes to effective

[227] 'Notification Pursuant To Article 34 Of The Convention' (*Treatydatabase.overheid.nl*, 2019) <https://treatydatabase.overheid.nl/en/Verdrag/Details/011343/011343_Notificaties_13.pdf> accessed 19 June 2020.
[228] 'HCCH | Declaration/Reservation/Notification' (*Hcch.net*, 2019) <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn> accessed 19 June 2020.
[229] Ibid.
[230] 'Notification Pursuant To Article 34 Of The Convention' (*Treatydatabase.overheid.nl*, 2021) <https://repository.overheid.nl/frbr/vd/011343/1/pdf/011343_Notificaties_24.pdf> accessed 10 April 2021.
[231] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands, preamble.

determination and enforcement, particularly if the parties have different preferences as to the country and mechanism before, and by which, their dispute should be resolved. Reliance of the parties solely on different national PIL rules could result in parallel disputes or forum shopping.[232]

Further, if the dispute is resolved, the winning party needs to have the judgement enforced in a country where the other party has assets which can satisfy the claim.[233] This could be the same country where the judgement was issued, however, it does not need to be always the case. If there is not a set of rules which would unify enforcement of foreign judgements the winning party may face lengthy disputes resolving PIL issues under national PIL rules as well as lengthy substantive disputes on the merits under contrasting national laws before eventual refusal of enforcement by the jurisdiction or jurisdictions in which assets are located.

To be able to avoid similar problems like the above, in 1992 the United States (the 'US') proposed to the Hague Conference on Private International Law (the 'HCPIL') the creation of a new convention which would include PIL rules.[234] However, due to the complexity of the area of PIL and differences in the national laws the development of such convention did not seem to be achievable in the scale proposed by the US.[235] Where the members seemed to be more willing for cooperation was in the area of the enforceability of jurisdiction agreements and enforcement of decisions arrived at by courts asserting jurisdiction on the basis of these

[232] Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 3.
[233] Ibid 3.
[234] 'HCCH | The Originating Proposal (1992)' (*Hcch.net*, 2020) <https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments/the-originating-proposal-1992-> accessed 28 June 2020.
[235] Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 3.

agreements.[236] This course of events gave the grounds for creation of the Hague Convention 2005.

Considering the above, the first question that arises is to enquire why the EU considered there was any need for this convention (which entered into force in all member states except for Denmark on 1st October 2015). Given the existing EU Regulations referred to above in the PIL area, the question is if there was truly a need for another convention. As was pointed out above the EU has developed its own system of PIL consisting amongst others of the Rome regimes[237] and the Brussels regime.[238] Therefore, the EU members benefit from these rules. It is quite clear that this system does not allow 'outsiders' to take advantage of them. The EU ratification of the Hague Convention 2005, therefore, allows the EU businesses to rely on a stable set of rules if they incorporate a jurisdictional clause (i.e. a choice of court agreement) in their contracts with their non-EU trading partners. The motivation on the EU side was, as indicated above, to promote legal certainty and also to '*boost the economic growth*' of the EU.[239] This is where the issue lies for the UK and provides at least some certainty for the UK businesses in the area of jurisdiction and enforcement of cross-border transactions.

Another option for the UK regarding securing an effective framework of PIL was to be part of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Lugano Convention 2007').[240] This was the preferred option as the

[236] Ibid 3.
[237] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6; 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 L199/40.
[238] 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 L351/1.
[239] 'European Commission - PRESS RELEASES - Press Release - Choice Of Court Convention: EU Businesses Receive A Major Boost For International Trade' (*Europa.eu*, 2014) <http://europa.eu/rapid/press-release_IP-14-1110_en.htm> accessed 20 June 2020.
[240] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.

UK submitted an application for re-accession to the convention on 8th April 2020.[241] The Lugano Convention 2007 governs the jurisdiction issues, and the enforcement of judgements, between member states of the EU and European Free Trade Association.[242] For the UK to accede to Lugano Convention 2007, there would however, have had to have been a unanimous consent of the signatories, namely all the Member States of the EU as well as Iceland, Norway, and Switzerland. [243] The UK had support of the Iceland, Norway and Switzerland.[244] However, as the unanimous consent of the signatories was required, the EU, as a ratifying party, held the future of the Lugano Convention 2007 and the UK accession to it entirely in their hands. Unfortunately, for the UK businesses, as pointed above, the EU Commission has recommended the EU not to give consent for the UK accession.[245]

From this perspective, the accession to the Hague Convention 2005 is reasonable, as the accession in this case does not require consent of the ratifying parties.[246] Therefore, as the UK has not so far obtained the needed consent from the EU (and Denmark) for the accession to Lugano Convention 2007 as suggested above, as the EU Commission did not recommend that the EU give its consent, it is likely that the accession to the Hague Convention 2005 is the best solution for the time being.

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[241] (*Eda.admin.ch*, 2020) <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf> accessed 28 June 2020.
[242] 'EUR-Lex - 22007A1221(03) - EN - EUR-Lex' (*Eur-lex.europa.eu*, 2019) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29> accessed 19 June 2020.
[243] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 Art 72(3).
[244] 'Support For The UK'S Intent To Accede To The Lugano Convention 2007' (*GOV.UK*, 2020) <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 28 June 2020.
[245] 'Communication - Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/files/communication-assessment-application-united-kingdom-great-britain-and-northern-ireland-accede-2007-lugano-convention_en> accessed 10 May 2021.
[246] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 27.

2.4 Context Synthesis

The above sections outline the context of the areas of interest on which this Thesis focuses. One of the main aims of the discussion here is to identify individual elements which impact the effectivity of enforcement of international commercial transactions by UK businesses in a fragmenting transnational institutional environment. Trade is one of the most significant notions and can be seen as a starting point when the above is discussed. Trade represents the commercial core for the transactions of the UK businesses.

Further, it is important to bear in mind that the discussion here regarding dispute resolution methods focuses on the disputes with a foreign element and, therefore, even though the domestic level is often discussed for better understanding of the whole picture, the international commercial dispute resolution methods are the ones of primary interest. It is convenient to take into consideration that there are different methods of dispute resolution available, the two most significant for the purposes of this Thesis being international commercial arbitration and litigation arising from international commercial disputes . One of the reasons for this selection is the fact that both these contrasting methods offer a binding decision as an outcome of their proceedings.

Another factor which needs to be born in mind is the fragmentation of the transnational institutional environment which impacts the above two areas of trade and the mechanisms of international commercial dispute resolution. One of the most significant fragmenting events discussed herein is Brexit and its impact to date and possible future impact on cross border enforceability of commercial rights. However, the current Covid-19 pandemic also needs to be considered as its impact on trade is and will be enormous as it can be seen observing the current events. Besides the above, the tension on the global political scene can

contribute to fragmentation of the transnational institutional environment and selected events are illustrated in the following chapters as appropriate.

The two selected methods of dispute resolution are discussed in the following chapters from different angles. While regarding litigation arising from international commercial disputes the most important aspect to discuss is the area of private international law, specifically the rules governing recognition and enforcement of foreign judgements, international commercial arbitration will be discussed as its own system largely independent of the state court system.

In Chapters 4 and 5 where systems theory is discussed, and in Chapter 8 where the findings are presented, the individual factors above are connected in one discussion outlining the concept of interconnectivity of these contrasting methods of dispute resolution both with each other and more pertinently with the societies that engender transnational trade. The interconnectivity of those core elements is significant for the findings of the Thesis. If this interconnectivity is realised by the states and by the businesses, there is a possibility to create effective measures capable of mitigating the potentially harsh impacts on transnational trade by fragmentation of the transnational institutional environment for trade. Departing from the contextual background further in the analysis, it is convenient to emphasise that the focus of the evaluation hereby is the trade of goods and services which allows a more niche focus of the discussion. Furthermore, the notion of fragmentation needs to be approached from a position of a flexible observer. The fundamental outburst of fragmentation will be seen in the state to state level, however, there may be certain symptoms of fragmentation found on the user level as well. This is due to the perception of the institutions. If the perception is

approached using Rodrik's theories, the institutions may be viewed as on all levels, between traders (relationships and beliefs) or on the state level (third party enforcement).[247]

[247] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012) 14.

3. Methodology

It is often pointed out that legal research is not very explicit regarding the methodology used to conduct a particular study in circumstances when the study is not concerned with empirical data.[248] Even though the methodology which is used by academic lawyers may not be as complex as in other disciplines, it is convenient to discuss the methods used nevertheless. Firstly, if there is empirical ambition included in a particular study, it is essential to outline what are the methods used. Secondly, even in circumstances where an empirical part is not included, the outline of the methods and discussion regarding research, even in a desk-based form, can have positive impact on the perception of the legal research discipline by other disciplines, including social theory.[249]

While addressing the aims of the research, the discussion hereby firstly briefly outlines the original plan of the research. The aims of the research are discussed throughout the Thesis, including the systems Theory in Chapter 4, followed by the discussion of legal, political and economic system and their interactions in Chapter 5. Chapter 6 is focused on the norms of private international law ('PIL') and Chapter 7 discusses international commercial arbitration. Chapter 8 concludes and outlines critical evaluation with regards to the research aims.

The first part of this Chapter 3 comprises the discussion of the doctrinal legal research, comparative law method outline, interdisciplinary methodology as well as the original plan for the empirical plan of the research which is briefly addressed.[250] According to some authors, doctrinal legal research includes expository research of the black letter law in which the

[248] Dawn Watkins and Mandy Burton, *Research Methods In Law* (Routledge 2018).
[249] Cotterrell, 'Social Theory And Legal Theory: Contemporary Interactions' (2021) 17 Annual Review of Law and Social Science 15.
[250] For more details regarding original and eventual plan of the research see Chapter 1.

comparative law method may be seen as included, however, as the Thesis manifests elements of a comparative law method, it has been discussed in a separate section of the research approach.[251]

The second part of this Chapter 3 focuses on the application of the discussed methods in practice. As it can be expected, the proposed research methods based on theoretical research were not causing difficulties for the progress of the study. However, the most significant obstacle turned out to be the recruitment of the participants. The researcher has spent many attempts to recruit participants via different methods, only to conclude that the empirical data for the study must be sourced from already existing sources. Due to this obstacle, for which nevertheless the researcher planned subsequent diversion of the direction of the study, it was the emphasis on the socio-legal interdisciplinary elements of the research which assisted with mitigating the lack of data from the empirical part.

Empirical research could be perceived as research relying on observation and data which were acquired through different research methods.[252] After the data is acquired, the data is subsequently analysed and inferences are made out of the analysis.[253] Within research which is focused on businesses practices when it comes to selecting an appropriate dispute resolution mechanism, there are a few different possibilities how the data can be sourced. Amongst the data which were selected hereby was to gather data from unpublished resources, specifically the UK businesses as a selected category of the participants. Investigation of business behaviours can be seen as a feature of such empirical method of research.[254]

[251] Paul Chynoweth 'Legal Research', In Knight A, and Ruddock L, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[252] Christopher R Drahozal and Richard W Naimark, *Towards a science of international arbitration: collected empirical research* (Kluwer Law International 2005) 4.
[253] Ibid 5.
[254] Ibid 8; For mor details see discussion below in Chapter 3 and Chapter 7 dedicated to arbitration.

The interdisciplinary methodology is understood, for the purposes of this Thesis, as fundamental research about law including the socio-legal perspective when the work of Luhmann is discussed.[255]The value of this approach can be seen in widening the application of the findings outside a strictly defined space of a legal system. The dynamicity of the systems discussed hereby and their connections are a valuable perspective which can be taken for illustration of selected events connected with fragmentation of transnational institutional environment.

3.1 Research Approach

Theoretical Part of the Research

Doctrinal Legal Research

Even though the doctrinal legal research has been criticised, amongst other reasons for its rigidity, it still can be seen as a core method when conducting leal research.[256] In its core, doctrinal legal research is the process which identifies and analyses the law which is the focus of the particular study and further synthesise the findings.[257] A researcher focused on doctrinal legal research critically discusses features of selected norms which results into a synthesis of the elements resulting from the critical evaluation.[258] The outcome is establishment of a statement regarding law selected to be the focus of the particular research.[259]

[255] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[256] Terry Hutchinson, 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods In Law* (Routledge 2018) 10.
[257] Ibid 13.
[258] Ibid 13.
[259] Ibid 13.

The above overview can be further elaborated on in more detail with respect to the content of the research conducted in this Thesis. Effectively, first step is to outline relevant jurisdiction. Once the relevant jurisdiction is identified, the next step is to outline which are the authoritative legal sources and their hierarchy needs to be established. The identification of such hierarchy is needed to illustrate how the authorities operate in case of a clash of norms, new application of norms or where there is gap in law. After establishing the framework, relevant sources which would fill the content of the framework needs to be identified with respect to the levels or jurisdictions of interest. Content of these relevant sources is further important to understand any possible conflicts amongst the sources and if there are such conflicts, a possible solution needs to be identified. Lastly, it needs to be established how do the researched and identified sources operate in practice. This includes the point of view of the users of the system, for the purposes of this Thesis, the UK businesses.[260] The final point of the practice reflection is consideration regarding underlying social practices that are in use or are structured by the law, for example the practice of international commercial arbitration. The above is a clear example of the complexity of the doctrinal legal research once the individual steps are specifically indicated and can be contrasted with the views of some disciplines regarding the nature of doctrinal legal research.[261]

The doctrinal legal research was planned to consist of reading relevant primary and secondary sources followed by the legal analysis of the read materials with elements of content analysis. Content analysis in *stricto sensu* (as per social sciences) may not be a method typical for legal research.[262] Content analysis in the eyes of legal research may be perceived as collecting

[260] An analogy could be seen in the 'bad man' as addressed by Mr. Justice Holmes in Oliver Wendell Holmes, 'The Path Of The Law' (1897) 10 Harvard Law Review 457.
[261] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 37.
[262] Klaus Krippendorff, *Content Analysis* (Sage 2013) 54.

documents, such as different legal instruments, systematic reading of such documents while identifying common features of their use and meaning.[263] This is not the sole method used within the research conducted hereby, however, it proves useful while identifying features on the systems discussed.

The documents which are being analysed are a variety of instruments and policies. There are primary sources such as legislation and case law analysed as well as binding instruments of regional (EU) and international law. Apart from the primary sources, there are secondary sources amongst which there are instruments of soft law (such as the UNCITRAL Arbitration Rules for example)[264] and policies and other instruments which have recommendatory role.

The doctrinal legal research was planned to result in formulating conclusions and creation of a foundation for the empirical part of the research. From the perspective of this discussion the doctrinal legal research is perceived as research in law while the interdisciplinary research hereby is seen as research about law.[265]

As suggested above, a significant part of the doctrinal legal research is expository research which focuses on the black letter law which, for the purposes of the Thesis, consists of statutes and case law, regional legal instruments and international legal instruments.[266] Black letter law could be seen as a fundamental source for legal researches as the said sources for the research are the primary sources.[267]

[263] Mark A Hall and Roland F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 64.
[264] *UNCITRAL Arbitration Rules (1976), With Amendments As Adopted In 2013* (United Nations Commission on International Trade Law 1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> accessed 15 April 2021.
[265] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[266] Ibid 29.
[267] Terry Hutchinson 'Doctrinal research: Researching the jury' in Dawn Watkins and Mandy Burton, *Research Methods In Law* (Routledge 2018) 12

As the focus is on the question what is the relevant law, the expository research may be seen as a prerequisite for the comparison of the said law.[268] This is due to the fact that the primary sources considered originate from different legal systems and different levels (domestic, regional, international). Black letter law, as perceived by the common law systems, may not be given similar name in other jurisdictions, however, it is possible to identify that what is perceived as black letter law by the common law systems may be outlined as binding norms of law for the purposes of the Thesis. The binding norms are the core of the interest and analysis of secondary sources is facilitating the evaluation of the core binding legal principles. It is necessary, however, to perceive the category of binding laws with caution as if parties incorporate for example UNCITRAL Arbitration Rules in their contracts, the rules will be binding between them but not for parties who decide not to incorporate such rules.[269] Therefore, it is perhaps more precise to state that the core of the analysis, and subsequently, with regards to the comparative elements included in this Thesis, is black letter law within the common law systems and written law within civil jurisdictions (or on the non-common law regional and international level). The subject matter of the investigation, i.e. the law and its perception, is further elaborated on when the systems theory is discussed in Chapter 4 of this Thesis.

The reflection of the expository research was planned in the identification of the legal instruments on different levels, i.e. domestic, regional and international. The respective instruments of the black letter law discussed were related to the underlining direction of the

[268] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[269] *UNCITRAL Arbitration Rules (1976), With Amendments As Adopted In 2013* (United Nations Commission on International Trade Law 1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> accessed 15 April 2021.

study. As the study is focused on enforcement and surrounding issues, the expository research was directed in this way.

In comparison to the suggested empirical part, the expository research is focused on the instruments and their subsequent interpretation and critical evaluation, while empirical research is based on data and their interpretation and critical evaluation.[270] Therefore, it is evident that the source of the information which is the core in the said methods is different, and, hence, the space for interpretation and evaluation may be impacted by the difference in the sources. When it comes to natural and social science, it can be suggested that the room for interpretation is even more restricted as the data sources are of a different nature than when empirical legal research is conducted. As suggested above, while conducting doctrinal legal research, once a jurisdiction is selected, the authoritative source within the jurisdiction is investigated. This again contrasts with natural and social science and creates difference in the handling of the sources and construction of arguments.

Apart from the expository research, the Thesis is focused on legal theory research which consisted of researching the jurisprudence and legal philosophy.[271] This part was connected with the fundamental research including the socio-legal research which is discussed below in the interdisciplinary methodology part. According to some authors, the legal theory research may be viewed as 'pure' reflecting the more theoretical discussion than the expository research which can be perceived as 'applied.'[272]

[270] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[271] Ibid 29.
[272] Ibid 29.

Comparative Law Method

As the research focused on multiple levels and different areas of law, including UK national law, regional law (law of the EU), international law and transnational law, the comparative law method was used when relevant with a focus on functionality of particular issues.[273] The functional equivalence of the instruments studied was the core focus of the analysis when the comparative law method was used. [274]

The functionality is one of the main central issues of the comparative law discipline with functional approaches being inherently teleological.[275] One of the experts on comparative law, Professors Michaels criticises the functional method of comparative law and discusses ambiguities of this term in his work.[276] According to Michaels, the phrase 'functional method' is inaccurate.[277] Michaels suggests that there are three main reasons why there is such an inaccuracy. Firstly, there are doubts about specificity of such functional method as there is not only one unique functional method applied in the comparative law discipline, but a variety. [278] Secondly, the functionality of the methods naming themselves functional is questionable.[279] Finally, the concern is about the term 'method' itself as it is disputable that a specific method is used in particular comparative studies.[280] It is worth noting that the

[273] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998).
[274] John Reitz, 'How to Do Comparative Law', (1998) 46(4) AJCL 620.
[275] Ralf Michaels, 'Comparative law by numbers? Legal origins thesis, doing business reports, and the silence of traditional comparative law' (2009) 57(4) AJCL 766.
[276] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford handbook of comparative law* (Oxford University Press 2008) 340.
[277] Ibid 342.
[278] Ibid 342.
[279] Ibid 342.
[280] Ibid 342.

approach towards comparative study differs from scholar to scholar and there is not a unified 'codex' accepted by all.[281]

The criticism presented by Michaels illustrates an underlying issue which appears at times where there are attempts to categorise researchers' behaviour under specific labels. Some of the categories may be created after encountering enough similar features which are strong enough to result into a label. However, there presumably always will be behaviours which may have similar features as well as features never recorded before and not appearing as entirely conform for certain labels. These situations may create hybrids and support criticism. The same may be observed when using models of behaviours. Models generally simplify and facilitate evaluation, however, models do not aspire to incorporate all elements of reality as simply this would be contrary to their nature.[282]

With the above in mind, it is convenient to say a few words about the expected methods and theories used in this Thesis. As per above, the functionality for the purposes of this Thesis is viewed as teleological with interest in the purpose of the law.[283] However, there is a very important point which needs to be stressed. Luhmann's systems theory views systems in society as dynamic systems able to reproduce themselves in time and considering this specific nature of the systems there is not space for the natural concept of purpose due to its limitation in temporal dimension.[284] The systems in society according to Luhmann reproduce into future versions of themselves and this dynamicity does not incorporate the classic

[281] Although, some may suggest that there are several 'best' guides of the comparative law method, such as Christopher Osakwe in his review of Zweigert's and Kötz's book. For details see Christopher Osakwe, 'RECENT DEVELOPMENT: AN INTRODUCTION TO COMPARATIVE LAW. BY K. Zweigert + & H. Kotz. ++ Translation by Tony Weir.' (1988) 62(4) Tul. L. Rev. 1509.
[282] Thomas C Schelling, 'Thermostats, Lemons, and Other Families of Models' in *Micromotives and Macrobehaviour* (WW Norton 2006) 87.
[283] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford handbook of comparative law* (Oxford University Press 2008) 344.
[284] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 198.

concept of purpose well as the classic theory of purpose seem to lay in the present dimension.[285]

Considering the above there needed to be a specific pathway that the Thesis would adopt. In the end, for purposes of this Thesis the principle of functional equivalence was used as a main principle of the comparative method taking into account other principles such as explicit comparisons or distinctive characteristics of each legal instrument compared and their commonalities.[286] By using the above approach it was possible to compare the functional equivalence between the compared legal instruments and outline the similarities and differences between the usage of such instruments by the individual legal systems. The aim of this pathway was to honour class theory and methods used in comparative law discipline as well as to produce a synthesis which then would be subjected to Luhmannian analysis as the Thesis progressed. As this is an area which is not widely researched this perspective suggest there may be future potential for additional research into amicable fusion of the classic functional theory with Luhmann's perspective.

Interdisciplinary Methodology

From the above it can be suggested that the main methodological approach in this Thesis is doctrinal methodology which is focused on research in law comprising of study of legal instruments, their comparison when desired, and study of legal jurisprudence and legal theory.[287] However, at times the need of a socio-legal approach shifted the research focus on

[285] Ibid 199.
[286] John Reitz, 'How to Do Comparative Law' (1998) 46(4) AJCL 624.
[287] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.

the historical, political and economic areas of societal development, and, therefore, shifting the position of the research from 'in law' to research 'about law'.[288]

It is difficult to draw a clear line between the doctrinal research and the interdisciplinary elements at times, as in Chapter 4 and 5 where the interdisciplinary method appears most frequently: it is the scholarship of Luhmann and the systems theory which is at the core of the presented analysis.[289] As the systems theory builds on the different systems in society and outlines their relationships, it is particularly when the legal system is discussed when the lines between the research in law and about law are interconnected. This does not cause any problems for the analysis or the discussion of the outcomes of the evaluations, however, it should be noted that a clear distinction in methodology in these circumstances is not possible.

The selection of Luhmann's systems theory materialised from a series of events which were encountered when conducting the research. Firstly, this outcome was induced by the way the research journey developed.[290]Once it was clear that there needed to be a dynamic approach to the analysis of the fragmentation of the international institutional environment, it was convenient to seek an approach which would reflect the dynamic elements. Since Luhmann perceives systems in society and their connections in a dynamic environment, it was ideal to incorporate his theory and apply his approach to the events which this Thesis evaluates. This application results in valuable findings which facilitate understanding about the interactions of different factors connected with fragmentation of international institutional environment as opposed to distillations of the legal systems which attempt to observe and analyse legal systems in a vacuum as can result from a black letter law approach. Further, this approach

[288] Ibid 30.
[289] For more details see Chapters 4 and 5.
[290] For more details regarding the research journey please see Chapter 1.

provides answers related to the events in society which if not placed in a dynamic context could be seen as systematic failure, however, from a de-centralised perspective could be explained by taking into account more variables than if the legal system was analysed in isolation.[291]

Empirical Part of the Research

The empirical part of the research was planned to consist of an empirical qualitative research method focusing on the participants in their natural setting.[292] The empirical part was desired, however, it was noted from the beginning that there might be a problem in recruiting of the participants, therefore, it was outlined that the empirical part was not essential.[293] The empirical part was contingent upon securing the participation of interested EM businesses. The instruments used for the research would include elite interviews as the method was found more suitable regarding the potentially busy schedules of desired participants than focus groups.[294] The elite interviews were planned to be followed by questionnaires based on the data extracted from the interviewing.[295]

The empirical part of the project as described above was dependent on the cooperation of the chosen participants in the project. The researcher and the supervision team were aware of the possibility that businesses might not be willing to participate.[296] In the event such cooperation was not forthcoming then, the research plan was to extend the socio-legal part

[291] For detailed discussion regarding the elements of system' theory, please refer to Chapters 4 and 5 of this Thesis.
[292] Yvonna S Lincoln and Norman K Denzin, *Collecting And Interpreting Qualitative Materials* (SAGE 2012) 3.
[293] For more details regarding the research journey please see Chapter 1.
[294] Lewis Anthony Dexter, *Elite And Specialized Interviewing* (ECPR 2006) 5.
[295] Mamun Habib, Bishwajit Banik Pathik and Hafsa Maryam, *Research Methodology-Contemporary Practices* (Cambridge Scholars Publishing 2014) 17.
[296] See section 3.2. below.

of the study and investigate and evaluate to a greater extent the systems theory of Luhmann.[297]

3.2 Application of the Research Approach

Theoretical Part of the Research

At the beginning of the research period, it was planned that the doctrinal part of the research including the comparative law aspect would commence at the outset. This was achieved and the researcher managed to identify relevant resources regarding the sources of black letter law which was to be analysed as well as the legal theory research.

The focus of the expository research was, as suggested, concerned with the three levels of legal instruments including the domestic, regional and international level. The crucial areas for the identification of the legal instruments were commercial litigation, having an international dimension (commercial litigation of cross-border disputes), and international commercial arbitration with an emphasis on the element of enforcement. Therefore, this approach is reflected in the content of the Thesis where the instruments are discussed, interpreted and evaluated in the relevant Chapters.

The focus of the legal theory research was directed significantly by the work of Luhmann and his theory of autopoietic social systems.[298] When analysing and evaluating the work of Luhmann, there were theories of other scholars brought in the discussion to outline similarities and differences, as for example where the scholarship of H.L.A Hart and his

[297] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004).

[298] Ibid.

Concept of Law may be used.[299] As suggested above, this part which, according to some authors, may be viewed as 'pure' reflects the more theoretical discussion than the expository research which can be perceived as 'applied.'[300]

Further, as per above, the Thesis manifests elements of the comparative law discipline. This methodology was not meant to be the overarching methodology of the research, however, the comparative elements are reflected in contrasting different rules particularly regarding the enforcement of arbitral awards.[301]

The interdisciplinary methodology, as suggested above, is viewed as research about law.[302] From this perspective, there are elements of fundamental research which are focused on the sociology of law, as well as elements of socio-legal research.[303] It can be suggested, the legal theory research and the interdisciplinary research are at times closely connected which is reflected particularly in Chapter 4 and 5 of this Thesis which is focused on systems theory.[304] The interlinking of the above is a consequence of the core focus which is not only the legal system but also the political and economic systems.[305] This fact inevitably influences the combination of the doctrinal methodology and the interdisciplinary methodology.

The above, which can be categorised in an umbrella category of a desk-based research, was challenging at times, particularly when it comes to the work of Luhmann, which is challenging to analyse in itself. However, the analysis eventually resulted in interesting outcomes which are discussed in Chapters 4 and Chapter 5 of this Thesis. The expository research could be

[299]HLA Hart and others, *The Concept Of Law* (Oxford University Press USA - OSO 2012).
[300] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[301] For more details see Chapter 7 of this Thesis.
[302] Paul Chynoweth 'Legal Research', in Andrew Knight, and Les Ruddock, *Advanced Research Methods In The Built Environment* (Wiley-Blackwell/John Wiley & Sons 2008) 29.
[303] Ibid 29.
[304] For more details see Chapter 4.
[305] See section 3.1 above.

found challenging at times as on the three levels of legal instruments, the domestic, regional and international level, there are a significant number of instruments in effect that are a challenge to orientate contextually. Further, the aspect of the possible fragmentation of the transnational institutional environment may appear challenging to grasp.

In order to not be limited by any rigid concepts and thus to be able to reflect on the dynamism of the systems, it is necessary to reflect on different aspects of fragmentation, in other words to be flexible when observing series of events which are subsumed into the notion of fragmentation as discussed in this Thesis. There are tendencies of fragmentation which can be viewed as forces which may eventually result into a break in the international institutional environment. Further, there are events which may be perceived as actual fragmentation, for example the UK not being granted the consent of the EU to become a part of the Lugano Convention.[306] Fragmentation is thus seen as a potential risk, continual development of events or already a proven reality. Even though there are different aspects of fragmentation as per above, there were sound results generated by the above desk-based research that reflect the above aspects and are coherent.

Empirical Part of the Research

The most problematic part of the study was the empirical part of the research. As outlined above the first task of the empirical research was to recruit participants. Unfortunately, even

[306] 'Communication - Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/files/communication-assessment-application-united-kingdom-great-britain-and-northern-ireland-accede-2007-lugano-convention_en> accessed 10 May 2021.

though the researcher contacted 120 businesses via letters and subsequently 100 businesses via questionnaires, the desired sample of participants was not acquired.

After this finding, the researcher had to discontinue the pursuance of the self-generated empirical part of the research. Even though the self-generated data were not collected, the Thesis still does benefit from usage of empirical data, however, these were generated by external publicly accessible resources.[307]

The above findings outlined and confirmed that businesses prioritise their own interests and do not wish to contribute in surveys which are conducted by independent research, especially with ongoing Brexit concerns. This finding is valuable in its own right as it opens opportunities for potential post-doctoral research where the resources for attracting the participants may be greater. Furthermore, the above opens a new opportunity to research into the reasons behind the participants' views regarding independent research and could potentially generate a collection of useful tips and know-how as to how to attract research participants from within the business sector.

As noted above, it is challenging to attract participants when the desired sample should comprise of businesses.[308] Some surveys operate with a very limited number of participants coupled with limited geographical representation. Bühring-Uhle for example gathered a sample group of 68 participants for personal interviews, 20 being Americans and 13 Germans, which by itself does appear as an overrepresentation of these two locations.[309] Amongst other problems could be a lack of certain prestige on the side of the researcher, size of the

[307] See for example the '2018 International Arbitration Survey: The Evolution Of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 1 September 2019.
[308] See para 5 of the introduction to this Chapter 3.
[309] Drahozal C R and Naimark R W, *Towards a science of international arbitration: collected empirical research* (Kluwer Law International 2005) 27.

business (larger businesses may be too rigid in their structure to be able to respond to the surveys) or general unwillingness to participate without any potential profits.

Due to the impossibility of self-generation of the data, the researcher had to amend the main direction of the Thesis. As outlined above, the researcher decided to extend the socio-legal perspective provided by the system theory based on the findings of Luhmann.[310] As Luhmann's theory of law as a social system is missing some points in application of the system theory to specific legal systems, for example international commercial arbitration and private international law issues of applicable law, jurisdictional competence and recognition and enforcement of foreign judgments there was a convenient gap identified. The application of the system theory in these areas where it has not been previously applied facilitates the understanding of connections of individual elements when it comes to a dispute resolution between the UK businesses and their cross-border trading partners. Further, the shift of the focus was from an EM business generally to the UK business as with this approach the applicability of the findings can be more extensive.

[310] Niklas Luhmann and others, *Law As A Social System* (Oxford University Press 2009).

4. Systems Theory

4.1 Introduction

The purpose of this Chapter 4 is to discuss how the systems theory, reflected in the scholarly work of Luhmann, applies to the areas discussed in this Thesis.[311] It is essential to note that neither this Chapter 4, nor the Thesis itself, aim to produce a synthesis of different jurisprudential theories. Further, it needs to be stressed that the Thesis is not proclaiming its selection to be the sole right approach for a description of a legal system, or indeed of those private international law aspects of a legal system that are addressed by this Thesis. Rather, it is simply contended that systems theory, as propounded by Luhmann, provides a useful conceptual framework for the consideration of the dynamic interplay at the heart of this Thesis between, not only divergent legal orders, but also between those diverse legal orders and the contrasting domains of politics and economics.

One of the main interests of the Thesis is to map the journey towards enforcement of cross-border disputes between UK businesses and their trading partners. Within the context of that interest, the function of this jurisprudential discussion, and subsequent application of the selected parts of the theory on individual elements of the journey, is to facilitate understanding of those systems and their complex interactions. So, rather than itself being the core analysis of this Thesis, the jurisprudential understanding should provide a firm conceptual foundation for the enquiry as to how the legal system of England and Wales and

[311] See for example Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004).

UK businesses might best respond to the apprehended fragmentation risk of their formerly strong linkages with the legal systems of the EU and its member states.[312]

Due to the facilitative role of the discussion, it will be subsequently possible for the Thesis to proceed with the application of the systems theory in a direct and straightforward manner.[313] Even at times when Luhmann's theory does not coincide precisely with reality, this can be perceived simply as an outcome of the process rather than a rebuttal of the theory in question.[314] As Professor Jacobson points out when commenting on Luhmann's autopoiesis of law: '*It is likely that no one model accurately describes any real legal system.*'[315] It is convenient, however, to use certain elements of Luhmann's systems theory in order to better comprehend the effective management of conflict and concordance between the various social systems engaged by the process of enforcement of international transactions which is the focus herein.

The extent to which an 'archetypal' UK business is fully aware of the complex environment for dispute resolution and subsequent enforcement is moot.[316] There are various routes through which an archetypal UK business could potentially proceed to settle its disputes. There are also various obstacles which manifest themselves throughout the journey towards enforcement.

[312] See for example Chapter 5 of this Thesis.
[313] The application is discussed in Chapter 5 and in final sections of Chapter 6 and Chapter 7.
[314] Thomas C Schelling, 'Thermostats, Lemons, and Other Families of Models' in *Micromotives and Macrobehaviour* (WW Norton 2006) 89.
[315] Arthur J Jacobson, 'Autopoietic Law: The New Science of Niklas Luhmann', (1989) 87 Mich L Rev 1689.
[316] The classification of an 'archetypal' UK Business should not be read in a complex way, such classification is brought in order to simplify the model from the perspective of the recipient – the UK business. As legal systems, when described, are generally simplified, the same is applied to the recipient. Identifying something as 'archetypal' could bring many problems as there will always be a certain level of subjectivity. The researcher does not aim to present a new reforming definition, the 'archetypal' simply means a solvent UK Business with reasonable assets and a stable longstanding trading network cross-border with no apparent incapacities.

One of those obstacles is the normative aspect of a dispute. Suddenly the UK business (or its representatives), usually used to its effective commercial trading environment and trading without the need for any dispute resolution option, needs to be aware of the norms of the law.[317] Perhaps it needs to revisit its contracts again. There is a dispute which has occurred, and the dispute needs to be solved in order for the trade to continue. And even if the UK business is not likely to continue trading with the counterparty, it is possible that there are very much needed resources that have been effectively locked into the relationship due to the particular dispute. Hence, the norms of the law are now of a higher importance for the UK business.

Initially, it needs to be established what are the norms in question. Firstly, what is the geographic area where the norms operate. If the level is domestic, regional, or international. For the purposes of this Thesis the majority of the investigated norms is at the regional and international level with an occasional detour to the relevant domestic laws.[318] When the relevant legal norms have been identified, suddenly there is an overwhelming normative complexity. Without a good awareness of the effective structural connections and operative hierarchies between norms, one can get easily lost in the enormous amount of law emerging. At this point, the benefits of adopting systems theory are notable. The systems theory helps to reduce complexity of law. It brings in the theory of society as a main system and other systems derived from it.[319] The complexity of society and the individual areas of, for instance, law, politics or economics are suddenly perceived as social systems – system of law, system of politics, system of economics.[320] Due to this division, the analysis obtains anchor points as

[317] It is necessary to bear in mind that this perspective uses an 'archetypal' UK Business, see above.
[318] The relevant norms are discussed in detail in the following Chapter 5.
[319] See for example Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004).
[320] Ibid.

the systems theory defines boundaries of the individual areas and is able to explain certain phenomena occurring in society via its own definitions.[321]

The final remark links back to the above note of Jacobson, as with any model - and as with any cartography which is not produced on the basis of 1:1 ratio, there will always be discrepancies between the model and the reality.[322] If there is a map of a certain region and the ratio is 1:1000, it can be hardly imagined that the map includes all of the details which the real landscape manifests. In the simplified view, the more obvious characteristics of the landscape are outlined. If there is a change on a more detailed level, the map does not reflect it. As with any theory of a social system, main drainage channels may be outlined, but it is possible that there are some ditches not included. Similarly, the systems theory may work as a convenient device in one situation only to be useless in another. Or there may be an element that Luhmann does not discuss as not relevant to his investigation or simply as he does not have an expert knowledge in it, or conversely as it is so obvious to a social scientist that it is self-evidently the case and need not be explicitly explained.

Further, jurisprudence encompasses many theories and models, and some may argue that in certain areas it is more convenient to use their theories than theories of others. This leads to disputes over which theory and which model is the correct one. The Thesis is not aiming to locate the 'correct' theory. Indeed, it should always be borne in mind when addressing the real-world application of law to practice that it is valuable to make reservations whenever legal theory is applied and that is as pertinent to the application of jurisprudential theories as

[321] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) 13 Cardozo L Rev 1423.
[322] Arthur J Jacobson, 'Autopoietic Law: The New Science of Niklas Luhmann', (1989) 87 Mich L Rev 1689.

it is to the application of legal principles. It is always necessary to be cautious and open minded when seeking to view the world outside the cave of one's own mind.[323]

It is worth highlighting the convenience of the application of Luhmann's theory from the perspective of dynamicity of the system which is one of the core characteristics of the theory. The dynamicity of the systems theory is reflected in the perspective which the theory offers to the observer.[324] Autopoiesis as the fundamental dynamic element of the investigated systems enables development of responses of the investigated system to societal pressures which can further be observed and investigated on an intra-system level. However, it is clear that the triggering pressures are not isolated occurrences and can be further observed on the inter-system level as well. The outcome of the above is that the potential fragmentation triggers can be observed in the context of a particular social system, as the systems theory offers the perspective within the investigated system but also the perspective of the relationship between the systems which are connected in society.

Hence, whilst Luhmann's systems theory is applied by this Thesis, in the sphere of international dispute resolution, to highlight the challenges posed by, and the potential solutions available from, the dynamic interplay connecting distinct legal orders and the contrasting domains of politics and economics within the context of a fragmenting international legal order, it will be applied with an enquiring mind constantly open to the shortcomings of the jurisprudential theory selected for this purpose.

The above sets out the context for using the systems theory developed by Luhmann including some aspects which are important to note when proceeding with the application of the

[323] Plato, *The Allegory Of The Cave* (Enhanced Media Publishing 2017).
[324] For the outline of the events leading to identify the systems theory as appropriate for the discussion in this Thesis please see Chapter 1.

systems theory on the journey to enforcement of international commercial transactions by UK business. The next stage is to outline the systems theory itself and its notional location in jurisprudence.

Prior discussing the parallel of Luhmann and Hart, it is convenient to note that there is a variety of scholar discussing Luhmann's perspective in relation to different aspects of their research. There are scholars such as for example Professor Teubner or Professor Paterson who explore Luhmann's theory further in their work separately and collaboratively.[325]

Certain scholars, for example Professor Lange are using Luhmann's theory for the purposes of empirical research of regulation and regulation studies.[326] Further, there are scholars such as Professor Philippopoulos-Mihalopoulos outlining Luhmann's work in a systematic manner rather than applying the perspective to a specific area of law.[327] It is appreciated, that there is a variety of research successfully conducted in the area of systems theory and it is acknowledged that this Thesis is not attempting to function in an isolation. Apart from the following discussion regarding Hart and Luhmann parallel additional scholarship is further acknowledged.

4.2 Hart and Luhmann Parallel

At the beginning of the discussion on the perception of the legal system as conceptualised by Luhmann it is useful to outline where it sits within the theory of law.

[325] See for example John Beattie Paterson, 'Reflecting on Reflexive Law' in Michael King and Chris Thornhill (eds), *Luhmann On Law And Politics: Critical Appraisals And Applications (Oñati International Series In Law And Society)* (Hart Publishing Limited 2006); Gunther Teubner, *Autopoietic Law* (de Gruyter 2011) or John Paterson and Gunther Teubner, 'Changing Maps: Empirical Legal Autopoiesis' (1998) 7 Social & Legal Studies.

[326] B Lange, 'Regulation without actors? – a Luhmannian conception of "interests"' in Celso Campilongo, Marco Antonio Loschiavo Leme de Barros and Lucas Fucci Amato (eds), *Luhmann and Socio-Legal Research: An Empirical Agenda for Social Systems Theory* (Routledge 2020) or B Lange, ' Sociology of Regulation' in Jiri Priban (ed), *Research Handbook on the Sociology of Law* (Edward Elgar 2020).

[327] Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann* (Routledge 2009).

Luhmann's scholarship, even though simplifying the concept of a legal system within the more comprehensive theory of society, could be less comprehensive if a reader does not 'live' in Luhmann's world. In order to be able to visit Luhmann's world, it is necessary to understand the perception of the concept of law outlined by Luhmann and put it into a context with other theories, such as for example the conception of Hart and his *Concept of Law*.[328] For this purpose, the following comparison between Luhmann's account of legal systems and the legal positivist conception of the legal system and its elements is made.

When discussing legal positivism, a compact characteristic description would be useful. Of assistance could be an opening proposition of one of Professor Gardner's lectures:

'(*LP) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits*.'[329]

This proposition emphasises the sources. According to Gardner, this proposition is one which is common for the traditional legal positivists including Hart.[330] Gardner further elaborates on the descriptor of law included in the above proposition, a legal norm, no matter if objectively of a good quality or not, will be part of a legal system if it is announced, practised, invoked, enforced, endorsed or otherwise engaged with by the relevant agents of the legal system.[331] According to the above, it appears that the relevance for validity of a legal norm is not its content per se, but the process by which the norm is dealt with by the individuals who operate within the legal system. The discussion below conveniently illustrates this statement.

[328] Hart H and others, *The Concept Of Law* (Oxford University Press USA - OSO 2012).
[329] John Gardner, 'Legal Positivism 5½ Myths' (2001) 46 The American Journal of Jurisprudence 199.
[330] Ibid 199.
[331] Ibid 199.

According to Hart, the rules creative of obligations come into an existence when there is a general demand for such rules and when punishment for the ones who would not follow such rules is required by the societal pressure.[332] This generally applies on different types of rules, it could be moral obligations or primitive forms of law (when a physical punishment is present but not performed by officials of the system).[333] A primary factor which, according to Hart, determines if an obligation is created is the seriousness of social pressure.[334] Further, Hart presents two other characteristics of obligation; importance of such obligation in terms of protecting social life, and the fact that in obligation there is often a sacrifice involved, as the person who is obliged, and therefore owes a duty, may not be especially interested in performing such duty.[335]

Hart further points out two ways how the rules can be observed – the internal and external perspective.[336] An external observer of a specific group which follows certain rules (with the external observer not knowing of the rules), will be able to, after some time of observing, outline the regularities in the group's behaviour and regularities in the punishment when deviations from following the rules occur.[337] If the external observer keeps his external position and does not involve himself within the group, his description of the rules will be in the terms of describing the regularities in behaviour, predictions or probabilities of punishment; it will be a mere description of an input and predictable output, rather than a core function of the rules.[338]

[332] H. L. A Hart and others, *The Concept Of Law* (Oxford University Press USA - OSO 2012) 86.
[333] Ibid 86.
[334] Ibid 87.
[335] Ibid 87.
[336] Ibid 89.
[337] Ibid 89.
[338] Ibid 89.

The pure external observation does not involve the dimension of a social life which represents the rules of obligations as rules of conduct for the members of the group which is being observed.[339] This means the usage of the rules as the guidance for behaviour: rather than a mere signal that, if these rules are not followed, punishment will occur.[340] In other words, as stressed above, the external observer will not be able to include the role of function of the rules in his observation.[341] This means that the internal aspect does include one more dimension; which is the perception of a member of the observed group, as the rules tell the member what he seeks to know, namely how he should behave (rather than an external observer who is not interested in the 'should').

The rules of obligations referred to above are perceived as primary rules by Hart.[342] These rules create obligations and function as a guidance for members of society as to how to behave. Hart states that even though there may be primitive societies functioning solely on primary rules, there inevitably will be three main defects which would appear to such a simple form of social control.[343] The first defect is uncertainty: in particular as to the essence of the primary rules in case of dispute and as to their scope, since the primary rules would not be organised in a system and one could not be sure how to identify and apply the rules in novel situations.[344] The second defect is that the primary rules only existing by themselves are static as there would be no effective way to change them other than through the societal growth and change of habits.[345] The third defect is the inefficiency of enforcement of the societal pressure as there would be no apparatus which would ensure that a dispute about a primary

[339] Ibid 89.
[340] Ibid 90.
[341] Ibid 90.
[342] Ibid 94.
[343] Ibid 92.
[344] Ibid 92.
[345] Ibid 93.

rule violation is resolved.[346] In Hart's perception, these three defects are remedied by the existence of secondary rules with a different function and altogether the primary and secondary rules create a legal system.[347]

The primary rules, the rules of obligation, contain the guidance for the members of a society how to behave. The secondary rules are not concerned with the members of a society; they are concerned with the primary rules.[348] The secondary rules '*specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.*'[349] It is apparent that they serve as a maintenance of the system and keep the system functioning, as without the secondary rules, the system's function would be defective and what is more would not likely be called a legal system.

There are secondary rules as a remedy for each of the defects which Hart discusses. The remedy for uncertainty is the secondary rules of recognition.[350] These rules are present in order to put a stamp of authority on all rules which are part of the system. In simple societies this could mean writing down a list of rules which functions as authoritative. In more complex legal systems this can be for example the list of characteristics which a rule needs to possess in order to be enforceable or an identification of the processes through which rules become enforceable.[351] According to Hart, being able to identify an authoritative rule brings us close to the idea of legal validity.[352]

[346] Ibid 93.
[347] Ibid 94.
[348] Ibid 94.
[349] Ibid 94.
[350] Ibid 94.
[351] Ibid 95.
[352] Ibid 95.

The secondary rules which function as a remedy for the system being in a static state are the rules of change.[353] These rules are connected with the rules of recognition in the terms of legislative processes in more complex systems and are generally guarding the process under which there could be a new rule created in, and an obsolete rule erased from, the system.[354]

Further, the last defect, the inefficiency of the system which means that there is a lack of authority to enforce rules, is remedied by the rules of adjudication.[355] These rules identify individuals who possess authoritative power and are able to participate in dispute resolution and further identify the procedure under which such dispute resolution is conducted.[356] The rules of adjudication define the concepts of judges, jurisdictions and judgements.[357]

Hart concludes his discussion of the union between primary and secondary rules with a note that even though this union could be perceived as the very centre of a legal system, it cannot be seen as the only element which forms the legal system.[358] Even though the union by itself is not the only content of the legal system, it is the minimal requirement together with the behavioural patterns of the system's participants for a legal system to exist. As Hart suggests, for the existence of a legal system there must be, minimally, two conditions fulfilled: namely, the private individuals must generally obey the primary rules of obligation, and the secondary rules of recognition, change and adjudication must be publicly accepted and enforced by the system's officials.[359]

[353] Ibid 95.
[354] Ibid 96.
[355] Ibid 96.
[356] Ibid 96.
[357] Ibid 96.
[358] Ibid 99.
[359] Ibid 116.

The rules of recognition further open debate about the nature of their own existence. The legal system is founded when secondary rules of recognition are accepted to identify the primary rules of obligation.[360] The acceptance of the rules of recognition provides individuals operating within the system with identification criteria for the establishment of the rules of obligation.[361] While in some societies the criteria given by the rules of recognition could be for example reference to an enactment of a statute by a king; in more complex societies there will be more complex criteria given by the rules of recognition, and there will also be some criteria regarding the different strengths of different legal instruments.[362]

The real nature of the rules of recognition is rather abstract, as Hart points out that the rules of recognition, apart from some exceptions, are often unstated; however, they show themselves in the behaviour of the individuals acting within the system.[363] The rules of recognition permit the assessment of the validity of rules which belong in a legal system.[364] This means that they are the rules which sit at the very beginning of assessing the validity of legal rules: they do have criteria for the recognition of other rules, however, they do not provide criteria for assessing their own legal validity (e.g. the rule that the Queen and the Parliament enacts law).[365] At this point, however, it is worth connecting the theory to the practical reflection of the rules which operate in the system and assess if the Hartian rules of recognition may be reconciled with Luhmann's dynamic perception.

In the case of *Miller II*, the Supreme Court discussed the principle of justiciability as Boris Johnson advised the Queen to prorogue Parliament which the Supreme Court has found

[360] Ibid 100.
[361] Ibid 100.
[362] Ibid 100.
[363] Ibid 100.
[364] Ibid 105.
[365] Ibid 107.

unlawful due to the fact that the prorogation would lead to limitation of the Parliament's ability to execute its constitutional role.[366] This decision emphasised the importance of the separation of powers in the modern state and highlighted the importance of the balance between executive, legislature and judiciary powers of the state.[367]In *Miller II*, the Supreme Court acknowledged the importance of the royal prerogative, however, reaffirming parliamentary sovereignty.[368] The approach of the Supreme Court illustrates the application of the rules of recognition which are outlined by Hart and at the same time an observer can see a dynamic reaction of the system to ensure effective flow of its operations.

The above, specifically Hart's rules of recognition, can be contrasted with Kelsen's theory of the basic norm (the Grundnorm or Basic Norm).[369] Often, the two theorists are compared and there are similarities pointed out regarding the emergence of a legal system.[370] However, the rule which Hart calls the ultimate rule of recognition is not the same concept as Kelsen's Basic Norm. One of the contrasting factors can be seen that Hart's ultimate rule of recognition is internal and exists within the legal system.[371] However, the true nature of the ultimate rule of recognition is that it cannot be found valid nor invalid, as Hart points out, its validity is '*assumed but cannot be demonstrated*.'[372] Hart does not want to call the ultimate rule of recognition either law or fact, instead he points out that the ultimate rule of recognition is either observed externally and illustrated by the practice of the legal system or illustrated internally through the individuals identifying valid legal rules.[373] Even though the illustration

[366] *Miller II* [2019] UKSC 41.
[367] James Blitz and Jane Croft, 'Parliament The Winner In Prorogation Case, Say Lawyers' (*Ft.com*, 2019) <https://www.ft.com/content/ba8a6afc-dede-11e9-b112-9624ec9edc59> accessed 26 May 2021.
[368] *Miller II* [2019] UKSC 41.
[369] Hans Kelsen, *General Theory Of Law And State* (The Lawbook Exchange 2011) 115.
[370] Sylvie Delacroix, 'Hart's And Kelsen's Concepts Of Normativity Contrasted*' (2004) 17 Ratio Juris 511.
[371] H. L. A Hart and others, *The Concept Of Law* (Oxford University Press USA - OSO 2012) 109.
[372] Ibid 109.
[373] Ibid 112.

may emerge externally or internally, the existence of the rule is still internal and does not exist externally. The above suggests, that even though Hart calls the rule of recognition a rule, he does not perceive it as law. Some authors suggest that this implies that it is not a rule of the legal system at all as it is an attitude in which the officials of the system assess the validity of rules of the system.[374]

In comparison to Hart's internal ultimate rule of recognition stands Kelsen with the Basic Norm. The Basic Norm can be perceived as an external justification of normativity.[375] Kelsen points out that the Basic Norm is not created in a legal procedure and has not the same characteristics as a positive legal norm. If this is contrasted with Hart, it seems that the ultimate rule of recognition is an internal feature of the system, no matter Hart's reluctance to perceive the ultimate rule of recognition as law. On the other hand, Kelsen's Basic Norm exists externally to the system as it exists in juristic consciousness.[376]

As the core of the Hart's union of primary and secondary rules has now been outlined as well as the perception of the emergence of normativity and the contrast between Hart's ultimate rule of recognition and Kelsen's Basic Norm, there is a need for the identification of the contrasting elements of systems theory, which could be regarded as Luhmann's response to Hart's concept of law. Since the individual elements of the systems theory are discussed in individual sections below, at this point the comparison will be taken from a general perspective without getting into unnecessary details. This will provide the reader with a clear illustration as to how Luhmann's systems theory differs from the positivist stream of jurisprudence. Comparison to legal positivism will offer a useful insight regarding the

[374] See for example Richard Nobles and David Schiff in Niklas Luhmann and others, *Law As A Social System* (Oxford University Press 2009) 11.
[375] Hans Kelsen, *General Theory Of Law And State* (The Lawbook Exchange 2011) 116.
[376] Ibid 116.

reflection or lack of reflection of dynamicity in the discussed theories. Further, as Luhmann himself contrasts the systems theory with Hart, it is convenient to ascertain the extent of his reflection on that contrast.

Firstly, Luhmann accepts the alternatives in observing law – the internal and the external observation but elaborates in that it is the sociologists who observe the law from the outside and it is the lawyers who observe the law from the inside.[377] This approach is a convenient starting point and does comply with Hart's perspective as the lawyers, observing from the inside, are undoubtedly users of the legal system.

Further, Luhmann comments on Hart's perception of the rules of the system (specifically the rules of recognition) as structures of the system; according to this the rules are the structures which are classified as law.[378] This perception works within systems theory. However, when assessing which structures, i.e. norms, belong to the system, the attention must be switched to operations of the system.[379] This is because only operations are able to identify what is law.[380]

There are a few points in which Luhmann himself discusses Hart's perception of validity of law and his perception of the unity of the primary and secondary rules. One of the points is the existence of the ultimate rule of recognition; Luhmann points out that the idea that the rule of recognition is accepted and this acceptance then creates the foundation of a legal system is the target for the autopoiesis of the systems theory.[381] The systems theory when testing validity of law outlines '*internally connected operations of the system, which could be*

[377] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 59.
[378] Ibid 78.
[379] Ibid 78.
[380] Ibid 78.
[381] Ibid 130.

called 'practices of recognition'.[382] Even when there are criteria provided by an external resource, this information would still remain inside of the system's operations.[383] An example of the above could be a statute created by the outcome of negotiations in the political system and the Crown's assent to the said statute. Since this information still remains internal to the legal system, the legal system is the system which operates upon this information.

Although legal positivism may lack aspects of dynamicity in contrast to the systems theory, there are similarities which can be depicted, and according to the above, there may be more consistency with Hart's theory than it may originally appear. Kelsen's Basic Norm which appears to be external to the legal system could be put in contrast with Hart's ultimate rule of recognition which is the feature of the system, and, therefore internal rather than existing externally (but which, nevertheless, can still be perceived externally of course).

There are a few observations about validity of law in the systems theory; one of them is that validity is something that the system produces.[384] Validity is of a temporary nature and rather than resting on an external supreme norm (e.g. Kelsen's Basic Norm) it rests upon the circular dynamic connections from one operation to another in time.[385] Therefore, Luhmann perceives the system as self-validating itself through its own operations.[386]

As it was suggested above, the discussion in this section has the function of an orientation point, which should further facilitate the understanding of the individual components of the legal system as presented by Luhmann. There are similarities between Hart's theory and Luhmann's theory which brings Luhmann close to the context of legal positivism. However,

[382] Ibid 130.
[383] Ibid 130.
[384] Ibid 130.
[385] Ibid 130.
[386] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 131.

as there are also notions which Luhmann rejects, such as the static notion of structural rules of recognition, it needs to be borne in mind that Luhmann cannot be categorised as a legal positivist per se.

4.3 Operative Closure

It is necessary to stress that the core of Luhmann's theory regarding law is the perception of the legal system as an '*autopoietic, self-distinguishing system*.'[387] Autopoiesis, developed by Professor Maturana and Professor Varela is defined as follows:

'*An autopoietic machine is a machine organized (defined as a unity) as a network of processes of production (transformation and destruction) of components which: (i) through their interactions and transformations continuously regenerate and realize the network of processes (relations) that produced them; and (ii) constitute it (the machine) as a concrete unity in space in which they (the components) exist by specifying the topological domain of its realization as such a network*.'[388]

As per above, Luhmann's theory proposes the legal system is an autopoietic system which is distinguished from its environment.[389] The legal system is, therefore, a unified network of processes which is able to reproduce itself and which is operatively closed to its environment.[390] Operative closure is one of the notions which is being used in the analysis hereinafter. Operative closure means that the legal system operates only within its own

[387] Ibid 70.
[388] Francisco J Varela and Humberto R Maturana, *Autopoiesis And Cognition : The Realization Of The Living* (D Reidel 1980)78.
[389] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 70.
[390] Ibid 70.

boundaries.[391] As an illustration, Luhmann suggests operative closure in case of a human being meaning that no human being can be part of any other systems.[392]

The operations within the system Luhmann categorises as communication. [393] The communication cannot be, however, perceived solely as a communicative action as this would mean that anything that is not explicitly communicated via action (speech) could not amount into an operation within the system.[394] Therefore, the perception of such communication must go further and encompass more than just the aspect of speech. What needs to be considered as well, as part of communication, is information and understanding.[395] It needs to be stressed that operations are always communication; however, the concept of communication is broader and includes all information, understanding and communicative action existing within the boundaries of the system itself,[396] albeit it does not include that cognitive awareness of the environment possessed only by human actors operating within the system and not by the system itself.[397] The cognitive awareness, however, might become manifest in communication of the system at certain points.[398]

Further, what communication (the category of operations) within an autopoietic system is, according to Luhmann, is a reality of its own; a reality that distinguishes between '*self-reference and external reference*.'[399] Primary and secondary rules identified by Hart, are the

[391] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) 13 Cardozo L Rev 1423.
[392] Ibid 1422.
[393] Ibid 1422.
[394] Ibid 1423.
[395] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 75.
[396] Ibid 209.
[397] Ibid 209.
[398] The points may be viewed as, for instance, by a court's acceptance by judgement of statements of case, factual witness evidence or counsel's persuasive submissions on legal principles leading them to be enshrined in the court's ratio decidendi, a judge's obiter dictum; or by a minority opinion in the higher courts being subsequently considered as authoritative in subsequent case; or by an academic's work being cited in court or even resulting in legislative change.
[399] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) 13 Cardozo L Rev 1424.

programmes (norms) that the operations create in order to specify criteria which the system produces for decision making.[400]

Further, it is important to note that as it is the legal system which is being discussed and the legal system is composed of the operations of a norm/fact distinction, Luhmann specifies that the fact that the norms resistant to disappointments leads to normative closure which can be also identified as an operative closure.[401] And further points out that: '*…normative closure is the context for ongoing self-observation by the system within the scheme of lawful/unlawful*.'[402]

4.4 Cognitive Openness

Cognitive openness is closely connected with operative closure. Cognitive openness in the context of systems theory means cognition which is achieved by the system simplifying the complexity of its environment.[403] When the environment is being internally assessed by the system, the normative closure enables the system to distinguish between the self-reference (the content of the system itself – its programme, i.e. a norm) and the external reference (the information, i.e. a fact).[404] The system is, therefore, able to recognise itself as a system of norms and the environment as a system of facts.[405] Since the system is normatively closed, it is able to autonomously define its boundaries.[406]

[400] H. L. A Hart and others, *The Concept of Law* (Oxford University Press USA - OSO 2012).
[401] Ibid 109.
[402] Ibid 109.
[403] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 70.
[404] Ibid 70.
[405] Ibid 70.
[406] Ibid 70.

Before the idea of cognitive openness is discussed from the perspective of its location in the system, it is useful to outline what cognitive openness stands for. Luhmann is not very succinct regarding the definition of cognitive openness, however, there are again certain points which can be extracted in order to understand the concept better.[407] The characteristic of cognitive openness according to Luhmann means that '*the system produces relevant information in a condition of external reference, and then relates that information to its differences from its environment*.'[408]

The above means that the system acknowledges an external reference and produces a report of such external reference which then determines a response to the initial external information. This can be illustrated on an example of the human nervous system. If a person is in a cold room without sufficient layers of clothes the receptors in nerves will acknowledge this information, and then through the system's (the human persons' body) operations transfer this report (the room is cold) via electrical signals to the brain which then creates the cold feeling and further a response to the cold feeling, e.g. leave the room, put the heating on, or put another jumper on. Even though the system reacts to the external information, all the reaction takes place within the system itself as it is operatively closed (but able to react to external information – therefore cognitively open).[409]

Further, when elaborating on the cognitive openness of the system, an appearing issue is the determination of the role of humans in this process. There are various aspects which are convenient to discuss in order to come to a satisfactory conclusion. Firstly, Luhmann suggests, that no objects are part of the autopoietic system. There is a guarantee that '*neither paper*

[407] It could be suggested that Luhmann is not only not brief but also neither precise nor comprehensive on the meaning of cognitive openness.
[408] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 112.
[409] Ibid 112.

nor ink, neither people nor other organism, neither courthouses and their rooms nor telephones or computers are part of the system.'[410] These 'objects' cannot be part of the system as their physical aspect is not communication.

The human being is of a particular interest regarding the legal system, there are significant categories of human beings which impact the system as for example lawyers, judges and similar legal persons. Luhmann stresses that '*it is impossible to take* […] *the whole human individual as a part or as an internal component of the legal system*.'[411] This is due to the fact that operations are the components which are responsible for the autopoiesis of the system.[412] The role of the human individuals is, therefore, rather difficult to grasp. It could be suggested that human individuals (and this is applicable to other means of communication as for example via electronic data interchange) are only devices (although multi-functional) of the system necessary to mediate communication. This is due to the fact that only the unity of communication is the content of the system, not the media through which the communication is transmitted. The communication itself is not expendable, but the media are.

However, the above must be also discussed with the quality of the media in mind. Even though it may seem that there is a clash between Luhmann's perspective – humans are mere media – and the fact that for example in the common law systems judges, i.e. humans, create law, this seeming clash may be reconciled by thinking of judges as humans for whom there are specific requirements to become a judge and if these requirements are met, the system does not care about the specific individual human being, the fact the person fulfils the

[410] Ibid 73-74.
[411] Ibid 84.
[412] Ibid 84.

requirements is enough. However, the information about the judge regarding for example identifying information (she is a judge) and function defining information (the carrier of the communication) is a part of the communication of the system itself.

The above is further supported by Jacobson's view that a human individual is a set of characteristics which may manifest attitudes when applying law, however, the attitudes do not matter except to the extent as they affect communicated output as it is only what interaction is displayed that matters.[413] Therefore, taking the common law judge example, the judges themselves are not part of the system, but the communication they produce is.

Codes

When putting the normative closure and the cognitive openness into context, it is also useful to specify what is the code in which the legal system operates. Luhmann states that the norms are perceived as programmes within the system.[414] It has also been outlined that the system is able to distinguish itself from its environment.[415] The question that is left to answer is how is the system able to perform the distinguishing: what are the means of communication that the system uses? Luhmann answers this question by outlining the existence of codes:[416] specifically, a binary code, which distinguishes given information by the values of legal/illegal.[417]

[413] Ibid 84.
[414] Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991) 13 Cardozo L Rev 1428.
[415] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004); see also Section 4.4 above.
[416] It may be suggested that the codes function as a type of secondary rule in the system of rules outlined by Hart, they would be the rules of recognition. See Section 4.2 above.
[417] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 209.

In order to stay congruent with the analysis, it is necessary to state that both norms and the codes are not separate from the system, both are perceived as communication and the system's structures.[418] As Luhmann points out '*Codes enable us to distinguish between belonging to the system and not belonging to the system, while programmes* [norms]*, which attribute the values legal/illegal, are the objects of judgements of valid/invalid.'*[419] These can be perceived as structures,[420] which might also be characterised as institutions using the nomenclature of Hart.[421] Therefore, it can be suggested, that the system operates on the basis that it distinguishes between norm or fact. Once norm (the programme) is identified, the code is activated and it is identified if the value of the information which is being analysed is legal/illegal.[422] Apart from similarity to Hart, resemblance to Kennedy can be observed as well, as Kennedy, when analysing legal interpretation (discussing Hart/Kelsen perspective), outlines that the process of interpretation, when identifying if a situation triggers an application of a norm to produce sanction, inevitably needs to use the lawful/unlawful test.[423]

According to the above, the normative closure of the system and its structures further supports the system's autonomy and its detachment from its environment. When the law is perceived as a system, using the analogy of a human being, it cannot be part of another system, i.e. its operations are closed towards its environment. This, however, does not mean and could not mean that the system does not react to impulses from its environment: simply because, if that was the case, then the function of the legal system would not be fulfilled. The function of law as perceived by Luhmann is '*the maintenance (stabilisation) of expectations*

[418] Ibid 209.
[419] Ibid 209.
[420] Ibid 209.
[421] H. L. A Hart and others, *The Concept of Law* (Oxford University Press USA - OSO 2012).
[422] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 209.
[423] Duncan Kennedy, *Legal Reasoning : Collected Essays* (Davies Group Publishers 2008) 158.

despite disappointments (counterfactual examples).' [424] Expectations do not mean an occurrence, which the system believes will happen, the system does not have the coding to do so. The expectation in the systems theory perception is '*a communication about what is approved and as time-binding, what will be approved*.'[425] The function of the legal system is fulfilled by norms (programmes). [426] Linking back to cognitive openness, the concept of cognitive openness provides the codes with prerequisites for distinguishing between legal/illegal in order for the norms to fulfil the function of stabilising the communication of what is approved or will be approved.[427] The system is dependent on facts and can change its programmes when being forced to do so, by the facts and it is cognitively open to the receipt of facts when presented to the system by a communication that it recognises as part of the system (e.g. by a statement of evidence lawfully presented to a court in accordance with court rules in the context of particular court proceedings). [428]

Relationship between operative closure and cognitive openness

The next stage of the operative closure/cognitive openness identification is to outline what is the ultimate relationship between the two, specifically how are these two characteristics of the system interconnected. According to Luhmann, the legal system in its every operation uses normative and cognitive orientation at the same time, however, both orientations are fulfilling a different function.[429] It was outlined above that the normative orientation fulfils the main function of the legal system – to stabilise the approved. By fulfilling this function, it

[424] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 14.
[425] Ibid 14.
[426] Ibid 162.
[427] Niklas Luhmann, 'The Unity of the Legal System' in Gunther Teubner, *Autopoietic Law* (de Gruyter 2011) 20.
[428] Ibid 20.
[429] Ibid 20.

maintains the autopoiesis of the system distinguished from its environment.[430] The cognitive orientation then '*serves the coordination of this process with the system's environment.'*[431] At this point Luhmann uses as an example taken from the economic system (also an autopoietic system), namely, the notion of payments as being the programme of the system: the purpose of the payment is then to make other payments possible and this is how, within the system, autopoiesis is ensured.[432] The openness of the economic system is then perceived as a motive behind every payment which is ultimately seeking to attain the paradigm demand/supply equilibrium.[433]

For a good orientation in the systems theory, the main characteristics need to be remembered at all times. One of the main features of the system is the ability to be cognitively open to its environment while being operatively closed within its operations.[434] The inside structure of the system is composed of norms (programmes) and codes, which appear as the devices of the system used to distinguish what belongs to the system and what does not.[435] Further, it needs to be borne in mind that the system, even though being operatively closed, is able to reprogramme itself under the influence of the facts (i.e. the information and the external reference).[436] The above altogether with the following two points of structural coupling and evolution will facilitate the subsequent application of systems theory to the legal orders which are being analysed in this Thesis.

[430] Niklas Luhmann, 'The Unity of the Legal System' in Gunther Teubner, *Autopoietic Law* (de Gruyter 2011) 20.
[431] Ibid 20.
[432] Ibid 20.
[433] Ibid 20.
[434] Ibid 20.
[435] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 209.
[436] Niklas Luhmann, 'The Unity of the Legal System' in Gunther Teubner, *Autopoietic Law* (de Gruyter 2011) 20.

4.5 Environment

The previous sections, which discussed operative closure and cognitive openness of the autopoietic system, provided identification of the system itself, defining the content of the system and the nature of some of its core characteristics. These characteristics are shared by all the autopoietic systems. In order to be able to extend the analysis to different legal systems and other systems and assess connections between them, it is necessary to redirect the attention from the autopoietic system itself to its environment. The above is necessary as it launches the analysis of the autopoietic system from within a vacuum and transfers it into the larger perspective of its operation within the environment in which it operates.[437] Due to this, it will be possible to illustrate the connections between the systems as well as any impact of any fragmentation of such connections.

Luhmann himself does not provide a direct all-embracing definition of environment. It seems that Luhmann is simply not interested in the environment as a structured space and does not find any value in discussing it in detail. However, for an analysis of the different systems discussed in this Thesis and their interfaces, the environment is one of the core interests of this discussion. Therefore, the fragments of the characteristics of environment which Luhmann provides need to be assembled and further developed in preparation for the full application of the systems theory to all of the systems that are discussed in this Thesis i.e.: the particular legal systems (e.g. the legal system of England and Wales; EU Private international law etc.); and the more amorphous dispute resolution systems (e.g.

[437] For the purposes of this Thesis, the 'environment' means the dispute resolution environment for transnational commercial disputes.

transnational arbitration); and the economic systems (e.g. global, supra-national in terms of the EU single market and national systems).

The structure of the environment is of importance as the societal utility of the autopoietic legal systems is enhanced by them having common interconnections and each of those more amorphous legal systems and those various autopoietic economic systems have essential interconnections with the legal systems considered by this Thesis. As will be further explained the more amorphous dispute resolution systems, such as the arbitration systems, do not appear to have the required characteristics of an autopoietic system. Therefore, if the environment is not specifically structured, this means that any interface between the main system and any other non-autopoietic system is chaotic, which does not seem to reflect the reality. If there are non-autopoietic systems connected to autopoietic legal systems, Luhmann's toolkit of concepts would appear to be underdeveloped to describe how these non-autopoietic systems operate within Luhmann's theory and this is why more developed analysis of the structure of the environment is needed.

It is possible to commence with a statement that a legal system is a subsystem of a society, both systems being from Luhmann's perspective autopoietic systems.[438] This perception is important to keep in mind because it signifies that the society is surrounding the legal system and, therefore, forms a part of its environment, however, at the same time is partly composed of the operations of the legal system as the legal system exists within society as a part of society.[439] Further, from the perspective of the system itself, it can be suggested, that everything which does not belong to the system is the system's environment.[440] This can be

[438] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 89.
[439] Ibid 89.
[440] Ibid 274.

linked back to the ability of the system to be able to distinguish between self-reference (itself) and an external reference (its environment).[441]

Luhmann emphasises that the environment's existence is undeniable and so is the environment's relevance.[442] The environment is unable, though, to communicate with the legal system by using the legal system's own operations.[443] In other words, the legal system's operations cannot simply be absorbed out through the legal system's boundaries and 'leak' into the environment.[444] The answer as to how the communication between the system and its environment is possible lies within the concept of structural couplings.[445]

There are, therefore, a few characteristics of the environment established. The environment is defined in contradistinction to the legal system itself and the legal system communicates with the environment through established patterns which Luhmann calls structural couplings.[446] The notion of structural coupling is further discussed in Chapter 5.

Since any detailed structure of the environment is not provided by Luhmann, it is convenient to seek a remedy for this within other theories. As Hart's legal positivism has been used for a contrast and in some point a parallel, Hart's theory can be used to extend the potential picture of the environment to which Luhmann's general view can be subsequently applied. For this purpose, Hart's discussion of international law is useful as this is directly connected with the legal environment which this Thesis deals with.

Hart uses his concept of unity of primary and secondary rules when identifying the concept of international law and points out that since there is no global centralised system of courts

[441] Ibid 87.
[442] Ibid 105.
[443] Ibid 381.
[444] Ibid 381.
[445] Ibid 381.
[446] Ibid 381.

and global unified legislature, international law cannot be perceived as such a unity of primary and secondary rules as the secondary rules of adjudication as well as the rules of recognition are missing.[447] International law is composed, according to Hart, only by primary rules of obligation and, therefore, is a simple system in comparison to developed legal systems which possess the unity of primary and secondary rules.[448]

Hart inspects the use of analogy between municipal law and international law and suggests that there are scholars who exaggerate this analogy in order to be able to call the international law 'law'.[449] There are some examples offered, one of them is the attempt to make a direct connection between the existence of national courts and the International Court of Justice (the 'ICJ'). In this example Hart points out that the scholars fail to pay attention to the fact that the states taken in front of the ICJ must firstly agree to be taken there.[450]

The analogy between municipal law and international law is further utilised to discuss the possible existence of the ultimate rule of recognition within international law. Hart points out that some scholars see an existence of such ultimate rule of recognition (e.g. Kelsen) which would be, in case of international law, the *pacta sunt servanda* principle, however, he does not agree with such assumption.[451] The primary rules, in order to be binding, do not require an ultimate rule of recognition, they are binding, if they are accepted.[452] Therefore, there can be accepted rules of obligation in place, however, the 'luxury' of the secondary rules can be

[447] H. L. A Hart and others, *The Concept of Law* (Oxford University Press USA - OSO 2012) 214.
[448] Ibid 214.
[449] Ibid 233.
[450] Ibid 233.
[451] Ibid, it is also questionable how far Hart himself perceives the existence of such rule in fully developed legal system, for more details see the Section 4.2 of this Thesis.
[452] Ibid 235.

missing.[453] This is again similar to the primitive societies which only subject themselves to the primary rules.

Hart suggests, that indeed there may in the future be a development in the field of international law in the terms of accepting rules of recognition and that, when this happens, the analogy between municipal legal system and international law will be able to proceed, however, as the situation stands now, international law does not possess a basic rule of recognition.[454] Even though Hart's *Concept of Law* was published in 1961, and even though in the past decades it may seem that globalisation has brought the development of international law towards the creation of a basic rule of recognition, international law can be seen - if one looks through Hart's eyes – to still not have developed the coherent unity of a legal system as it still does not have a global centralised system of courts or global unified legislature. This can be suggested as the system of international law still lacks the complexity of a complete legal system and moving towards unity of primary and secondary rules is a very slow process when sovereignty of the actors is involved. It is doubtful if such unity could ever be achieved. Hart's perspective can be further explored in order to provide a structure for environment generally within the context of systems theory.

It is apparent that the legal system is a subsystem of society and that without society the legal system would not exist. This is the view of both Hart and Luhmann and, it is perhaps safe to say that, in order for any legal system to exist, there must be a society in existence. Further, Luhmann does not see the legal system based on any rules of recognition as Hart does, however, Luhmann also sees the system as being able to validate itself from within (unlike

[453] Ibid 235.
[454] Ibid 235.

Kelsen).[455] Further, it is apparent that even though Luhmann's systems theory is more dynamic as resting on operations and Hart's theory is more static as resting on rules of recognition, both theories have aspects in common.

Both theories argue that a legal system develops from simpler antecedents and requires a developed structure of some sort before being recognised as, or functioning as, a legal system. For Luhmann it is a development of structures and operations, for Hart a development of primary and secondary rules. Prior to this complexity and actual functioning occurring there is no legal system merely an attempt to govern by laws – being, presumably, an attempt of the political system concerned.

Global aspect of environment

If Hart's perception of international law is taken in comparison to his theory of a fully mature legal system, it is apparent that due to the lack of unity of primary and secondary rules, international law is not a fully formed legal system. This can be contrasted with Luhmann's views as his perception on international law is not clear. However, it is convenient to highlight some points which can be used as guidance. Altogether, taken with Hart's view, this can help determine the possible extension of the systems theory to international law and, therefore, help to determine the possible structure of the environment.

Luhmann does not provide defined direction regarding the application of systems theory to international law, however, he discusses global society, and this can be used as a starting point. As a society is a supra system for other systems, including the legal system, in order to identify elements of a global legal order, there should be a global society present. This is

[455] Hans Kelsen, *General Theory Of Law And State* (The Lawbook Exchange 2011) 115.

indeed the case as Luhmann points out that due to cognitive expectations, which are capable of learning, the global society was consolidated and in some areas of societal behaviour can be seen as being truly global.[456] Luhmann does not find the term 'international' as convenient as according to him this brings further problems in having to define 'inter' and 'nation', therefore, he prefers to use the term global.[457]

Within the global society, there are systems which can no longer be perceived as national, and this applies for example in the natural sciences and economics.[458] These systems expanded due to their cognitive abilities. On the other hand, national legal systems are still capable of existence. This means that the national legal systems are performing their autopoiesis, however, the question is, since there is indeed a global society, if there is also a global legal system which is able to perform autopoiesis apart from the individual national legal systems.

Luhmann sees the legal system of global society as a special case.[459] He outlines that it is a worldwide functional system.[460] Discrete legal systems have similarities in terms of institutions and principles such as property, contracts, proceedings etc.[461] However, despite these elements being present on the global level, Luhmann states that there are enormous differences regionally as well.[462] He stresses that '*there cannot be any doubt that the global society has a legal order, even if it does not have central legislation and decision-making.*'[463] This is a direct correlation between Hart's perception of international law as Hart states that

[456] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 468.
[457] Ibid 40.
[458] Ibid 468.
[459] Ibid 481.
[460] Ibid 481.
[461] Ibid 481.
[462] Ibid 481.
[463] Ibid 481.

international law lacks the presence of secondary rules, secondary rules of adjudication in particular.[464]

The above by itself does not give an answer to the question of whether or not international law can be perceived as being an autopoietic system, however, it can be seen as lacking the valuable base foundations of a fully developed legal order. In the case of the global legal order there is a lack of a centrally enabled system of codes and programmes capable of generating universal operations. Further, Luhmann points out that there is no equivalent of a structural coupling between a political system and a legal system on the global level through a constitution as there is no predisposition for such a structural coupling.[465] This structural coupling is missing as the complexity of the structures (present on for example the national level) is missing on the global level.[466] This further confirms the hypothesis that the required 'mass' of communication is missing and therefore it is questionable if there is autopoiesis being performed by the global legal order.

Structure of the global environment

It is clear that an autopoietic legal system differentiates between coding and programming. Codes produce legal/illegal information and programmes are norms, which determine the validity of the system (through the recursive manner of the ongoing reproduction of operations). According to Luhmann, the differentiation does not work on the global level, or it is significantly reduced.[467]

[464] H. L. A Hart and others, *The Concept of Law* (Oxford University Press USA - OSO 2012) 214.
[465] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 487.
[466] See discussion regarding the global element with regards to a legal system earlier in this Section 4.5.
[467] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 489.

It is important to bear in mind that the below applies to a global society generally. In order to determine what are the preferences of the global society, Luhmann outlines a 'meta-structure', which is equivalent to coding and which operates in a binary way as well, however, embedding different values of coding which is exclusion vs. inclusion.[468] Exclusion in this sense means that the code identifies a certain social group which is excluded from certain rights or duties, for example a person who does not have an address cannot open a bank account.[469] From this perspective, inclusion provides a social group with more freedom – those who have a confirmed addresses are able to open a bank account.[470] This meta-structure serves as a base of a global society and is able to mediate between all other codes.[471] The legal/illegal code as well as the programmes (statutes which are responsible for attributing the coding to facts) are in existence on the global level, however, due to the meta code of exclusion/inclusion, this function is eliminated or reduced as it is not the priority.[472]

Global aspect of a legal system

The sole perception of only one society – the global society – can be problematic when further attempting to find out if the global legal order is an autopoietic system or if it has not yet reached the capability of autopoiesis from the evolutionary perspective. Luhmann states that a legal system is an immune system of society which creates antibodies, formulates legal rules, in response to reaction to conflicts in society.[473] He does not perceive the immune system as a metaphor, he believes that the legal system is truly an immune system of society.[474] The

[468] Ibid 489.
[469] Ibid 489.
[470] Ibid 489.
[471] Ibid 489.
[472] Ibid 489.
[473] Ibid 477.
[474] Ibid 477.

conflict itself is important as '*without conflicts law would not develop, would not be reproduced, and would then be forgotten*.'[475] The legal system reacts to a change and this triggers the circular motion of operations and the ability to reproduce itself, therefore, the ability to reach autopoiesis.

The above seems plausible, until it is pointed out that Luhmann believes that there is only one society – global society.[476] This would mean that since national legal systems are preserved, and there is an evidence of their autopoiesis, they would then need to be perceived as individual immune systems. Following this, there is not a global immune system as the meta structure of exclusion/inclusion eliminates or reduces the function of the code legal/illegal and the flow of the operations. Therefore, since on a global scale the differentiation between coding and programming (as it is known from Luhmann's definition of the autopoietic legal system) is eliminated or reduced, this implies that there is no global immune system, and accordingly, the global legal order is not an autopoietic system (at least not yet).

If the existence of only one global society still persists, it is questionable if one supra system is able to have multiple immune systems, since Luhmann is not using an immune system as an analogy, but as a description per se. The reconciliation could be potentially seen in the existence of multiple societies, defined by certain boundaries. If the legal system is an immune system of its society, there must be situations when certain events are not relevant for the system, the system does not need to respond to those as they are not included in its society which the system protects. This hypothesis links back to the meta code of exclusion/inclusion. The immune system will be reacting only to conflicts which are identified

[475] Ibid 477.
[476] Ibid 479.

by the meta code as included in its society and, therefore, defining the relevance and also the boundaries – the society is extended within its inclusion but not beyond.

If the above applied, there would be on the other hand problems with identifying how other systems (e.g. natural sciences or economics), which can be seen as operating globally, and are perhaps autopoietic systems, resolve their operation beyond their individual societies (this would mean that they are no longer subsystems of their societies, but that individual societies would be subsystems of them). The answer could lay in evolution – for example the economic system gathered enough operations and structures that it evolved into a global system. The exclusion/inclusion coding works in this case as well, as for example an individual society (e.g. an autarky, an authoritarian insular regime such as North Korea) that did not participate in the global economy would be excluded, since there would be little international trade present in that society and it would not be perceived as one of the players in the global economics system.

The synthesis of the information above provides a clearer idea on the operation of individual systems on a global level. It is clear that there are individual legal systems which are autopoietic and there are some autopoietic systems which appear to operate beyond national boundaries. The question of the society is unclear regarding the conflict between the existence of only one global society and the individual legal systems being immune systems (which may be theoretically reconciled by a global society with multiple immune systems). Even though this is an interesting point for discussion, it is not vital to the ultimate reconciliation of the interactions of these societies. The significant information is that there are systems able to operate beyond national boundaries and that there is a meta-code of exclusion/inclusion present. In Chapter 5, this meta-code, together with other information

gathered here, will facilitate the illustration of the operation of the system in the environment of international trade and the process and potential impact of the apprehended fragmentation in the global socio-political-economic-legal consensus of this environment.[477]

4.6 Evolution

When discussing evolution of law, Luhmann points out that the discussion needs to be conducted having Darwin's theory of evolution as a pointer. Even though there is a requirement of further amendments to Darwin's theory in order to produce a suitable theory which applies to law, this theory is useful to begin with.[478] Therefore, the application of variation, selection and stabilisation is used even for formulating the process of evolution within the legal system by the systems theory, however, as it is outlined below, the scheme of the three is not seen as a '*point-by-point response from the outside*' but as a circular motion.[479] Luhmann stresses that legal literature does not provide a sufficiently specific analysis of evolution of the legal system.[480]

One of the legal theorists who Luhmann himself uses as an example of following Darwin's theory to explain how society achieved a complex legal system is Professor Alan Watson, one of the world's most significant scholars with regard to Roman law and comparative law disciplines as well as legal history.[481] Watson's contribution to the legal scholarship is unquestionable, however, as many other legal theorists he does not focus on developing a

[477] See Chapter 1 Introduction for discussion of the concept of fragmentation for the purposes of this Thesis
[478] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 230; The above should be read, however, bearing in mind that Darwinian evolution is directionless and subject to drift – there is no intention behind developing complexity (or simplicity in the case of many parasites) and no purpose beyond reproduction at work.
[479] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 259.
[480] Ibid 230.
[481] Ibid 266.

specific (in Luhmann's words 'well-developed') evolutionary theory per se.[482] Watson's general message can be outlined by a quote from one of his publications regarding the evolution of the private law in Western Europe: '(…) *law is largely autonomous and not shaped by societal needs; though legal institutions will not exist without corresponding social institutions, law evolves from the legal tradition*.'[483] There are some similarities to this statement within systems theory as according to Luhmann, the pure nature of an autopoietic system with its self-reproduction must be seen as independent (even though a sub-system of a society) and, therefore, the evolution of the legal system is independent as well.[484] However, the response to the 'societal needs' is unclear. Luhmann states that even though law adjusts to changing conditions in the environment, the legal system cannot be seen as determined by the environment.[485] Luhmann sees the impulses from the environment towards the evolving legal system as a series of accidents and these accidents are transformed (via structural couplings) into a 'guided development.'[486] Furthermore, as Luhmann perceives the legal system as an immune system of a society, it is hard to imagine that this system is not shaped by societal needs. However, even though Watson presents some points which are similar to systems theory, evolution in his publications is not discussed from the mechanical nor biological perspective and, in this way, is limited by the historical events. Luhmann, however, aims to go to the core process of evolution. It is not only important to outline what is evolution of the legal system, it is moreover important to outline how evolution occurs.

[482] Ibid 266.
[483] Alan Watson, *The Evolution of Western Private Law* (Johns Hopkins University Press 2000).
[484] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 233.
[485] Ibid 258.
[486] Ibid 265.

The first question, when determining what evolution of a legal system is, 'what role does society play?.' In other words if the law evolves in direct dependence on society, or if it evolves separately from society.[487] The answer to this, as per above, is that independent autopoiesis equates to independent evolution.[488] Luhmann points out that before the system reaches its first operative closure, '*there is a wealth of legal material recorded in the form of conditional programmes.*'[489] The conditional programmes determine what is legal and what is illegal before the code legal/illegal is fully in operation.[490] Therefore, it can be deduced, and this is particularly useful for Chapter 5, that the autopoietic system does not just begin to exist without previous development of its operations and structures. There are conditional programmes in existence – the accumulated legal material.[491] The existence of this pre-autopoietic state is significant for systems, such as arbitration, which have elements of an autopoietic system, but in respect of which it is possible that the system has not yet attained the capacity for operative closure. If perceived through the systems theory, systems like this can exist in society and are likely to be in their pre-autopoietic state.[492]

Further, Luhmann points out that *'whenever an autopoietic system achieves operative closure for the first time or when it has to maintain its closure and restructure its closure in the face of radically changed social contexts, it does not happen as a planned reorganization but through an evolutionary restructuring of established installations*.'[493] There are several significant points in the above statement. Firstly, again it is confirmed that the system exists in the pre-autopoietic state and achieving operative closure, therefore becoming autopoietic,

[487] Ibid 232.
[488] Ibid 232.
[489] Ibid 233.
[490] Ibid 233.
[491] Ibid 233.
[492] An example of this can be the legal system in its current state on the global level as discussed in section 4.5.
[493] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 233.

is possible after the system possesses all the necessary elements in order to reproduce itself. Secondly, the restructuring of the system's content is unplanned, therefore, there is a lack of predictability.

Before Luhmann discusses how the evolution of the legal system occurs he turns to the establishment of structures of the legal system in order to further illustrate how the evolution operates.[494] One of the possibilities is that the structures of the legal system were established by writing.[495] Luhmann uses this idea only as an opening point for a discussion as he immediately states that writing is only a device for carrying the communication.[496] This is similar to Luhmann's view of humans and their role in the legal system. They are not part of the system, but they carry the communication. Therefore, there is a difference between the text itself and its content.[497] The legal text depends on a process of reading its content and the reading of the content is responsible for expansion of the structure.[498] Due to this expansion, the evolution is able to '*take hold and to select*'.[499] Since the writing itself is a carrier of the communication and not a part of the system per se, it is important to investigate what is the role of writing. Writing enables the law to be communicated as information repeatedly over time rather than being communicated once and then disappearing over time.[500]The above can be compared to Watson's theory regarding Gaius' Institutes when he points out that the Institutes were an enormous success, the content, the communication,

[494] Ibid 233.
[495] Ibid 233.
[496] Ibid 233.
[497] Ibid 245.
[498] Ibid 240.
[499] Ibid 241.
[500] Ibid 241.

yet we do not have any significant reference to his writing per se, being in line with the idea that the text is a medium, not the communication itself. [501]

The difference between the form (written text) and its content (meaning) highlights the role of interpretation of legal texts.[502] Luhmann points out that '*every valid text is exposed to interpretation, and is indeed text only in the context of interpretation*.'[503] Since the society as a system is structurally coupled with consciousness, interpretation (even when Luhmann does not specify how that interpretation is carried out) appears as a product of structural coupling between the legal system and the systems of consciousness using the text as the medium which carries the communication. When a system of consciousness is structurally coupled with the legal system, it is able to subject the meaning of a legal text to interpretation. This view could be seen as confirmed when it is pointed out that '*psychological systems* […], *by constituting consciousness, are a necessary environment for communication*.'[504] Luhmann further outlines that the legal system is directly connected to the psychological system as it needs communication in order to function and this connection is '*internalized in the consciousness of participants directly*.'[505]

The above links back to the writing as a medium for its meaning, which is further subject to interpretation. Since the legal system, as well as other subsystems within society, is an autopoietic system composed of communication, legal writing as the tangible text itself is not a part of the legal system in the autopoietic sense. However, it does serve the system and becomes 'alive' once it is communicated (e.g. read, quoted etc.).[506] Therefore, the evolution

[501] Alan Watson, 'The Importance Of "Nutshells"' (1994) 42 The American Journal of Comparative Law 5.
[502] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 242.
[503] Ibid 243.
[504] Ibid 413.
[505] Ibid 413.
[506] Ibid 242.

of law does regard writing as one of the influential factors (as previously stated, due to the expansion of 'reading', the evolution mechanisms are able to perform selection), however, the development of the writing itself, is not part of the evolution of the legal system (as the legal system is composed only of communication, i.e. what the writing carries and what is explicated when the information carried by writing comes alive).

In other words, the form, which is not subject to interpretation (the writing), is not responsible for the mechanisms of evolution of the legal system.[507] However, the content itself (i.e. the expression of law) is what is a part of the system, and, therefore, is subject to mechanisms of evolution. This again links back to Watson's view of the Gaius' Institutes as mentioned above.[508] The structural coupling between the legal system and systems of consciousness exists and, therefore, the participants of the system are able to perform interpretation. Eventually, in accordance with the above, Luhmann concludes that '*all legal evolution* […] *has been made possible by the difference between text and interpretation, and this has had a decisive impact on the form of outcomes*.'[509]

Luhmann further discusses the development of the legal system from the perspective of the conditions for evolution.[510] There are several aspects of the evolution, which should be outlined in order to understand the evolution process of the legal system. Firstly, according to Luhmann, the law cannot be validated through consensus as this would exclude any further evolution as this means that '*all of the people will agree to all of the norms all of the time*.'[511]

[507] Ibid 242.
[508] Alan Watson, 'The Importance Of "Nutshells"' (1994) 42 The American Journal of Comparative Law 5.
[509] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 243; This seems to be how the role of the lawyers and judges as individuals is conceptualised by Luhmann – see discussion above regarding the role of a human being in the system in Section 4.4 of this Chapter.
[510] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 243.
[511] Ibid 247.

What must be viewed as supporting the evolutionary mechanisms is an ability to resolve conflicts in society by those who are competent to do so and able to act as '*a few for all people'*.[512] This is connected with the status roles present in early societies (e.g. an aristocracy being competent to solve certain disputes).[513] As the evolution of the legal system proceeds (by the mechanism specified below), eventually the principle of '*a few for all people*' is replaced by the neutral principle trimmed of its personal status requirements, which becomes '*the legal system for society*.'[514]

Once the above is understood, it is possible to identify the core mechanism of the evolution as a process. As stated at the beginning of this section, there are elements from Darwin's evolution theory which can be used to facilitate understanding of the processes of evolution within the legal system.[515] The three stages of variation, selection and stabilisation are especially relevant.[516] The proceedings which can be found at the beginning of a legal system's formation can be seen as individual episodes in the search for the resolution of conflicts.[517] Variation can be seen as the mutation of an element within the process, which then leads to a clear process of selection in terms of the identification of the opinion which is most in compliance with the legal system (bearing in mind origins rather than continuing evolution).[518] However, the forces that guide evolution may be found in the environment and may irritate the system which is then triggered to progress with evolution. The following addresses how the process of stabilisation functions within the system.

[512] Ibid 247.
[513] Ibid 247.
[514] Ibid 247.
[515] Ibid 230.
[516] Ibid 258.
[517] Ibid 247.
[518] Ibid 248.

The process of stabilisation can be seen as composed of a few phases. There is an operation generated which amounts to a conflict which requires attention (A). The response to this conflict is being made and repeated (B). At certain point, once the system is triggered by its environment, the system changes the response which is being made (C). Further, the novel response is repeated by the system (D). The system is triggered by its environment and there is a change in the novel response (E). However, this time the change to the novel response is not repeated (F). This process is further repeated over time.

From the perspective of evolution, the first response which is being made and repeated (B) is a simple resort to social practice and the first stabilisation. The trigger which causes the change in the response (C) is a variation of the system (or mutation). When the system repeats its novel response (D), it effectively chooses this response over the old response until the old response is no longer followed and the system stabilise itself. At some point in time, there is a new trigger (E) which can be seen as further variation. The fact that the system does not repeat the change to the novel response (F) signifies another selection (old over the new this time) and through this selection stabilises the earlier state, therefore, the system continues in its earlier stabilised state.

The above considers the source of variation to be external as indicated by the irritation of the system from its environment. However, such source may also come from within the system as the system is cognitively open. This can occur when the conflict which needs attention changes. Under these circumstances, the system has to either impose the older norm or develop a new response. However, since the trigger is in a form of an operation within the system (change in the conflict) this could be seen as internal source of evolutionary development. The actual mechanism of selection and stabilisation is the same behaviour in

the system (repetition of response) but the difference is the persistence of the behaviour, first (or early) repetition is selection, later (or prolonged) repetition is stabilisation.

As the legal system gathers a mass of legal material, it is able to move from generating ad hoc decision to generalisation and development of general rules which then have the ability to be applicable to similar cases in a similar fashion.[519] Further, Luhmann stresses again that the evolution of law is not a '*planning scheme'*.[520] Evolution is a by-product in the process of transformation of law due to the system identifying a need for a change or development.[521] There can be a situation when the current law is no longer appropriate due to a change of circumstances and, therefore, needs to be changed, however, this change is not planned, it is something that occurs as the system needs to respond to its new needs.[522] Alternatively, there is a lack of rules for a new episode and the system needs to stretch its experience and knowledge, using analogy, to the new situation.[523] This need for a new development is, as well as the need for change, fundamentally unplanned.[524] It is important, however, to always note that within the systems theory the above happens in the system itself (even though receiving irritations from its environment). Therefore, illustrating that the '*law's changeability comes by itself*.'[525]

Further, the question which arises is how the legal system is still able to perform its autopoiesis when it develops new structures and creates seemingly more complexity.[526] Historically, the above corresponds with the legal reforms of nineteenth century in England

[519] Ibid 249.
[520] Ibid 249.
[521] Ibid 252.
[522] Ibid 252.
[523] Ibid 252.
[524] Ibid 252.
[525] Ibid 252.
[526] Ibid 255.

concerning the court system, for example simplification of pleading, rationalisation of court structure or generalisation of legal doctrine.[527] Luhmann finds answers to the possibility of autopoiesis while developing more complex structures within the existence of legal dogmatics.[528] He states that '*dogmatics guarantees that the legal system approves itself in its change as a system*.'[529] Legal dogmatics facilitates the move of the structural restabilisation of the system (new and/or changed norms) from validity to consistency.[530] From the UK perspective, the term legal dogmatics is by some authors used in a sense of doctrine or academic study of the law, alternatively legal scholarship.[531]

The ability of a legal system to change or to develop should not be viewed in a sense that the environment of the legal system determines the legal system.[532] Here Luhmann outlines again the circular motion of the programmes within the legal system, however, this time applying the circularity to the stages of evolution of the legal system.[533] The process of variation, selection and stabilisation is not an onward progressing process.[534] Rather than a progressing process, it is a circular motion, which is given by the autopoietic nature of the system – namely, the circular reproduction of itself.[535]

With the circular motion of the evolutionary mechanism, Luhmann follows that '*law itself produces the situations, which trigger off conflicts, by regulatory manipulation of everyday*

[527] Charles Mitchell, *Law And Society In England 1750-1950* (Hart Publishing 2019) Chapter One Part E i and ii.
[528] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 256.
[529] Ibid 257.
[530] Ibid 257.
[531] See for example Christian Boulanger, 'The Comparative Sociology of Legal Doctrine: Thoughts on a Research Program' (2020) 21 German Law Journal 1362.
[532] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004)258.
[533] Ibid 258.
[534] Ibid 258.
[535] Ibid 258; However, when focusing on the circularity, it can be suggested that he process that generates evolutionary change is indeed circular, however, it gives rise to changes which may be linear although are not predictably linear (so they go in an undirected and undetermined directions e.g greater complexity or simplification discussed above).

life. Law promotes itself.'[536] This can be confirmed from the perspective that if there was no law, then there would be no conflicts within law. As the conflicts feed the circular motion of the system in a sense of feeding the variation stage (where an element is compared to existing pattern), the selection process must follow immediately.[537] The selection (i.e. the ascertainment as to which opinion best fits within the legal system),[538] is operationally coupled with interpretation as the interpretation '*performs a consistency test by examining which meaning of a norm fits in the context of other norms*.'[539]

Eventually, in order to be able to stabilise itself while increasing its variety, the system reduces its redundancy, which has an effect of decreased transparency as the legal system becomes less accessible by those who are not structurally coupled with it but would like to be.[540] Due to the amount of variety circulating within the system, it is not possible to see the system's validity based on unity as the unity itself is questionable.[541] Here Luhmann concludes with his reminder that the validity of the system is the circular ongoing reproduction of the law's distinctiveness from its environment.[542]

It was suggested previously that the system is influenced by the environment, however, the influence cannot be perceived as a direct input but an impulse which is then reflected on the system's internal structures and responded to accordingly. Luhmann at times, however, uses the world 'input' when he discusses the environment's influence on the system.[543] When such

[536] Ibid 259.
[537] Ibid 260.
[538] It needs to be born in mind that in light of the discussion hereinafter the ascertainment does not require a person out of the system who performs the ascertainment.
[539] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 260.
[540] Ibid 261.
[541] Ibid 261; Unity as a concept is discussed by Luhmann for example ibid on page 103. He suggests that what some scholars view as unity cannot be reintroduced to the system. Luhmann refers for example to the possible perception of unity of a legal system when considering hierarchical structure of the legal system (which Luhmann opposes) based on a supreme norm (basic norm – this is a clear reference to Kelsen).
[542] Ibid 262.
[543] Ibid 265.

terminology is encountered, it must be borne in mind that Luhmann means an irritation that is then reflected within the system rather than a physical input which is then processed by the system. Luhmann sees the irritations from the environment as 'accidents', which is an understandable viewpoint as these impulses are, by their nature, unpredicted.[544] These irritations are then '*transformed by the system into a guided development*.'[545] This process is facilitated by structural couplings which exist between the system and the environment.[546]

There are certain means (e.g. writing), which the system uses when evolving and there are certain processes by which the system engages when evolving (i.e. the circular motion of variation, selection and stabilisation). The last point of discussion is the nature of the evolution of the system itself. Luhmann stresses that evolution of a legal system cannot be viewed as a progress.[547] However, it is undoubtedly true that evolution of the legal system enables a greater complexity of law.[548] Instead of seeing evolution of a legal system driven by a need for a higher economic efficiency, the driving factor is the increasing variety of cases which the system encounters.[549] The evolution itself is a part of the reaction to the complexity and more of '(…) *a test of how much room autopoiesis frees up for the formation of complex orders, than of adjusting the system to a given environment*.'[550]

The above discussion outlined significant aspects of evolution of the legal system which can be used as a framework for application of these aspects on the concrete legal systems which are being focused on by the discussion in this Thesis. The difference between Luhmann's

[544] Ibid 265.
[545] Ibid 265.
[546] Ibid 265.
[547] Ibid 266.
[548] Ibid 267.
[549] Ibid 269.
[550] Ibid 271; It may be suggested that increasing of complexity does on the other hand mean reduction of redundancy. This does not necessarily mean a positive progress as the implication of the above may be a decrease in accessibility.

systems theory and theoretical approaches of other scholars to the evolution of a legal system is that Luhmann is interested in the scientific processes of evolution which can be subsequently applied to law. Rather than being focused solely on the historical development of society, and the corresponding development of the legal system, Luhmann proceeds further. He is interested in how evolution works as a process and what are the factors that can be perceived as influential when it comes to the evolution of a legal system as an autopoietic system.[551]

This approach facilitates further discussion of the legal systems that this Thesis is concerned with as well as their interconnections. The systems theory simplifies the description of the legal system. Instead of being overwhelmed by a description of the full complexity and the manifested variety of the system, it is possible to use individual identifiers (e.g. the identifier 'programme' for a norm) enabling the discussion to free itself from robust and complex descriptors and have a lively flow. As a result, the potential effect of the risks of a fragmenting environment in global trade and global law on the legal systems that are the focus of this Thesis can be illustrated using a theory which is straightforward rather than being buried in a labyrinth of disconnected theories.

[551] It seems that Luhmann's functionality of the legal system is not concerned primarily with the performance of social functions (functions in the economy or political systems) but of internal functioning – the rationality between the irritation and the system response is far from given. In the classic comparative law functionality is presumed rational and effective.

5. The Application of systems theory on selected systems in modern society

Chapter 4 has discussed aspects of systems theory which are relevant for further application to the systems of interest. Before moving to the analysis regarding particular systems of interest and their composition using the elements of systems theory, there is a one aspect which is worth more detailed discussion and that is the concept of structural coupling. The findings made in this chapter as to structural couplings are further discussed in final sections of Chapters 6 and 7 as well as in Chapter 8.

The reason why it is convenient to discuss this element is because this is, according to Luhmann, a way in which an autopoietic system communicates with its environment.[552] It is important to bear in mind, when discussing the individual systems below, that only an observer is able to see the systems being structurally coupled in the environment. From the perspective of an autopoietic system, from within, the system is only able to distinguish between itself and its environment, thus, it is able to identify itself and to distinguish its own boundaries from the environment, however, it will not be able to allocate boundaries of other systems.[553] If there were no further tools (as for example structural couplings), this system would be faced with an enormous amount of information from the environment which could potentially destroy it.[554]

[552] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 381; see Section 4.5 of Chapter 4 of this Thesis.
[553] See Chapter 4 Section 4.4.
[554] Similarly to the filtering function of human brain – sensory gating – an ability to only perceive a section from its environment as if all the inputs from the environment were absorbed by the brain, the brain would turn insane. For more information see Bernd Fritzsch, *The Senses: A Comprehensive Reference* (Elsevier Science & Technology 2020).

Structural couplings, therefore, are tools which the system possesses in order to communicate with the environment in a structured way. There are several common aspects of these tools which it is convenient to discuss as manifestations of the structural coupling concept prior to submerging into a discussion of the systems of interest. Firstly, it is convenient to take Luhmann's perspective that the separation and linkage between the systems by structural coupling can be illustrated using digital and analog processing.[555] The difference between the two processes in general is that with regards to analog processing, there is a continuous electrical signal while with regards to digital processing, there is a non-continuous electrical signal.[556]

Autopoietic systems grow continuously in time, which can be compared to analogous processing while they are processing the data on digital bases, which as per above is not a continuous processing.[557] Therefore, when observing the systems from outside, they will develop continuously in time (and the development may be not be always positive) in a circular yet linear way, however, they will digitalise the ad hoc information individually as the digital processing will be up to a particular system.[558]

Apart from the two dimensions of analog and digital processing, the speed of reaction of the systems has its own importance as well.[559] Depending on the type of system, the speed in which the systems react to irritations from the environment may be different (and will be illustrated below). This characteristic ultimately leads to an observation that the structural

[555] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 381; see Section 4.5 of Chapter 4 of this Thesis 382.
[556] Sydney Reader, Won Namgoong and Teresa Meng, 'Partitioning Analog and Digital Processing in Mixed-Signal Systems' (2000) 24 The Journal of VLSI Signal Processing 59.
[557] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 381; see Section 4.5 of Chapter 4 of this Thesis 382.
[558] For more details regarding development see Chapter 4 Section 4.6 Evolution.
[559] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 383.

couplings are there to ensure that the system communicates with its environment synchronously with regards to a particular event, however, does not grant synchronisation of the system and its environment generally.[560]

The above may be postulated when the discussion concerns autopoietic systems. However, the question is if a system which has not reached autopoiesis yet is able to be structurally coupled with its environment. It was outlined in Chapter 4 that the evolution of a system means that, once enough mass of communication is gathered, there is a possibility for the system to reach an operative closure for the first time.[561] It seems that at this point of operative closure, the system may already use structural couplings as there may be certain events which impacted the system prior to it reaching the capability of operative closure. At the same time there may be systems which do not use structural couplings yet as they did not gather enough information regarding any repeating events yet and certain patterns in the environment are not yet recognised as reoccurring.

Another question, connected with structural coupling is what the relationship is, if any, with cognitive openness. If structural coupling, as a tool, is perceived as communication with the environment and recognition of reoccurring patterns, it may be suggested that the cognitive openness is a predisposition of structural coupling, but the cognitive openness of social systems is not dependent on structural couplings. As the system is able to cognitively react to its environment, subsequently it can form structural couplings with its environment.

Therefore, from the above, it seems that it depends on the type and evolutionary progress of the system if the structural coupling is formed prior to first autopoiesis or only after. It will

[560] Ibid 383.
[561] Ibid 381; see section 4.5 of Chapter 4 of this Thesis 233; see Section 4.6 of Chapter 4 of this Thesis.

depend on the cognitive abilities of the system prior to the first autopoiesis being performed, namely if the not-yet autopoietic system is able to recognise a pattern in its environment.

5.1 Economic systems

Luhmann perceives the economic system as another autopoietic subsystem of society with its specific communication and, therefore, codes and programmes which are specific for the economic system.[562] The code of the economic system is also binary and its role is to distinguish between a payment and non-payment.[563] This is due to the fact that the core of the economic system's communication is money.[564] The communication of money is the main indicator of operations within the economic system.[565] Further, the requirements of the autopoiesis are similar to the requirements for autopoiesis of a legal system and must be able to survive a structural change.[566] It is clear that the economic system was able to gather enough mass of information and was able to reach the state of operative closure and cognitive openness as these features are shared by the autopoietic subsystems of society.[567]

It has been outlined that Luhmann perceives society as a global system altogether with other systems which have outgrown national boundaries, one of those systems being the economic system.[568] According to him '(…) *national economic systems are hardly imaginable any longer*.'[569] In contrast to the global legal order, which lacks certain of the required elements for global legal interactions to be considered a single autopoietic system, the global economy

[562] Ibid 391.
[563] Niklas Luhmann, *Ecological Communication* (University of Chicago Press 1989) 52.
[564] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 391.
[565] Ibid 391.
[566] Ibid 391.
[567] Ibid 381.
[568] Ibid 468.
[569] Ibid 468.

appears to be operatively closed.[570] The global legal order does not possess a unified legislation nor does it have a unified international system of courts.[571] The global economic system, for which the core of communication is money, does not require these structures in order to be able to reproduce itself.[572] The communication of money is well understood amongst the global society and the development of global international trade supports the argument in favour of there being a global autopoietic economic system.[573]

The existence of a global economic system appears to be logical and is supported by ongoing globalisation of the worldwide economy. Luhmann states that it is hard to imagine national economic systems, however, there clearly are regional economic systems which could be perhaps perceived as subsystems of the global economic system and which are specific to a certain area.[574] It is possible to have only certain areas included in a certain economical union while other areas are excluded. There are many examples of such arrangements, for example the monetary union which includes states using the Euro as their currency.[575] Even though the economic system still uses the codes and structures which are based on the communication of money, the global society differentiates between different subsystems using the meta-code of inclusion and exclusion.[576] Therefore, for example in case of the Euro monetary union, the meta-code would generate the information as to which areas (states) are included in it and which are not. It is questionable to what extent Luhmann would agree

[570] Ibid 482.
[571] Ibid 481.
[572] Ibid 391.
[573] It is worth noting the existence of cryptocurrencies such as Bitcoin as these currencies are generally not stable and may have a disruptive effect on the economic system in situations when a payment using such currencies is involved.
[574] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 479.
[575] 'Economic And Monetary Union' (*European Commission - European Commission*, 2020) <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/economic-and-monetary-union_en> accessed 12 May 2020.
[576] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 489.

with this perspective, as according to some authors, the systems theory is 'radically antiregional', however, applying the above principles, this seems as a plausible result of such application.[577]

The above could be also applicable on the regional level of individual states, which in the past could be perceived as national boundaries. There are businesses trading solely locally, for example because it is sufficient for them or because of the nature of the goods and services they supply.[578] There are also businesses which may trade in a wider radius as it is more profitable or convenient. This model further develops onto a national and then to a transnational level. If the economic system is seen from the global perspective, then the meta-code of inclusion and exclusion is what differentiates individual levels of trade ending on the global level which represents the highest pool of inclusion.[579]

This identification is convenient not only for the apprehended fragmentation in the institutional frameworks supporting global trade, which is discussed in Chapter 2 but also for better understanding of the systems which are the interest of this Thesis. It was outlined in Chapter 4 Section 4.5 that even though the concept of global society is plausible, it is not likely that the global legal order has reached its operative closure yet.[580] The economic system, however, composed of different structures based on the communication of money, seems to be able to perform autopoiesis on the global level.[581] Therefore, the global economic system is the first one which this discussion is interested in. However, the global economic system is not the only significant level. In order to eliminate any unnecessary complexity, the other two

[577] Daniel Lee, 'The Society Of Society: The Grand Finale Of Niklas Luhmann' (2000) 18 Sociological Theory 320.
[578] For example funeral services, butchers, egg merchants and similar.
[579] Even on the global level there are certain areas excluded from the global economic system. These are areas not trading outside their boundaries such as still surviving uncontacted tribal societies etc.
[580] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 481.
[581] Ibid 481.

levels which will be discussed are the regional level, signifying regions beyond individual states, such as the EU and the federal or national level.

The global level of the economic system needs to be discussed as it represents the largest pool of businesses and this level may be relevant for the UK businesses once the more niche regional level of the EU is no longer as relevant or convenient for them. Further, the regional level has a particular relevance for the apprehended fragmentation. As suggested, once the UK businesses are able to identify the changes brought by Brexit, they may decide to expand on the global level as the regional EU level would not bring the prior significant advantages anymore. The national level is also important as some of the businesses, with only a partial trading interest on the regional or global scale, may find that their costs would be higher if they sought to maintain regional cross-border trade rather than focusing solely on the national level of trade. Therefore, the national level of the economic system could be a variable in the fragmentation impact equation and hence needs to be borne in mind.

5.2 Political systems

It is worth emphasising, that the below analysis reflects on Luhmann's perspective on political systems and its purpose is to illustrate the functioning of a political system together with other systems within society. By any means this section does not attempt to present an exhaustive analysis of Luhmann's understanding of the political system nor his influence by Carl Schmitt – from the above it is clear that the systems theory simplifies the perception of the systems in society and it is not being argued that at times Luhmann's view is other than highly selective.[582]

[582] Chris Thornhill, 'Niklas Luhmann, Carl Schmitt And The Modern Form Of The Political' (2007) 10 European Journal of Social Theory 499.

In Luhmann's view, political systems are other systems that are each connected closely to their own structurally coupled legal systems and hence relevant for this discussion. In terms of systems theory, both, legal and political systems can be perceived as autopoietic subsystems of society.[583] This generally must be true regarding the economic system as well: however, it seems that since the economic system's structure and operations are more general, there being a global economic system in existence (as a subsystem of the global society), political and legal systems are specific products of the concomitant society that they govern.

Luhmann disregards the long-standing tradition of perceiving the political system and legal system affecting a particular federal or national territory as one united system and points out that the separation of the systems is evident when their different coding is revealed.[584] The binary code of the legal system is legal/illegal while the political system has a binary code of government/opposition.[585] For the legal system, an opposition is irrelevant as the conflicts, which the law needs to react to, are dispersed amongst individual cases which irritate the system.[586] Even though the two systems are separated they are very closely connected to each other via structural couplings and they are dependent on each other due to the structural couplings.[587] From the perspective of the UK, an example of such coupling could be the coupling between the unwritten constitution and legislation. Another example could be the coupling between the force (within political system) which is needed to enforce a judgement (within the legal system).

[583] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 357.
[584] Ibid 367.
[585] Ibid 367.
[586] Ibid 367.
[587] Ibid 368.

The main aspect which differentiates a political system and its concomitant legal system is how they each perform their respective autopoiesis.[588] It is characteristic for all autopoietic systems that they are operatively closed and hence their operations are performed within their own boundaries.[589] It is also clear that the structures – the codes and programmes– of autopoietic systems facilitate the autopoiesis of the systems by letting the operations run through them.[590] Luhmann illustrates how a political system and a legal system reproduce themselves in the following way: '*In the political system, this is achieved by the distinction between superior power (authority) and those subordinate (the governing/the governed) and by the coding of authority by the schema government/opposition. In the legal system, coding is based on the quite different kind of distinction between legal and illegal*.'[591]

It is apparent that even though the two systems are closely tied together they still maintain their own identity. Further, the similar problem as with the economic system arises for the political system as well. The question is, if there is a global society, is there also a global political system and if so, is the system operatively closed. Luhmann points out that the global political system '*makes states enter into indissoluble dependencies on each other and do this in view of the ecological consequences of modern warfare with the compelling logic of prevention and intervention*.'[592] This statement can be seen as significant for the nature of the global political system which is outlined. There undisputedly is a global political system of sorts (similarly to a global legal order of sorts), however, its autopoiesis is questionable. It is also worth noting, that some authors do see Luhmann's analysis lacking a good overview of

[588] Ibid 378.
[589] Ibid 378.
[590] Ibid 378.
[591] Ibid 378.
[592] Ibid 480.

global political system and that there is space for further exploration.[593] This note again confirms that systems theory in its pure form serves as a simplistic tool which has been outlined previously in Chapter 4 Section 4.1 and it is not demanded that the analysis hereinafter is a full reflection of the reality.

When further elaborating on the global aspect of political system, Luhmann stresses that '[p]*articularly in the global perspective it is evident how meaningful it is to differentiate the political system by region in order to relate it more effectively to local conditions and utilize the chances of consensus better*.'[594] It can be stated that similarly to a legal system, the existence of a political system on the national level which helps to define a state is apparent and it also is able to reproduce itself.[595] It is debatable whether or not any political system on the regional level is operatively closed. It is possible that some of the political systems which operate beyond nations can be seen as operatively closed and capable of performing their autopoiesis, this could be for example the case with functioning federations such as the USA. The UK political system could be an example as well, since there are individual nations which, following devolution, have their own individual political systems, notwithstanding the continued existence of a functioning political system on a UK level beyond the individual nations.

On the other hand, there are regional political systems for which autopoiesis may be seen as desirable, however, it is questionable if these regional political systems are operatively closed and able to perform their autopoiesis. An example of such a system is the EU. The EU aims to unite the European states in many ways. There is a manifested regional desire for the EU

[593] Mathias Albert, 'Luhmann And Systems Theory' [2016] Oxford Research Encyclopedia of Politics.
[594] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 484.
[595] Ibid 357.

states to be closely united regarding economic matters as well as various policies and legislation,[596] and, whilst the legal dimension of this integration is discussed below, it is appropriate to focus at this point on the extent of the political integration.

It was outlined above that a political system can be separated from the legal system by distinguishing the specific coding, which in case of a political system is the government/opposition binary code.[597] A political system also operates while identifying an authority and those subordinate to it.[598] This view can be seen as rather similar to John Austin's command theory of law.[599] Therefore, if Austin's command theory of law is viewed through Luhmann's lenses, the core of the theory could be seen as located on structural coupling between the political system and the legal system as the sovereign (authority) imposes a command (norm – the programme of the legal system) on the subordinate. Apart from the structural coupling, if the political system is operatively closed it is able to identify its boundaries and perform autopoiesis within a network of its own operation.[600]

As per above, it is not a focus of this Thesis to discuss political systems in detail, however, it is useful to identify political systems which are connected to the legal systems discussed below. There are undisputedly elements of an autopoietic system which can be identified within the political system of the EU. The EU political system does have institutional structures similar to national political systems and there are operations which mimic operations of autopoietic political systems. Yet, there seems to be a lack of the strictly defined code of

[596] See for example the Preambles of Consolidated version of the Treaty on the Functioning of the European Union OJ [2012] C326/47 or of Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[597] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 367.
[598] Ibid 378.
[599] John Austin and Wilfrid E Rumble, *Austin: The Province Of Jurisprudence Determined* (Cambridge University Press 1995).
[600] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 378.

government/opposition. It could be suggested that the EU political system is not able to fully exercise authority as an operatively closed political system. While an autopoietic political system is able to distinguish between authority and its subordinates and enforce an order with physical force, it seems that the EU political system lacks these powers. This is due to the fact that the EU is composed of sovereign states and even though there is a certain amount of authority delegated to the EU institutions from the individual governments, the ultimate power to enforce with physical force is lacking. Therefore, the EU political system may be moving towards achieving the capability of performing autopoiesis in the future, however, it appears that as of now the EU political system is not operatively closed.[601]

Further, as it was previously suggested, there is a global level which is of interest. In other words, if the assumption of a global society is accepted, it is necessary to identify if there is also a global political system which can be identified. At this point, it is necessary to reflect back on the existence of the code which an autopoietic political system operates in – the binary code of government/opposition.[602] It can be suggested that there is no existence of a global government, which is supported by the fact that there is no code of government/opposition in operation at the global level. Even if the meta-code of inclusion/exclusion is suggested, it is hard to imagine that this code would serve to organise separate national political systems into subsystems of a global political system. However, it may be suggested, that this view in its selective nature may need further exploration beyond Luhmann in order to see if the recent post-Luhmann development on the global political level may have impacted the need for a more elaborate tool. This would be convenient, provided

[601] This would accord with the view that the systems theory is 'radically antiregional' as per Daniel Lee, 'The Society Of Society: The Grand Finale Of Niklas Luhmann' (2000) 18 Sociological Theory 320.
[602] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 367.

that the sole focus of this Thesis was the political system, however, as this is not the case, it is necessary to operate with the given elements reserving space for further future exploration.

Above it was stated that the autopoietic global economic system may be in existence and may operate by means of the coding inclusion/exclusion.[603] This is because the structures and operations of the economic systems are well translated as the communication of money which is transferable amongst the global society. With the political system, similarly to a legal system, it appears that regional cultural and political differences are too significant to be able to constitute an overall global autopoietic political system. With increasing globalisation, it is perhaps imaginable that the global political system may in the future be equipped with the capability of achieving its own autopoiesis, however, this could be decades if not centuries in the future.

5.3 Legal systems

Legal systems are included in the main set of systems which are of an interest to this Thesis. This is due to the fact that, whilst the journey to enforcement of an UK business credit is impacted by all the discussed systems, the legal system is the most significant as it operates to resolve conflicts within society. Chapter 4 Section 4.4 which discussed Luhmann's perspective and individual relevant aspects of his systems theory was composed with an autopoietic legal system in mind and hence at this point it is convenient to briefly summarise the characteristics of an autopoietic legal system.

[603] See Chapter 4 Section 4.4.

One of the main characteristics of an autopoietic legal system is that it is operatively closed while cognitively open.[604] This means that the system does not share operations with its environment and only operates within itself including self-definition of its own boundaries.[605] The system is able to learn and react to impulses from the environment and orchestrate a change to a valid law through its autopoiesis.[606] The impulses from the environment of the system can be perceived as irritations.[607] Luhmann describes the nature of irritations as follows: '*The system itself registers the irritation – for instance, in the form of the problem of who is right if there is a conflict – only on the video screen of its own structures.*'[608] This illustration facilitates the understanding of how the environment interacts with the legal system – the environment does influence the legal system, however, it does not incorporate itself into the system's own operations. The legal system is able to process the information and react to it, however, the system does not allow the environment to penetrate it. If the system failed to exercise what is effectively *border control* at its own boundaries the irritations from the environment could perhaps be responsible for destruction of the legal system and would certainly destabilise its operations and render it unpredictable, hence, the system controls the irritations that emerge from the environment via patterns which the legal system establishes with the environment that Luhmann labels as structural couplings.[609] Thus, structural couplings are mechanisms which reduce the influence of the environment on the legal system and, therefore, facilitate the channelling of the information stream.[610] Structural couplings are also mechanisms which allow different systems to be connected between each

[604] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 80.
[605] Ibid 81.
[606] Ibid 110.
[607] Ibid 383.
[608] Ibid 383.
[609] Ibid 383, discussed also in the introduction in this Chapter 5.
[610] Ibid 382.

other, although this can be stated only from an 'observer' perspective as, from the perspective of each system, everything that is not the system itself, is its environment.[611]

In Chapter 4 Section 4.5 it was suggested that, viewed at a global level, no single transcendent legal system can be perceived as being capable of operative closure at the global scale as, amongst other reasons, there is an absence of '*central legislation and decision-making*'.[612] In this way the concept of a legal system is similar to the concept of a political system which also appears to be operatively open on the global level lacking the necessary structures of government and opposition. This is another example of the closeness of these two types of systems. There is undoubtedly a global legal order in existence, however, it may not yet be able to reach the stage of autopoiesis.[613]

When discussing the question of the existence of operatively closed legal systems on the regional level, it is important to identify once again the regions which are of interest to this Thesis. The regional level in question will be primarily the EU legal system. The UK and its legal systems will be perceived as a group of autopoietic national legal systems arranged in a union of the UK with an overarching federal legal order and, therefore, as on a level below that of the EU legal system which operates at the regional level.[614] The distinguishing of different levels is not being performed in order to sort the systems in a strict hierarchy. The different levels are necessary to be established in order to outline the connections between the systems and further to be able to identify subsystems and supra-systems in the discussion.

[611] Ibid 87, this means that the system is not able to identify other systems, as it is only able to performs self-reference (identify self) and external-reference (the environment – all that is not the system itself).
[612] Ibid 481.
[613] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 481.
[614] Despite the Thesis using the terminology of a federation with regards to the UK, it is acknowledged that the UK is not strictly a federal union.

In Section 5.2 it was pointed out that it is possible that the political system on the EU level is not operatively closed yet as, similarly to the global level, the political system at the EU level lacks the necessary structures.[615] It appears that the EU legal system does have an advantage as it possesses a mass of legislation and a decision-making system at the apex of which is the Court of Justice of the European Union (the 'CJEU').[616] On the other hand, there are non-centralised issues within the legislation, at times there are options which are left to the Member States to define or supply.[617] Further, the CJEU's role is not that of being a central decision-making court system. Instead, it is ensuring unified application and interpretation of the EU law and compliance with the EU legislation amongst the Member States.[618]

Regarding the structures and programmes, the EU legal system certainly possesses the code of legal/illegal and, further, a mass of norms. It is, however, again questionable if it can be perceived as the autopoietic system. It is not however a necessary corollary of the proposition that the political system of the EU is not operatively closed that the EU legal system too, is not operatively closed. As per above, these are two separate systems which are closely connected, but which are not unified.[619] In Chapter 4 Section 4.5 it was discussed that a legal system is an immune system of the society. It's autopoiesis generates the 'antibodies' which serve to 'heal' conflicts which are generated in society.[620] It is apparent that the EU legal system serves as a 'safety net' for its Member States and for its citizens as it provides them

[615] See Section 5.2 for details.
[616] 'Court Of Justice Of The European Union (CJEU) | European Union' (*European Union*, 2020) <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en> accessed 18 May 2020.
[617] The notion of public policy could be an example, see for example Art. 45 of the 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 L351/1. However, the EU still sets boundaries for interpretation of public policy for the Member States, see for example Case C-7/98 Dieter Krombach v André Bamberski [2000] European Court Reports 2000 I-01935.
[618] Consolidated version of the Treaty on the Functioning of the European Union OJ [2012] C326/47, Section 5.
[619] Analogously to the general thesis of Luhmann's non-unification of the two systems; Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 367.
[620] Ibid 475.

with tools which can be used in order to protect their rights under EU law after all national tools of protection have failed, provided that the claim in core is rightful under EU law, they have legal standing to bring that claim and it can be proven (ultimately before the CJEU). Further, the 'safety net' can be seen in a form of various instruments of legislation, the EU private international rules being the most relevant example for the purposes of this Thesis. However, the question is if these tools are sufficient for the EU legal system to perform an autopoiesis and, therefore, if it can be suggested that the EU legal system is operatively closed.

In order to answer this question, a national legal system can be of a help. It is apparent that the systems theory perceives a legal system as an operatively closed system generally without specifying at which level (for simplicity national, regional or global) is the system operatively closed. However, when discussing society and its law Luhmann outlines the existence of national legal systems, therefore, it may be deduced that the general unit of a legal system which is operatively closed is on a national level.[621] It is also apparent that the global legal order may not be operatively closed.[622] The mezzo (or regional) level which is now in question is not specified. It can be suggested that the EU legal system is more defined by its structures and operations than a global legal order, yet there are certainly elements missing which are included in a national legal system. Even though there is a certain court system at the apex of which is the CJEU, it cannot be seen as a centralised decision-making court system equivalent in capacity and capability to those of each of the Member States.

Further, the mass of legislation is certainly more detailed and granulated on the national levels. This is due to many factors, for example historical development, by which the evolution of the individual legal systems themselves and their ability to react to conflicts on a local level

[621] Ibid 468.
[622] Ibid 481.

has developed a capacity to deal with a multitude of distinct issues that a supra-system, such as the EU legal system, is not able to tackle. It has been stated that a legal system when performing an autopoiesis, increases its complexity while reducing its redundancy and thus becoming more robust.[623] It seems that the EU legal system does aim to build the complexity up, however, does not reach complexity on the same level as the national legal systems. One of the reasons why this is so, is that the EU legal system is not able to perform certain operations that are on a regular basis performed within an autopoietic legal system on a national level.

An example is the already mentioned dispute resolution process. The EU legal system possesses a court system, however, it is not able nor aims to resolve the usual conflicts between individuals (whether human or corporate) which a national legal system deals with. From this perspective, the EU leaves these operations to the national courts to resolve, whilst enforcing against Member States the obligations that they have at the regional level to apply EU law effectively.[624] It could be suggested that even though there are certain operations missing which do exist on a national level of a legal system, there still appear to be enough mass of communication generated for the EU legal system to be operatively closed. Since operative closure means that the system operates within its own boundaries, it appears that this is the case with the EU legal system. If compared with Hart and the view that international legal order is missing secondary rules of adjudication and recognition, the EU legal system does include such secondary rules, and, therefore, may be seen as certainly more complete

[623] Ibid 261.

[624] For example setting boundaries for the Members states regarding public policy interpretation as per Case C-7/98 Dieter Krombach v André Bamberski [2000] European Court Reports 2000 I-01935.

than the legal order on a global level.[625] Hence, considering the above, the EU legal system may be indeed seen as operative closed.

The above directs the discussion to the most decentralised level – the national legal system. According to Chapter 4, it is apparent that the systems theory perceives a legal system as an autopoietic system. This perception can be applied to national legal systems of individual states. For the purposes of this Thesis, the most relevant autopoietic legal system is the UK legal system, since the UK business are of the main interest when the journey to enforcement is mapped.

5.4 International Commercial Arbitration

The previous Sections 5.3 illustrated the three categories of systems which are the most relevant from the perspective of this Thesis: namely, the economic, political and the legal system, which are all important from the perspective of an UK business which trades cross-border. There are undoubtedly other subsystems of society which are relevant for the trade, however, for the purposes of this Thesis these three categories are the most significant regarding the enforcement of remedies consequent upon dispute resolution in the context of the apprehended fragmentation which is discussed in Section 5.7 below.

When considering the journey to enforcement of an obligation owed to an UK business and its options regarding the mechanisms of dispute resolution, it is necessary to add to the three categories of systems discussed above. The last system which needs to be highlighted is the system of international commercial arbitration. International Commercial Arbitration is discussed in a greater detail in Chapter 7 of this Thesis. Whenever the 'system of arbitration'

[625] H. L. A Hart and others, *The Concept of Law* (Oxford University Press USA - OSO 2012) 214.

is mentioned from this point further it means the system of international commercial arbitration. Whenever the national arbitration system is discussed, it is pointed out that it is the national arbitration system that is being discussed.

What needs to be outlined at first is the presumed position of the system of arbitration in the discussed environment. Arbitration is an alternative method of dispute resolution to litigation in a court system which parties may choose when deciding upon the kind of mechanism to be utilised to resolve their future or present dispute. In other words, it is at the option of contracting parties jointly as to whether they make no provision for arbitration, permit arbitration, or insist upon arbitration in the event of a dispute arising in the future, or being already extant, out of their contract. The above needs to be considered in light of an agreement of the parties as to the choice of arbitration as the method for their dispute resolution which can be problematic if not all parties see arbitration as the most effective method.

The ordinary mechanism for dispute resolution which comes to mind is generally court litigation, which forms a subsystem of the legal system.[626] The court system can be perceived as a centrepiece of a legal system which uses the code legal/illegal in order to reach a decision.[627] It is clear that the legal system resolves the conflicts in society through the centre-positioned decision-making court system.[628] This applies even in case of a dispute between two businesses, each from a different country. Although it is necessary to settle upon a single court system for resolving a dispute. If there is no jurisdiction agreement, the rules of private international law of the particular autopoietic legal system before which the dispute is

[626] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 275.
[627] Ibid 290.
[628] Ibid 290.

brought determine the jurisdictional competence of the court in that legal system for that particular dispute. This situation leads to one autopoietic legal system receiving the dispute and either determining that it has no competence or else resolving the dispute itself. In an ideal situation, through structural couplings with other legal systems the final judgement is then recognised, and the decision enforced where the journey to enforcement ends (i.e. in the place where the losing party has assets which will satisfy the winning party's claims).

The parties may, however, want to subject their dispute to arbitration, either in their contract or by a way of voluntary submission of their dispute to arbitration. Therefore, it is necessary to discuss what is the position of arbitration and whether it should be regarded as a legal system capable of autopoiesis. The first point is that arbitration is an alternative dispute resolution system to court litigation, therefore, existing in parallel. This point leads to an assumption that apart from the court system, there is another parallel system which can perform the same operation – resolve a conflict in society. The next question is, if it is a parallel mechanism to court litigation, does it mean that it is a subsystem of a legal system. In case of national arbitration this could be potentially the case, the arbitration tribunal is performing the same conflict resolution task as the courts and this could mean that the operations within the legal system operate through different structures, yet still through the same national legal system.[629]

However, as suggested above, it is the cross-border level which is of interest. It was suggested that the regional level of autopoiesis regarding a legal system depends on the existence of certain structures which are forming the said system. If the UK legal system is perceived on the federal level, it can be said that the UK legal system subsumes each individual national

[629] It needs to be noted, however, that the task of a court is wider in that it is obliged to maintain the normative coherence of its own legal system.

legal system, yet it is able to perform autopoiesis on the federal level. In comparison, the EU legal system can be perceived as operatively closed even though the complexity of the structures is not so developed to the same extent, however, the mass of communication seems to be generated to a satisfactory level to perform autopoiesis within the limited scope of its operational competence, as was discussed in section 5.3.

International commercial arbitration could be seen as a system on the global level, however, with elements that are distinct from both the global legal system and the regional EU legal system. Firstly, it is specifically designed to resolve disputes. Therefore, it is a global decision-making system which must be chosen by the parties in order to be used. If this were taken to parallel the operation of arbitration at a national level, it might be argued that international commercial arbitration would be a parallel to a decision-making system of the global legal system. It could be pointed out that the global legal order has such a system for resolving disputes between nation states.[630] Nevertheless, using the analogy to a national legal system, international commercial arbitration would not be perceived on the same level as a global legal order as it does not have to operate between states but can and does ordinarily operate between non-state parties, namely natural and legal persons.[631] International commercial arbitration would then be perceived as a subsystem of a global legal order. It was suggested that the global legal order is not an autopoietic system.[632] Therefore, it is questionable if the subsystem of international commercial arbitration could be seen as autopoietic. There are undoubtedly structures in existence which lead the system of international commercial arbitration towards an operative closure in the context of a particular dispute, such as the

[630] The International Court of Justice at the Hague decides disputes of a legal nature that are submitted to it by States.
[631] Subject to exceptions when the state are in a position of one of the parties as for example the International Centre for Settlement of Investment Disputes (ICSID).
[632] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 481.

New York Convention 1958, which provides a solid legal framework for the enforcement of arbitration awards internationally.[633] Further, the system of international commercial arbitration has been able to gather a great mass of legal information which again could lead the system towards a capability for operative closure in the context of particular disputes. That capability is insufficient, however, to evidence autopoiesis of international commercial arbitration as a system; since the operative closure of a particular arbitration would not by itself have any bearing on future arbitrations and thus in itself would not contribute to the evolution of the system.[634]

In Chapter 7 of this Thesis, where international commercial arbitration is discussed in detail, it is outlined that there are many arbitration centres worldwide which the parties are able to choose from when deciding to subject their future disputes to arbitration. These arbitration centres are themselves decision-making systems which operate within a set of binding rules generating a binding decision using their binary code of legal/illegal in order to resolve a dispute. From this perspective, using the assumption that on a global level international commercial arbitration is an operatively open system, it could be seen that on the specific level of the individual arbitration centres, they could be seen as operatively closed systems of decision making. If this assumption is correct, it lends a unique position for the individual arbitration centres. They are not on a national level, neither are they on global or regional level. They seem to be systems which are not anchored at any specific level discussed herein.

[633] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) (NYC); for details about the NYC please see Chapter 7 of this Thesis.

[634] Further, it is possible that the system of international commercial arbitration lacks the aspect of stabilisation of expectation in a same way as an autopoietic legal system. For further details regarding expectations see Chapter 4, Section 4.4.

5.5 The Connections

After outlining the above by way of an attempt to extend the principles generated within systems theory to the discussed systems, it is convenient to investigate in a greater detail what is the nature of the structural couplings between the individual systems of interest. This will provide a better understanding of how the systems can influence each other. The different synchronicity of the systems needs to be born in mind, as illustrated in the introductory remarks in Section 5.1. Structural couplings as a way of connection between the systems can be perceived as an extremely close and specifically targeted relationship between a system and parts of its environment.[635] However, the system can again only reflect on its own operations and since it is not porous, there is an element of unpredictability as to the outcome of its processing of an irritation generated by a system's environment.[636]

Economic system and legal system

As was suggested in Section 5.1, individual systems are connected to their environment and hence with each other via structural couplings.[637] The connections between the economic system and legal system are, therefore, their structural couplings which build a channel for their mutual irritation.[638] As Luhmann points out, '[t]*he coupling turns operations of the economic system into irritations of the legal system and operations of the legal system into irritations of the economic system.*'[639] The notion of property is one of the most significant

[635] See for example John Beattie Paterson, 'Reflecting on Reflexive Law' in Michael King and Chris Thornhill (eds), *Luhmann On Law And Politics: Critical Appraisals And Applications (Oñati International Series In Law And Society)* (Hart Publishing Limited 2006) 20.
[636] Ibid 20.
[637] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 381.
[638] Ibid 392.
[639] Ibid 392.

mechanisms of structural coupling when discussing the connection between an economic system and a legal system.[640] Further, there are many other notions which tie the systems firmly together. An example would be the notion of money and aspects connected with money such as debit or credit. Another, more general notion which connects the two systems is the notion of agreement as an initial stage of a contract.

The notion of property which can be seen as a mechanism of a structural coupling between the two systems is an initial distinction which requires further specification, namely an identification of the '*status of a unit of property*.'[641] The term which the legal system uses when identifying a status of a unit of property and thus locating individual owners is 'contract' which in the economic system is identified as an 'exchange'.[642] Luhmann further stresses that the structural coupling between the economic and legal system '*achieved its modern (if not perfect) form with the institutionalization of freedom of contract*.'[643] The freedom of contract means that in the economic system there can be transactions performed independently of having to orientate the economic bargain to one of the various different types of contract and likewise in the legal system it is possible to identify the limits of that freedom which are imposed by the legal system itself.[644]

Luhmann sums up the above as follows: '*Seen from the perspective of the legal system, the contract is and remains a form of obligations, which have to be assessed retrospectively if there is a dispute, while the economic system changes its state through the mode of its transactions, with consequences that can hardly be controlled, let alone 'steered', by law*.'[645]

[640] Ibid 392.
[641] Ibid 393.
[642] Ibid 393; the context of these notions may be by an observer identified as a 'sale'.
[643] Ibid 399.
[644] Ibid 399; for details see Chapter 2 Section 2.1 regarding Domestic perspective.
[645] Ibid 400.

This illustrates the independency of the two systems. Both systems operate with a contract within their structures and perceive it differently. The legal system views it as an obligation while the economic system views it as a transaction. The different perceptions within each system are independent of each other. Therefore, in less abstract terms, it can be stated that a contract has a different significance for the legal system and for the economic system.[646] The consequences in the economic system which cannot be controlled by the legal system can be perceived for example as a growing amount of wealth. The fact that Jeff Bezos[647] is likely to become a first trillionaire cannot be controlled by law in economic terms. Likewise, the economic system cannot control the obligations that Bezos has regarding his property which are controlled by the legal system.

There are certain elements which facilitate the understanding of the connections between the two systems. The general perception of property, as illustrated by Luhmann, contributes to that understanding. However, for the purposes of this Thesis, a more detailed analysis is required. The reason behind the need for a more in-depth analysis is the fact that Luhmann at times leaves a discussion of certain topics undeveloped as it is not in his main interest to pursue such a discussion. Therefore, the analysis of the connections between the individual systems, the legal system and the economic system at present, must be developed further regarding selected individual notions which are significant for both systems. The list referred to below is not exhaustive and the notions taken into consideration were selected with regard to the interest of this Thesis specifically bearing in mind the UK businesses and their journey to the enforcement of the obligations owed to them.

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[646] Ibid 392.

[647] 'Jeff Bezos Could Be World's First Trillionaire By 2026. Ambani, Jack Ma To Follow - World's First Trillionaire?' (*The Economic Times*, 2020) <https://economictimes.indiatimes.com/news/company/corporate-trends/jeff-bezos-could-be-worlds-first-trillionaire-by-2026-ambani-jack-ma-to-follow/worlds-first-trillionaire/slideshow/75801789.cms> accessed 1 June 2020.

Property

The notion of property is one of the most significant mechanisms of structural coupling between the legal system and the economic system. Luhmann himself acknowledges this connection and discusses this notion as briefly outlined above. The significance of property as a mechanism of structural coupling between the legal and economic system can be seen in the fact that most of the notions which are relevant both for the legal and economic systems can be derived from property. As Luhmann suggests, a legal system when identifying the status of a property is interested in the attachment, transfer and reattachment of ownership of a property, which is an object of a contract, between direct or indirect contracting parties that may contrastingly be identified as an exchange from the perspective of an economic system.[648] This distinction suggests that the economic system is interested more in the property itself and its value rather than its legal status. This assumption is in line with the internal code of payment and non-payment which the economic system runs.[649] Since the communication of an economic system is the communication of money, there is no code for identifying ownership of a property as this perception of the legal system is not relevant for the economic system beyond the notion of exchange.[650] However, the value of property is of a high relevance to the economic system as it serves the ability of an economic system to give a value of money to a particular exchange. In contrast, the legal system cannot by itself ascribe value to property in terms of a money communication as there are no structures or operations which would enable the system to process this information. The legal

[648] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 393.
[649] Niklas Luhmann, *Ecological Communication* (University of Chicago Press 1989) 52.
[650] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 391.

system is able to recognise status of property in terms of a rightful owner and further ascertain any subsequent transfer and reattachment of such property to a new rightful owner, but it requires the assistance of some structural coupling to ascribe value. An example could be section 8 of the Sale of Goods Act 1979 which states that in an absence of an agreed price, agreed method or fixing the price or course of dealing between the parties, a payment of a reasonable price is required.[651]

Agreement

There are stages of social interactions which precede a contract formation (as seen in legal system) or exchange (as seen in economic system). There is negotiation between the interested parties which usually include discussing conditions of the future contract or exchange respectively. The phase of negotiation, provided the parties are satisfied with the conditions and are willing to enter into a contract, results in an agreement and subsequently in a contract. In common law, there are certain conditions that need to be fulfilled, as discussed below, in order to enforce the agreement. In civil law, despite the frequency of usage of the term agreement and contract interchangeably, the situation is similar. It can be suggested that an agreement must exist in order for the parties to successfully enter in a contract. From a perspective of the economic system, in order to successfully fulfil an exchange, there are no strict requirements, however, there also has to be an agreement before the exchange is performed. The nature of an agreement is different in the economic system as the relevant communication is of money, or at least a promise of money.[652]

[651] Sale of Goods Act 1979 s. 8.

[652] In terms of money and the code paid/unpaid, it could be suggested that money is not the only way commercial value is transferred (more a universal tool of valuation than a universal tool of payment - where payment means passing of economic value). Exchange of goods, real property, intangibles (including incorporeal rights, duties and liabilities and even unique Bitcoin codes) could all be considered as other ways of transferring value. If an obligation to 'pay' is accepted by

Therefore, the parties must agree on the value of the exchange. Other conditions are not relevant for the economic system and it will not reflect them in its own operations.[653]

Contract

From the perspective of law of a contract, there are certain requirements which need to be fulfilled in order to perceive a contract as enforceable. Most common law and civil law jurisdictions do incorporate a requirement of offer and acceptance. In common law, a contract further requires consideration and it must be clear that there is an intention to create legal relations.[654] Civil law, which does not recognise consideration per se does, however, recognise reciprocity of rights and obligations.[655] Monetary value of a property which is a subject of a contract is not relevant for the common law legal system which can be illustrated on the legal principle of sufficiency of consideration whereby consideration must be sufficient but, however, does not have to be adequate as illustrated for example in *Thomas v Thomas*.[656] Further, the English legal system requires for consideration to have some economic value (*Chappell & Co Ltd v Nestlé Co Ltd*.)[657] The civil law doctrine historically reflected inadequacy

another that can be seen as completing the transfer of value as far as the economic system is concerned and can be entered, or more precisely debited, in accounting terms.

[653] Effectively, the economic system has a structural coupling with the legal system as it reflects the fact of the agreement as being void by ascribing a nil value to the exchange. Furthermore, if the contract is valid the payment changes ownership, if the contract is invalid the payment is recoverable and ownership is not changed. Actions of the legal system either confirm (valid) or refute (invalid) the actions in the economic system – which can then (through repayment and return) respond through its operations.

[654] Edwin Peel and G. H Treitel, *The Law Of Contract* (15th edn, Sweet & Maxwell/Thomson Reuters 2020) 306.

[655] Arthur T. von Mehren, 'Civil-Law Analogues To Consideration: An Exercise In Comparative Analysis' (1959) 72 Harvard Law Review 1009.

[656] *Thomas v Thomas* [1842] 2 QB 851.

[657] *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87; It is, however, open for discussion how the economic value and the ratio in *Chappell & Co Ltd v Nestlé Co Ltd* are interpreted. The contrast between legal (symbolic, e.g. the wrappers) and economic (money) values could be outlined here. In *Chappell & Co Ltd v Nestlé Co Ltd* Lord Somervell stated that: '*It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn*.' The peppercorn is the 'nominal consideration used in old contracts - it exists in effect to show some consideration but is not 'money or moneys worth' – i.e. it has no real value. The above would mean that the value of consideration is not an issue the court will look at, assuming whatever the party stipulates for what has sufficient value for that party. This general rule is ousted in certain situations e.g. transactions at an undervalue in insolvency law.

of a value by the *laesio enormis* doctrine, which originated in Roman law and refused enforceability of contracts where the exchange value had a great difference as between the parties.[658] These principles illustrate the historical development of freedom of contract in society and from this perspective common law appears to provide parties with greater freedom.[659] Further, this could mean that a civil law legal system, which incorporates the doctrine of *laesio enormis*, is connected closer to the economic system.[660] This is due to the fact that it is the monetary value which is the most relevant for the economic system in terms of exchange. The economic system operates on different principles and as the communication of money is the relevant type of communication which the economic system acknowledges, it is the economic principles of demand and supply (amongst other economic principles) in which the system is interested when evaluating the exchange.

Money

It has been outlined multiple times that the communication relevant for the economic system is that of money.[661] The code in which the economic system operates is payment/non-payment, however, this payment does not have to be in a specified currency, the core for a transaction recognised by the economic system is the value of property.[662] Therefore, the economic system is interested in the values that are exchanged rather than legal requirements of a transaction. For the legal system the value is relevant from the legal/illegal point of view. The requirements of the English legal system as per value are that there must

[658] Arthur T. von Mehren, 'Civil-Law Analogues To Consideration: An Exercise In Comparative Analysis' (1959) 1065.
[659] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 399.
[660] Such a civil law legal system can be viewed the Czech legal system as it incorporates the *laesio enormis* doctrine in its Civil Code in s. 1793.
[661] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 391.
[662] Niklas Luhmann, *Ecological Communication* (University of Chicago Press 1989) 52.

be sufficient consideration but it does not need to be adequate so that the requirement is merely that the consideration has some economic (nominal) value.[663] The notion of money, which in the economic system is viewed as a unit to measure value,[664] is perceived through the lens of legal requirements by the legal system. This structural coupling, which by the economic system is perceived from the operations of the system as units to measure value, is by the legal system tied to the concept of legal tender and connected to its statutory requirements, which in the English legal system is illustrated in the Coinage Act 1971. It is clear, that due to the difference in the structures and operations of the legal system and the economic system, the notion of value transfer, which for an observer is a single event, is characterised differently within each system.

Debit and Credit/Debt and Damages

Another relevant example of a structural coupling which connects the legal system and the economic system are the debit and credit notions, which correspond to the legal system's remedies of debt and damages. Credit and debit are in economic system closely connected with the area of accounting and follow every transaction equally as a transaction will have both a debit and a credit entry in account ledgers.[665] Generally, an increase in assets is recorded as debit and a decrease in assets as credit.[666] However, it is not only the assets account which is concerned with debit and credit records. As debit and credit are two sides of the same coin, decrease on one side will have an impact on the other. Therefore, an increase in assets (debit) relates to an increase in equity (credit).[667] A decrease in assets

[663] *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.
[664] Ronald I McKinnon, *Money And Capital In Economic Development* (Brookings Institution 1973).
[665] Christopher Nobes, 'Accounting For Capital: The Evolution Of An Idea' (2015) 45 Accounting and Business Research 421.
[666] Earl Clevenger, 'Presenting the Theory of Debit and Credit.' (1943) 18 The Accounting Review 42.
[667] Christopher Nobes, 'Accounting For Capital: The Evolution Of An Idea' (2015) 45 Accounting and Business Research 421.

(credit) is then related to decrease in equity (debit).[668] Equity can be calculated as assets minus liabilities (future obligations such as loans).[669] An increase in liabilities (credit) relates to increase in expenses (debit) and vice versa.[670] Therefore, as an example for a complete picture, if liabilities increase (credit) this means that expenses increase (debit), the assets decrease (credit) and the equity decreases (debit). In other words, if a company acquires a loan, its liabilities account increases (credit) which has an impact on the overall wealth of the company which decreases (decrease of equity recorded as debit). Another example less related only to the accounts could be debit and credit cards. Debit card operates with funds deposited from the side of the account holder (increase in assets) while a credit card operates with the funds of the institution which issued the credit card (increase in liabilities).[671]

The economic side of debit and credit is not relevant for the legal system, which focusses instead on the legal rights of a creditor (to whom the money obligation is owed) and the legal duties of the debtor (from whom the money obligation is owed) and this is reflected on the operations of the legal system.

There are certain areas where the terms are encountered in the legal system, as for example the Consumer Credit Act 1974 (the 'CCA 1974'). The CCA 1974 explains the meaning of credit which is used in the Act. Section 9 reads as follows: '*In this Act 'credit' includes a cash loan, and any other form of financial accommodation.*'[672] From this definition it is clear that there is a difference of the perception of the term. For the economic system, the relevant information is the change of value while for the legal system it is the legal requirements and definition which are relevant. The CCA 1974 does not include a definition of debit, however,

[668] Ibid 421.
[669] Ibid 417.
[670] Ibid 421.
[671] Zinman J, 'Debit Or Credit?' (2009) 33 Journal of Banking & Finance 358.
[672] Consumer Credit Act 1974 s. 9.

section 10 includes the following: '*In relation to running-account credit, 'credit limit' means, as respects any period, the maximum debit balance which, under the credit agreement, is allowed to stand on the account during that period* […].'[673] Therefore, the legal system perceives debit as a debt which stands on the account. While for the economic system the importance is the change in the value, for the legal system it is the existence of a debt which is relevant.

The legal system reflects the notion of debt in a non-monetary approach. An example could be the presumption in common law that a part-payment of a debt is not good consideration as outlined in *Pinnell's case*[674] which was then confirmed by the House of Lords in the case of *Foakes v Beer*.[675] This principle is connected with sufficiency of consideration in common law and means that: '*Payment of a less sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole.*'[676] Therefore, from the perspective of the legal system, the debt is recognised as an obligation and fulfilling the obligation only partially would not be satisfactory.

There are exceptions, however, to the rule. One set of exceptions is outlined by the *Pinnell's case* itself when the obligation would be satisfied if there was a non-monetary value given to the creditor or when the part-payment of a debt is performed at an earlier date or a different place.[677] Another exception was developed by Lord Denning in the case of *Central London Property Trust Ltd v High Trees House Ltd*[678] in the form of promissory estoppel being an equitable principle which outlines a possibility of a debtor being able to rely on a promise of a creditor not to enforce the right to claim the rest of a debt. There are certain requirements

[673] Ibid s. 10(2).
[674] *Pinnell's case* [1601] 1 WLUK 164.
[675] *Foakes v Beer* [1883] 6 WLUK 88.
[676] *Pinnell's case* [1601] 1 WLUK 164.
[677] Ibid.
[678] Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130.

for the doctrine of promissory estoppel to operate and the doctrine merely suspends the rights of the creditor and if the debtor is able to resume their financial position the creditor is able to claim the rest of the debt if a reasonable notice is given.[679]

The above are convenient illustrations of the ways that the notion of a debt is administered within the legal system. It is recognised that there is a party owing money to another party, however, the emphasis is not on the monetary value of the claim, the emphasis is on the legal requirements surrounding this specific type of obligation. The fact that there are different types of obligations recognised, reconcile a possible argument that suddenly it seems that a legal system is interested in a communication of money. The reconciliation is that the legal system is not so interested, as this role belongs to the economic system, the legal system is simply interested in the satisfaction of a legal obligation.

For the legal system the fact that this is a specific monetary obligation does not play a role per se. The importance which the legal system recognises is that it is a different type or quality of an obligation, similar to, for example, an obligation of a performance. Therefore, the information that an obligation is of a monetary value is relevant to the extent of this specific monetary quality. Another quality of obligation would not be satisfactory if a monetary type is required (except when specified in such way). As a monetary obligation is a type of obligation, for the legal system this means that there is a different set of programmes (norms) relevant for this specific type. The nature of the type of obligation has a relevance for the type of programmes which are applied by the legal system and the system does not investigate a specific value or quantity of the obligation when the obligation is fulfilled according to the appropriate legal requirements (for example according to a contractual specification).

[679] *Ajayi v Briscoe* [1964] 1 WLR 1326.

On the other hand, if an obligation is not fulfilled according to the legal requirements, the legal system is alerted by such behaviour and there can be consequences generated within the system. An example of this is a breach of a contract. In very general terms, in case of a breach of a condition the affected party is entitled to terminate the contract (claim damages and claim refund) while if there is a breach of warranty, the affected party may claim damages, subject to further legal requirements and exceptions.[680]

At times, there are situations which negatively impact a contractual party, and in some cases the legal system is irritated by this negative impact and operates programmes which correspond to the specific situation. An example of the above is the common law's doctrine of frustration established in *Taylor v Caldwell*[681] by which, if applicable, the parties are discharged from their obligations generally due to the impossibility (or fundamental difference as per *Krell v Henry)* [682] of further performance of the contract caused by an unforeseen event beyond the control of the parties.[683] However, the doctrine of frustration is not applicable to situations when the contract simply becomes more difficult to perform, more expensive to perform or inconvenient to perform.

The doctrine of frustration is only applicable in a very specific circumstances and as suggested above, if a contract becomes for example more expensive to perform, the contract is not likely to be found frustrated. This approach again illustrates how the legal system and the economic system react to a different set of irritations. While some contracts would be found frustrated for an economically unimportant event regarding the performance of the contract (e.g. cancellation of a coronation parade as per *Krell v Henry*),[684]the fact that a contract becomes

[680] An example of the eligibility to claim damages can be the Sale of Goods Act 1979 s 53.
[681] *Taylor v Caldwell* [1863] 5 WLUK 26.
[682] *Krell v Henry* [1903] 2 KB 740.
[683] *Taylor v Caldwell* [1863] 5 WLUK 26.
[684] *Krell v Henry* [1903] 2 KB 740.

extremely expensive to perform, or encounters unforeseen onerous economic consequences does not irritate the legal system.

An example of a case where the Court of Appeal found the doctrine of frustration not applicable despite the fact that this decision had an onerous economic consequence in the form of damages is *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd.*[685] In this case the seller was unable to perform the contract as, due to World War I, he was not able to source Finish timber which he agreed to sell to the buyer. However, the courts found that this reason was not sufficient to frustrate the contract as for the buyer the way the timber was sourced was not contractually significant. From the perspective of the legal system the fact that the seller, in consequence, essentially became an insurer of the buyer was not significant from the perspective of the legal system. The legal system is irritated by the situation and produces a decision using the code legal/illegal and the fact that the decision is economically absurd does not have any further impact on the legal system as it is not concerned with the communication of money (the economic value of the contract is irrelevant). On the other hand, the economic system is not concerned with the principles of the doctrine of frustration, however, it becomes irritated by the quantity of the economic consequences. This example illustrates, that the fact that there exist structural couplings between the systems, does not always mean that the systems 'cooperate' with each other.[686] This is due to the fact that a system is only able to distinguish itself from its environment and it is not enabled to define the structure of its environment.[687] Therefore, what can be perceived as a 'relationship'

[685] *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467.
[686] See for example John Beattie Paterson, 'Reflecting on Reflexive Law' in Michael King, and Chris Thornhill (eds), *Luhmann On Law And Politics: Critical Appraisals And Applications (Oñati International Series In Law And Society)* (Hart Publishing Limited 2006) 20.
[687] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 87.

between two system is only observable from a position of an external observer rather than from a system itself. This example contributes to the explanation why there are at times such differences in how an event is treated from an economic and legal standpoint.

The above illustrates an element of a structural coupling between the economic and the legal system. It brings forward an example where a contract is not performed according to its own terms and how the consequences of such a breach are reflected within each system in question. Therefore, it can be suggested that if a contract is performed without any issues, the legal system is not irritated, however, when there is a situation where a reaction from a legal system is required, it is irritated by such a situation and responds accordingly within its operations.

It is, therefore, observable that the economic system reacts analogically, however, instead of being irritated by the issues which are relevant to the legal system, it is irritated by the issues relevant only to itself. When an exchange of property between two parties occurs, the operations are alerted and reflect the situation from the communication of money perspective. The economic system will see the transfer of value from one side to another and will respond by coding the operation in terms of a credit and a debit fluctuation on the accounts. The above is not only applicable to existing accounts in the banking sense. Even when there is an exchange of values from one side to another which are not being accounted for in the books of account, the economic system still allocates debit/credit values by its operations which run in the payment/non-payment structures.

Damages

It was suggested above that the legal system grants the possibility to claim damages as one type of remedy for a breach of a contract. In the English legal system, the damages have a

compensatory function.[688] The aim is to compensate the loss of the affected party rather than to punish the party responsible for the loss.[689] There are legal requirements in order to determine that there is indeed a possibility to claim the damages as for example the test of remoteness and reasonable contemplation as per *Hadley v Baxendale*[690] and *Koufos v C Czarnikow Ltd (The Heron II)*.[691] The rules on remoteness are used to determine if there are grounds to grant damages for normal loss which can be reasonably considered as arising naturally as a result of a particular breach of contract or for abnormal loss which is beyond normal loss and the responsible party would have to be aware that there is a possibility of this excessive loss to arise.[692]

The above illustrates some of the main legal requirements which are relevant for the legal system when damages are in question. It would appear that, as the difference between the normal loss and abnormal loss is acknowledged by the legal system, the legal system is finding the value of the loss itself relevant. However, this is not the case. The legal system indeed perceives the difference, however, the value itself is not relevant. What is relevant are the circumstances under which a breach of contract occurs and if there are any impulses present in the situation which trigger the programmes of the legal system. In other words, the legal system is interested in the fact that there is a normal loss which naturally arises and would arise usually and further if the responsible party could reasonably contemplate the abnormal loss in question not in what the monetary value per se of these losses is. Thus, the law generally does not have regard to changes in market price post contract – which may have a significant effect on damages for usual loss, nor to the value of the standard price charged

[688] Edwin Peel and G. H Treitel, *The Law Of Contract* (15th edn, Sweet & Maxwell/Thomson Reuters 2020) 1213.
[689] Ibid 1213.
[690] *Hadley v Baxendale* [1854] 2 WLUK 132.
[691] *Koufos v C Czarnikow Ltd* (The Heron II) [1969] 1 AC 350.
[692] *Hadley v Baxendale* [1854] 2 WLUK 132.

despite the liability exposure when a special intended use has been disclosed to a junior employee.[693]

In contrast, the economic system is not concerned with the rules of remoteness. The triggering impulse for the economic system is that a party to an exchange lowered their wealth. The economic system will reference the loss in the appropriate account reflected accordingly on the credit and the debit side.[694] A concrete account where such a loss is reflected will depend on the individual circumstances of the exchange.

Application of the analysis

The examples of the structural couplings above outline the difference in the perception of the same events within different systems. What is a single occurrence for an observer, has a different meaning within economic and legal systems. Each system is irritated by a different part of the occurrence. A convenient example would be a drawing using blue and red pens.[695] An observer sees the whole concept of a drawing which comprises of blue and red lines. However, if the observer wears glasses with blue lenses, suddenly the drawing will comprise only from red lines. If glasses with red lenses are worn, the observer will only see the blue lines. This illustrates how each system filters the information. For a system, for which only red lines are relevant, the blue lines will not be able to irritate it and vice versa.

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[693] There are, however, exceptions to this general rule. These exceptions could be potentially seen as evolved in time as a reaction to the irritations to the system. One of those examples would be statutory prima facie measure of damages as per Sale of Goods Act 1979 section 51(3) 'Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.' Under this rule, the 'market or current' price of the goods post contract will be reflected. Further, regarding remoteness, in *Transfield Shipping v Mercator Shipping* (Achilleas) [2008] UKHL 48 the contractual rule of remoteness did extend to contemplation of the value of the apprehended loss, so that the charterer was not responsible for a contemplated category of loss (i.e. loss of charter hire for delayed redelivery) where the value of the lost chartered hire was in excess of the amount of hire that might have been reasonably contemplated by the party in breach (i.e. the charterer) –(Lord Hoffman para 23).

[694] Christopher Nobes, 'Accounting For Capital: The Evolution Of An Idea' (2015) 45 Accounting and Business Research 421.

[695] The assumption would be a drawing on a white paper.

The above brings forward a question of why there is a need for structural coupling between the systems if each autopoietic system is able to filter the information relevant for them. The answer lies perhaps in the need of structural order and organisation which each system needs in order to perform their autopoiesis and the incredible mass of information available in the environment. It is convenient to bear in mind the fact that the society in which events occur is a supra-system which subsumes both legal and economic systems.[696]

It can be suggested that the structural couplings between the systems need to be in place in order to facilitate the filtering of the information into each system from each system's environment. Further, the structural couplings direct information (irritations) into the respective systems.

However, it is important to note that each system does not see the boundaries of the other system in its environment as it is not able to perform such identification.[697] This is due to the fact that the system does only distinguish between itself and its environment, not specifying the structures of its environment.[698] The structural couplings are then a result of a pattern recognition within the environment – Luhmann brings the example of the fact that money is accepted.[699] From the above it is now clear that this is perceived as the legal tender at the side of the legal system which is structurally coupled with the money as a value in the economic system. The legal system does not know that there is an economic system on the other side of the structural coupling, however, it does recognise this pattern in the environment which facilitates the filtering of the events from the environment which are then reflected in the inner operations of the legal system. The pattern nature suggests that it is

[696] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 186.
[697] Ibid 87.
[698] Ibid 87.
[699] Ibid 382.

possible to view a structural coupling as of a systemic nature in contrast to an episodic coupling, which is how an operational coupling could be viewed as it only lasts for the duration of a particular event in a particular time period and generates no future pattern.[700] In effect structural couplings equip legal systems to impose order on successive operational couplings occasioned by successive irritations and thereby reduce, and even eliminate their potentially erratic effects within the system.

Since the perspective as to how the connection between the economic system and the legal system operates has been outlined, it is possible to highlight what are the concerned systems in question for the purposes of this Thesis. Firstly, it is necessary to bear in mind that there are different levels on which the systems operate depending on their relevancy. In Chapter 4, Section 4.5. it was highlighted that the different levels can be identified by a closer identification of the part of society which is relevant for each level. According to Luhmann, the economic system has outgrown any national boundaries and can be perceived as operating on a global level.[701] This is due to the increasing globalisation of trade and the modern technological possibilities which make such globalisation possible. Although it seems, that the global economic system is likely to be able to perform its autopoiesis as a whole, there are certainly economic subsystems which operate exclusively on national level. This could be for example due to transaction costs which certain local businesses may be facing, together with the possibility that a local business does not need to reach beyond its regional area as it may be sufficient for such a business to gain enough supplies, sales and profits through its local links.

[700] Ibid 382.
[701] Ibid 468.

After the starting point of a national economy and a national legal system is identified, the next level would be regional when there is some degree of regional integration.[702] This can be perceived from different positions depending on which region is concerned. Nevertheless, to keep consistency throughout the analysis, the national level considered is England and the regional level referred to hereinafter is the level of the EU or similar regional units.[703] The last level is the global level. This differentiation is apparent in Chapter 2 where the commercial disputes environment is discussed.

The main national level discussed throughout this Thesis is England and this is because the main concern is the UK businesses and their journey to enforcement of their contractual rights in their transnational trading. The regional level, as suggested above, is mainly the EU and its legal and economic environment.[704] Further, the last level of interest is the global level. Therefore, when realising the individual structural couplings as outlined above, it is convenient to bear in mind these different levels of communication when addressing regulatory integration horizontally at the different levels and vertically between levels. An example of a system that operates between the levels could be seen in arbitration as it is a method of dispute resolution that is employed by traders in the economic system, which is

[702] It should be noted that a regional integration is a possibility rather than a necessity as there may be countries which are not included in regional integration as for example North Korea. This means that the extent and shape is determined by historical development.

[703] As opposed to for example the region of a kingdom in case of the United Kingdom which unifies multiple nations. UK is perceived as the starting point due to the focus of this Thesis on the cross-border element of the UK businesses' trade. Therefore, even though there are some local businesses which trade only locally, it can be assumed that these particular businesses are not seeking an enforcement of a claim that would originate from a cross-border trading relationship. This means that rather than perceiving the solely local level which does not expand further as referential for the first level of trade (and seeing this as the national level), the national reference would be to the UK as a whole.

[704] As this Section 5.5 discusses connections between the legal and economic system, it is the legal and economic system which is relevant hereby. Further, when the connections between the legal and political system are discussed, the relevant environment is pointed out.

enabled at the national and UK union level facilitated largely by omission at the EU level and enabled internationally at the global level.[705]

Political and legal system

The outline of the perception of the legal system within systems theory was presented in Section 5.3 above. It is clear that even though political systems and legal systems operate in a significant proximity, their operations are separate.[706] Further, it can be suggested that due to lack of existence of certain elements, it is unlikely that a political system can be perceived as autopoietic on the global level, bearing in mind that one is aware that Luhmann's theory is highly selective.[707] The political system operates within the code government/opposition identifying the authority with power and the subordinate without power.[708]

The connections between the political system and the legal system can be viewed as structural couplings addressing what can be seen as a single event from an external observer's point of view resulting in different perceptions within the individual systems.[709] It is convenient to refer to the example which was discussed in the previous section regarding the drawing of the two sets of lines of two different colours and subsequently using the colour lenses in order to filter each colour out and, absent structural couplings with other systems, only ever see one set of lines. As the political and the legal system operate closely to each

[705] Arbitration is enabled by the UK pursuant to the Arbitration Act 1996, insulated from EU regulation by the EU pursuant to the 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 L351/1 and facilitated by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).

[706] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 368.

[707] Ibid 488.

[708] Ibid 367.

[709] See for example John Beattie Paterson, 'Reflecting on Reflexive Law' in Michael King, and Chris Thornhill (eds), *Luhmann On Law And Politics: Critical Appraisals And Applications (Oñati International Series In Law And Society)* (Hart Publishing Limited 2006) 20.

other, there are many connections that can be identified between them. Below, the selected examples of structural coupling are used to facilitate the understanding of the relationship (from an external observer point of view) between these two systems. The constitution needs to be outlined as it can be seen as one of the strongest structural couplings between the systems, similar in importance to the structural coupling of property between the economic system and the legal system.[710] The legislative process was selected as this example is fundamental to this linkage and distinguishing how the perception of the legislative process differs between the two systems is challenging. Finally, the structural coupling of enforcement is selected as it is one of the most important points of interest for the purposes of this Thesis.

Constitution[711]

It was discussed above that the legal system is closely connected to the political system, even though they are two separate systems.[712] The environment which an external observer can see as a carrier of the proximity of these two systems can be classified as a 'state'.[713] Luhmann points out that the existence of this phenomenon is possible due to the creation of constitution.[714] He elaborates as follows: '[…] *the state was given a constitution which made positive law the instrument of choice for political organization and, at the same time, made constitutional law a legal instrument for disciplining of politics*.'[715] The instrument of constitution as a mechanism of a structural coupling between the two systems is effective if

[710] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 404.
[711] It should be noted that this is a standpoint for both, written and unwritten constitution. The role of writing and texts was discussed in Chapter 4 section 4.6.
[712] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 368.
[713] Ibid 404.
[714] Ibid 404.
[715] Ibid 404.

there is mutual irritability and if both of the systems are able to perform autopoiesis.[716] In a situation where the legal system and the political system are connected via non-constitutional powers such as for example terrorism or corruption (Luhmann refers to this phenomenon as 'private' pressure) the requisite complexity of each system cannot be achieved and it can be suggested that in such cases the systems (or at least the legal system) are unable to perform autopoiesis.[717]

An effectively functioning constitution can be defined as an instrument which '*constitutes positive law itself and through that regulates how political power can be organized and implemented in a legal form with legally mandated restrictions*.'[718] Further, as this discussion must bear in mind the different perception of both systems, it needs to be outlined what is the nature of such different perceptions. The constitution within the legal system is referenced as a '[…] *supreme statute, a basic law*'.[719] The political system on the other hand references the constitution as an '[…] *instrument of politics, in the double sense of both instrumental politics (which changes states of affairs) and symbolic politics (which does not).'*[720] Luhmann further points out that there are examples where the constitution is a functioning instrument only of the symbolic politics as the legal system does not perform autopoiesis yet and, therefore, is vulnerable to a direct influence of the political system.[721] This situation may be occurring in developing states or for example states which are subject to autocratic leadership.[722] Further, this example links back to the 'private pressure'

[716] Ibid 404.
[717] Ibid 404.
[718] Ibid 405.
[719] Ibid 410.
[720] Ibid 410.
[721] Ibid 410.
[722] Ibid 410.

phenomenon which is very likely to be appearing in the states without, as yet, autopoietic legal systems.

It is apparent that the nature of the structural coupling between the political system and the legal system in the form of a constitution has elements which are relevant only for the political system and vice versa, however, there are further aspects which are relevant to both and add to the complexity of this connection. One of those aspects could be the need for a change in law due to societal need for such a change. The legislative process, as outlined below, is in the procedural core conducted by the political system (with interventions by the legal system as the carrier of the rules which must be followed within the legislative process). However, the question is where the impulse to change the law originates. Luhmann points out that '[s]*ince the capacity for activating politics in order to change law is continuously reproduced by communication in society and since law legitimizes itself by legalizing parliamentary democracy, legal practice must keep distinguishing between introducing legal change through an 'activist' interpretation of law and waiting for change in political and public opinion*.'[723] Therefore, the possibility to trigger the change of law may also originate from the legal system itself due to the nature of interpretation which may change in response to a need in society. The other possible impulse, apart from the direct irritation of the political system by the public opinion, is from the political system itself meaning the political system being a subject of self-irritation which stimulates the change of law.[724]

On the other hand, from the perspective of the legal system, there are irritations of a different nature according to the relevancy to the legal system itself. These irritations would be the ones which can be reflected only by the legal system on its internal operations. The legal

[723] Ibid 364.
[724] Ibid 411.

system reflects on impulses regarding the rules and regulations which are limiting the operations of the political system.[725] Within the legal system the events related to the applicable rules on the procedures of the political system will be filtered through the legal/illegal code and sorted accordingly. The procedures within the political system are filtered through the code of government/opposition, however, the political system needs the legal system to ensure its legality. If there was no structural coupling between the two systems, it is hard to imagine how these subsystems could be effectively performing their autopoiesis as they are significantly interconnected in their purposes in serving the society and the fact that the state is the carrier of their constitutional structural coupling.[726] The above can be perceived as Luhmann's statement on the perception of rule of law.[727]

Legislative Process

Another point of connection between the political and legal system can be illustrated by the process of enacting legislation. Generally, most autopoietic political and legal systems would address the legislative process through the constitutional structural coupling.[728] Therefore, and similarly to the strongest connection between the legal system and the economic system in the form of property, the constitutional structural coupling would be one of the most important connections between the political and legal systems.[729]

The connection through the law-making process can be derived from the constitutional link. However, at the same time the nature of this specific connection can be perceived separately

[725] Ibid 411.
[726] Ibid 404.
[727] For more detailed discussion regarding the rule of law, see Chapter 4 section 4.2 including discussion of *Miller II* [2019] UKSC 41.
[728] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 411.
[729] Ibid 404.

due to the existence of the legislative process itself. When the process of passing law is in place, there are operations within the political system being reproduced and this process is reflected within the legal system's operations at times when the legal system is triggered by the result of the operational flow within the political system.[730]

At the beginning of the legislative process, the political system is stimulated by the need to change the law.[731] As previously outlined, this can be triggered by various factors.[732] After the need to change the law within the operations of the political system is identified (which comes to the political system in a form of irritation) the political system through its own filters using the code government/opposition performs autopoiesis and the reproduction of its own operations results in an enactment of a new statute.[733] At this point the enacted statute becomes law and is not part of the political system's operations anymore.[734] The legislative process impacted the political system as the system had to perform reproduction of its own operations, however, the statute is now a part of the legal system and the political system is not in a position to determine what happens to it.[735] The above assumptions are relevant when both the political system and the legal system are operatively closed and do not apply to a situation where the legal system is operatively open and exploited by the political system as discussed above.

From the perspective of a legal system, new law means increasing complexity and the generation of a larger mass of communication. In Chapter 4 Section 4.3 it was discussed that

[730] From this perspective, the constitutional structural coupling can be perceived as an umbrella coupling for this connection. Therefore, there is a question if the link between the systems in the form of a legislative process can be seen as a structural coupling in its own right or existing as a coupling within the pattern of the constitutional connection. As this this particular process is closely connected to the constitution, it can be suggested that the latter may be more plausible.
[731] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 364.
[732] Ibid 364.
[733] Ibid 372.
[734] Ibid 372.
[735] Ibid 372.

the legal system is able to reach its autopoiesis at the point when there is enough 'mass' of law, being a sufficient body of communication. The new statute generated by the political system contributes to the building of this 'mass'. Luhmann points out the impact of time on both of the systems and suggests that even though the time passes for everyone (including the systems) in the same way, the pace of operations within the systems differs from one to another.[736] The operations within the legal system are often slower than the operations within the political system (or economic system).[737] The legislative process within the political system can be fairly fast.[738] However, it can take considerable time for the new law to settle in the legal system. This could be due to the omnipresent unpredictability of disputes, or to put it simply due to the fact that '*the future cannot be known*.'[739] Therefore, even though the legislative process is fairly straightforward, the future of the operations in the legal system is unknown and can be of a slow development.[740]

Enforcement

The last selected example of the connection between a political system and a legal system, in the form of enforcement, is one of the most relevant for the purposes of this Thesis as it is the UK Businesses' journey to enforcement of their contractual rights which is being addressed. It can be suggested that from the perspective of the legal system, the need for enforcement comes in a few forms. There is a need for enforcement of political decisions which irritate the legal system. An example of this is when the public administration outlines

[736] Ibid 382.
[737] Ibid 382.
[738] Michael Zander, *Law-Making Process* (Bloomsbury Publishing UK 2015).
[739] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 372.
[740] This will often depend on the area of impact of the new law. It can be suggested that the more 'urgent' the need for a change of law, the less timely it is for the legal system to operate the new law.

patterns for behaviour which are generally followed (e.g. the area of a community waste management).[741] When these patterns are being followed, it is the moral criteria of right or wrong what is being used by the public administration.[742] If these criteria are no longer followed, the political system resorts to the legal system which is irritated by this behaviour and will generate the basis for enforcement by outlining permitted and forbidden patterns of behaviour (e.g. fly typing being illegal in the area of the community waste management).[743]

Another form of enforcement is the enforcement of law. The enforcement of law within the legal system depends on sorting the irritations using the code legal/illegal which subsequently assigns values to the result of this differentiation.[744] It does not possess the power of authority in order to enforce law with political force.[745] Enforcement of law only requires evidence and interpretation within the legal system while the enforcement of law within the political system is the last resort when the orders within the legal system's enforcement are not followed.[746] When the enforcement of law within the political system is sought, the political system investigates '[…] *whether or not a prescribed action or failure to act can be enforced by the use of power*.'[747]

According to the above, there are certain chronological patterns in which the systems are triggered via the notion of enforcement. Firstly, there is an impulse from the environment towards the legal system that a certain pattern of behaviour needs '[…] *explicit instructions concerning what can be legally enforced or not*.'[748] Luhmann identifies this impulse coming

[741] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 373.
[742] Ibid 373.
[743] Ibid 373.
[744] Ibid 179.
[745] Ibid 374.
[746] Ibid 374.
[747] Ibid 164.
[748] Ibid 373.

from the political system,[749] however, it is imaginable that this impulse can come from any societal subsystem where there are conflicts between the prescribed pattern of behaviour and a particular behaviour.[750] When a decision of a court becomes legally binding and the decision is not followed by the judgement debtor, there is a conflict between a prescribed pattern and a particular behaviour. At this stage, the legal system is alerted and using the operations of evidence and interpretation together with the code legal/illegal it determines if there is a base for legal enforceability.[751] If the legal system generates a result that there is a base for legal enforceability, it sends the impulses to the political system which then determines if the behaviour in question can be enforced by the use of power.[752]

In practice, an example could be suggested as follows: An irritation of the legal system occurs when an agent makes a formal complaint of violation of the law by another. The legal system confirms the occurrence of a violation and a judgement is rendered. The obligation ordered in the judgement (e.g. obligation to pay) is not followed which then triggers the political system. The failure to pay is itself an irritation of the legal system that ten irritates the political system. Using political force, further measures are taken, for example a property of the debtor's spouse is seized. This may be a wrongfully seized property and, therefore, a legal case may be taken against the officers of the state. If this is indeed the case of a wrongfully seized property, the property is further returned and a new attempt to seize property in satisfaction of the dept is generated. The legal system includes norms which constitute the authority for the political system as well as constrains the use of political power. The political

[749] Ibid 373.
[750] This can be for example an impulse from the system of mass media and the impulse can be for example a situation when freedom of speech is being supressed.
[751] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 374.
[752] Ibid 164.

system gives the courts the power to grant the remedy but constrains the nature of the remedy, for example a money obligation enforced through civil process.

The relative lack of interest the legal system has in changes in the economic sphere (payment of value) can be seen in an award of a personal remedy against the insolvent defendant. The legal system has identified the obligation and enforced it through judgement. The judgement debt can be proved in the insolvency. But the judgement creditor is likely to receive nothing.

This is a simplified outline and there are certainly detailed nuances when it comes to enforcement, however, it illustrates how different programmes within different systems are triggered by the same events. In the above example the event is the conflict between the expected pattern and a particular behaviour. To complete the outline, it is useful to stress the function of law at this point. From the above it may seem that if the legal system cannot use force to enforce a claim, what is the point of the system.[753] The answer to this question lies in the Luhmann's perception that '[t]*he function of law is solely to bring about certainty of expectations* […].'[754] Therefore, the legal system must ensure that there is a certainty to the behavioural patterns which are expected to be followed.[755] The fact that the use of force as the ultimate resort of enforcement lies within the political system is not crucial for the legal system as this last stage of the enforcement of law becomes irrelevant in the legal system due to fulfilment of its function prior to this last stage.

Application of analysis

It is apparent that the legal and political systems are closely connected and the above examples illustrate how both systems approach the same event through different 'lenses'. In

[753] Ibid 164.
[754] Ibid 164.
[755] Ibid 164.

Section 5.2 it was outlined that there are different operational levels of the political system but at which levels of the political system autopoiesis is possible is a moot point. Similarly to the global legal system, the global political system is not likely to be seen as autopoietic in Luhmann's perspective. Further, as Luhmann points out: '[…] *the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society*.'[756]

The question is if there is a connection on a regional level, namely a connection on the EU level. It was suggested in Section 5.3 that the legal system of the EU is likely to perform autopoiesis while the political system is likely to be seen as an operatively open system. However, the question is if there are connections between the two systems which can be of a similar strength to structural couplings between two autopoietic systems. It is possible to see the constitutional connection in the form of TFEU[757] and TEU[758] and through these treaties there can be identified further connecting patterns as for example the establishment and jurisdiction of the CJEU.[759] Therefore, there certainly exist connections, possibly even structural couplings between the EU legal system and the EU political system, however, it needs to be borne in mind that the nature of these connections is different from those in place between autopoietic political and legal systems at a national level.[760]

The national level is the paradigm representative level of the general discussion above regarding the structural couplings and their characteristics between a legal system and a

[756] Ibid 488.
[757] Consolidated version of the Treaty on the Functioning of the European Union OJ [2012] C326/47.
[758] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[759] See for reference for example Article 19 TEU or Articles 252-281 TFEU.
[760] This may be due to different reasons, and it could be seen as dealing with different irritations on any higher than a national level.

political system.[761] It can be suggested that from the perspective of autopoiesis, that the national level is the most detailed one comprising of the most operations. This certainly must be the case in respect of the structural coupling of a political system and a legal system which are tightly interlinked within the local cultural aspects of individual units of a global society. Generally, in a fully developed unit of society with mature democratic state establishments the above connections or structural couplings can be identified. In such societal units, it is likely that the political system and the legal system are coupled via a constitution, there is a legislative process and also there are solid enforcement patterns.

International commercial arbitration and legal system

Firstly, it needs to be emphasised that the system of international commercial arbitration (also the 'arbitration system') is discussed in detail in Chapter 7 of this Thesis and, therefore, the discussion below in this Section is solely dedicated to the examples of possible connections between the system of arbitration and the legal system. As outlined in Section 5.4, it is not likely that the system of international commercial arbitration is an operatively closed system. Some authors suggest that some types of international commercial arbitration are likely to be autopoietic, however, this does not appear to be the case on the global level.[762] This is due to the fact that the system of international commercial arbitration on the global level does not possess a sufficient amount of interlinked structures and operations to enable it to be capable of autopoiesis.[763] In order to investigate how the non-autopoietic system of arbitration at a global level is connected to the legal system, the New York

[761] The UK, even though being a united kingdom, is for the purposes of this discussion perceived at the national level rather than on the regional level.
[762] For example international investment arbitration see Arthur W Rovine, *Contemporary Issues In International Arbitration And Mediation* (Brill 2012) 42.
[763] See for example Chapter 4 Section 4.2.

Convention 1958[764] (the 'NYC') is outlined as one of the strongest links between national legal systems and the system of international commercial arbitration. Further, the point of enforcement is discussed as this outlines another strong connection between the two systems. It has also been previously suggested, that the arbitration centres may be in a unique position as there is a possibility that one or more of them have indeed a sufficient mass of communication to achieve operative closure, thus, the connection between them and the legal system is discussed below as well.

New York Convention 1958

The full and detailed discussion on the NYC is provided in Section 7.3 in Chapter 7. Therefore, at this point the NYC needs to be discussed as a concept, a characteristic element of international commercial arbitration and as a link to the legal system. The NYC is a convention which ensures that a foreign arbitral award is enforced and recognised within a territory in another contracting state.[765] The NYC is a legally binding international legal instrument and became part of the legal systems of the contracting states of the convention.[766] Therefore, it can be suggested that the connection through the NYC which forms one of the most important parts of the framework of international commercial arbitration, and at the same time forms a part of many national legal systems (when ratified), mimic the constitutional connection which exists between the legal system and the political system. However, there is one crucial difference – the international arbitration system is not likely to be operatively closed. Even though this seems to be a breaking point from the perspective of an external

[764] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[765] Ibid Art. II(1).
[766] 'UNTC' (*Treaties.un.org*, 2020) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en> accessed 10 June 2020.

observer, for the legal system this fact is not relevant. This is because the legal system cannot differentiate between the nature of the systems in its environment as it is only able to identify itself and its own boundaries and its environment (not concrete systems in its environment).[767]

Even though the NYC can be seen from a similar perspective as the constitutional connection between the political system and the legal system, the fact that the system of international commercial arbitration is operatively open has an impact on the nature of the connection. In comparison to the constitutional link, the NYC link does not cover the same complexity as its main focus is on the recognition and enforcement of the arbitral awards, however, other building stones of arbitration such as procedural rules or similar are not included.[768]

Since the NYC forms a part of the legal system, the question is how it is possible that the legal system is not recognising international commercial arbitration as part of its own operations. The answer to this can be outlined using the example of NYC Article II (3) which states that: '*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*.'[769] This is a clear illustration that the legal system when irritated by the arbitration agreement of the parties reflects on its own structures and subsequently produces an instruction not to use the legal system. This is

[767] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 87.
[768] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[769] Ibid Art II(3).

respected throughout all the levels of the legal system and is one of the most significant characteristics of international commercial arbitration.[770]

Enforcement

One of the most significant notions which connects the legal system and the system of international commercial arbitration is enforcement. The NYC 1958's strongest focus is on recognition and enforcement of foreign arbitral awards. This can be seen as another illustration of separation of these two systems. Even though the arbitration proceedings result in a binding decision, the arbitration system must irritate the legal system in order to complete the recognition of the decision within the national legal systems. This is in accordance with the process of enforcement of law within the legal system as discussed above as all systems must ultimately bring their disputes to the legal system in order to ensure enforcement. And subsequently, if this does not achieve enforcement, the legal system's last resort is the enforcement by force via structural coupling with the relevant political system.[771]

Individual Arbitration centres

An intriguing question arises when the individual arbitration centres become the focus of the discussion regarding links between the legal system and the system of international commercial arbitration. These centres have their own rules of procedure and often provide the disputants with a complete arbitration service.[772] Therefore, when parties decide to subject their dispute to arbitration, and they choose a specific tribunal, the tribunal is able to

[770] See for example 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 L351/1 Art. 1(d).
[771] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 374.
[772] 'LCIA Arbitration Rules' (*Lcia.org*, 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 27 February 2022.

effectively resolve their dispute from the beginning right up to the making of a binding arbitration award.

The connection to the legal system is as outlined above through the enforcement. However, there are many other connections which further twist the possible perception of the nature of the arbitration centres. One of them is the applicable law. The area of applicable law in the context of arbitration has several subcategories. The substantive law applicable to the core of the dispute, the procedural rules of the arbitration proceedings, and also the law of the arbitration agreement and the arbitration award.[773] The connection between the arbitration and the legal systems can be conveniently illustrated by reference to the substantive law. An example can be extracted from the Arbitration Rules of the London Court of International Arbitration (the 'LCIA). In Article 22.3 the LCIA Arbitration Rules state that: '*The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate*.'[774]

The above is a clear example of the arbitration tribunal using the substantive rules which belong to the legal system as the base for the decision.[775] It was previously suggested that the code that the arbitration uses is inevitably the same as the legal system's code of legal/illegal. This does not seem to be problematic as this is a structure used to assign the values to the

[773] There are different sources for these different categories, the substantive law is provided by the legal systems of the individual states, the rules of the procedure are provided by the tribunals or other institutions (an example could be the UNCITRAL Model Law), the law applicable to the agreement and the arbitral award is again provided by the legal system.
[774] See for example 'LCIA Arbitration Rules' (*Lcia.org*, 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 27 February 2022 Art. 22.3.
[775] It needs to be noted that when addressing applicable law in case of international commercial arbitration, there are various 'laws' which are applicable, it is the law governing the arbitration agreement, the law governing the existence of the arbitral tribunal, the law governing the substantive issues in the dispute (as referred to above), other applicable rules and non-binding guidelines and recommendations and also the law governing recognition and enforcement of the award.

operations of the respective system.[776] However, the question is how the process of the arbitration proceedings sourcing and replicating the substantive programmes of the legal system can be analysed from the perspective of autopoiesis.

The possible interpretation is that it is the pure text of the programmes which the arbitration is sourcing. The arbitration takes the text of the substantive law programming and subjects the text to its own operations regarding the receipt of evidence and interpretation and gives them its own value. The value may be eventually the same or similar, however, there would be a difference as to which system produces the values in question.

If the interpretation and giving the meaning to the text is the core operation in order to make the programmes 'alive', it can be suggested that each arbitration within or without an arbitration centre could be seen as operationally closed; but not autopoietic, as autopoiesis requires evolution over time and a single arbitration does not reproduce itself over time.[777] The interpretation of the applicable law is performed within the arbitration proceedings and cannot be seen as being performed by the legal system.[778] This may lead to the arbitrators interpreting the substantive rules differently to the national courts.[779] It also means that the individual centres of arbitration may be very close to performing autopoiesis in Luhmann's sense if and to the extent they develop their own interpretative approach over time in different disputes across the distinct operationally closed tribunals that determine those disputes. However, this may not be achievable in the current setting as the fact that arbitration is not public may impact the process of reaching autopoiesis persistent in time.

[776] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 185.
[777] Ibid 243.
[778] Joanna Jemielniak, *Legal Interpretation In International Commercial Arbitration* (Ashgate Publishing 2014) 24.
[779] Joshua Karton, 'Substantive Law Determinations In International Commercial Arbitration: The Legal Rules' (2013) The Culture of International Arbitration and The Evolution of Contract Law.

Different levels

When the individual systems were discussed, it was outlined that there are certain structures on different levels, namely on the global level, regional level and national level. It has also been suggested, that the system of international commercial arbitration is likely to be operatively open. It is apparent, that the structure of the system of arbitration differs from the other discussed systems. Even though the arbitration centres each exist in certain locations, they are not tied to their location in the same way as for example the national legal or political system. There are certain elements of the process that are localised to a particular location as for example Article 32.2 of the LCIA Arbitration Rules which states: '*For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat*.'[780] The enforceability at the arbitral seat appears as a certain tie as according to the LCIA Arbitration Rules in default of the parties agreement as to the seat of arbitration, London is considered as the seat.[781] However, the overall impression is that the arbitration tribunals are in a unique position of offering non-localised dispute resolution across a broad swathe of the transactional activities taking place in the international commercial environment.[782]

[780] See for example 'LCIA Arbitration Rules' (*Lcia.org*, 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 27 February 2022 Art. 32.2.
[781] Ibid Art. 16.2.
[782] This is confirmed by the ICC Arbitration Service which has a more flexible rule than the LCIA as to the curial law: namely Article 19 (Rules Governing the Proceedings), which provides that: 'The proceedings before the arbitral tribunal shall be governed by the [2021 Arbitration Rules of the ICC] and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.' See '2021 Arbitration Rules And 2014 Mediation Rules' (*Iccwbo.org*, 2021) <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> accessed 23 October 2021.

5.6 The Fragmentation

Fragmentation is a seemingly negative notion which represents a change from one state to another. The object of this change of state can be anything that is able to be fragmented, it can be relationships, abstract concepts, tangible or intangible assets or even society itself. The change can be perceived as a breakage, or for example a thinning, of linkages. The function of this section is to conceptualise fragmentation for the purposes of this Thesis. Similarly to the previous sections of this Chapter 5, the conceptualisation of fragmentation aims to facilitate subsequent discussion. As this Thesis is interested in the fragmenting of the transnational institutional environment, some setting of context vis-à-vis this apprehended fragmentation is essential to support an adequate analysis.

Professor Cogan suggests that in order to be able to identify fragmentation there needs to be a certain status quo.[783] He follows that: '[f]*ragmentation occurs when there is a deviation from the world that we imagine to be uniform—that is, a shift (or threatened shift) away from the established baseline to one in which additional rules and additional actors are relevant*.'[784] If Luhmann's perspective is implemented, the 'world that we imagine to be uniform' can be seen as the global society.[785] The question is how can fragmentation be understood in terms of systems theory. Further, it can be suggested that some fragmentation of the legal systems occurs from the irritation of the system from its environment as it comes from the societal pressures.[786]

[783] Jacob Katz Cogan, 'The Idea Of Fragmentation' (2011) 105 Proceedings of the ASIL Annual Meeting 2.
[784] Ibid 2.
[785] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 479.
[786] Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search For Legal Unity In The Fragmentation Of Global Law' (2004) 28 Mich J Int L 999.

One observation from the above discussion is that regarding events in the environment, systems theory does not seem to be very comfortable within rigid concepts. The reason behind this is that systems theory is of a dynamic nature. Further, as the environment is not precisely structured as an autopoietic system, the systems theory is not able to, and it can be seen as not interested in attempting to, define the structures of its environment apart from recognising structural couplings of the identified system with elements of its own environment.[787] However, as illustrated by the above discussion, it is possible to develop Luhmann's principles further without being in conflict with systems theory. Therefore, it is possible to conceptualise events which are important for the external observer. Fragmentation can be identified as one of these events or as a set of these events.

It seems that according to the information subtracted from Luhmann's scholarship, there are a few possible scenarios how fragmentation may manifest itself within society.[788] Either a non-autopoietic system may evolve enough mass of communication to be able to reach autopoiesis and breaks itself from its non-autopoietic environment. Or a new subsystem of a system is formed, which although being from its own nature a subsystem staying within the boundaries of its original system, also has its own defined boundaries. The two above examples may be seen as positive and even though a fragmentation may be happening, this will not necessarily mean a loss of order. Another option, which may mean a loss of order would be an autopoietic system losing coherence and collapsing back to its environment.

Further, once the focus is directed to structural couplings, there may be other fragmenting events identified. If an autopoietic system loses contact with another autopoietic system but

[787] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 381.
[788] It needs to be noted that this is not an exhaustive list of scenarios.

continues to function, this loss of contact may be perceived as of a fragmenting nature, yet may not necessarily mean loss of order, very much depending on concrete systems and structural couplings. Another possible scenario is that an autopoietic system loses couplings with a non-autopoietic environment but continues to function. The fact that is continues to function may indicate that a loss of order did not occur. When loss of order may occur is when a loss of structural coupling causes inability to function for an autopoietic system and it collapses back to its environment. Therefore, it is convenient to further investigate what precisely is being fragmented and how when one is interested in 'fragmentation' this may be applied on systems within society.

The starting point may be the global society at every point of its existence. Further, as there are many subsystems, it also needs to be stressed that it is the legal, political and economic subsystems which are being analysed from a fragmentation perspective.[789] Subsequently, it needs to be identified what are the relevant objects of fragmentation for the purposes of this Thesis. The most relevant objects of fragmentation for this discussion can be subsumed into two categories indicated above: (i) the systems themselves, and (ii) the structural couplings between the systems. From the perspective of the global society, fragmentation can be conceptualised as an ongoing structural change.[790]

The relevance of time to the issue of fragmentation is apparent, as the change of state which can be called fragmentation (and within the analysis herein is identified regarding the systems and the structural couplings) inevitably has to have a history.[791] Therefore, even though

[789] The system of international commercial arbitration is also of a relevance, but it will be outlined that it is not the primary object of fragmentation while the other three relevant systems may be.
[790] It can be assumed that the structural changes are ongoing as the society is a dynamic system and if there were no structural changes there would be no fragmentation which seems highly unlikely. This is due to the fact that even though there is a status quo presupposed for illustration of fragmentation, this status quo is itself constantly changing in time.
[791] Jacob Katz Cogan, 'The Idea Of Fragmentation' (2011) 105 Proceedings of the ASIL Annual Meeting 2.

autopoiesis is performed as an ongoing reproduction of operations at one moment in time, in order to be able to conceptualise fragmentation the relevant segment needs to be extended from the one moment in time to an assortment of these moments in one comprehensive record of chronological events.

Before these events are discussed, it is worth highlighting the element of unpredictability which is often emphasised by Luhmann. Relevant for this discussion is the following statement regarding society and its structural changes: '[…] *modern society's relationship with its future has a lot to do with the increase and acceleration of structural changes that are visible to this society itself*.'[792] From the above, it can be suggested, that the society is significantly sensitive to structural changes and their speed, and that this sensitivity shapes the reaction to the future events which occur in the society (i.e. the extent and pace of any apprehended future fragmentation will be inherently uncertain).

The process of fragmentation as identified by the external observer cannot be perceived in the same way from the perspective of the autopoietic systems in question. The autopoietic systems are able to identify their own operations and distinguish themselves and their boundaries from their environment.[793] Further, it is clear that they are able to react to irritations from the environment which are then reflected on their own structures and operations.[794] It was outlined above that fragmentation can be understood as a change of state which can happen in different forms, for example a breakage of objects of cohesion or thinning of linkages, relationships and anything which is able to be fragmented.

[792] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 372.
[793] Ibid 87.
[794] Ibid 383.

The above understanding of fragmentation, however, is possible only from a perspective of an external observer. The systems do not conceptualise fragmentation as they do not have the ability to do so, however, the systems will be sensitive to irritations.[795] Further, the systems will be filtering the information available in the environment and will be irritated only by the impulses which are relevant to them.[796] What is observed as fragmentation by the external observer, will be perceived as an impulse for change by the system and will be processed by its autopoiesis. However, the system will not be able to code this impulse as 'fragmentation'. For the system it will be yet another irritation from the environment. This irritation or set of irritations which can be perceived as fragmenting by the external observer, taking into an account the element of unpredictability, can result in any number of possible reactions by the system. As it was outline above, this could be an improvement of the system, alterations of the structural couplings between the system and its environment, loss of complexity, deterioration of the system or even a destruction of the system.[797] This is due to the dynamic nature of the autopoietic systems and due to the fact that '[a]*utopoiesis is no guarantee for survival, let alone a formula for progress.*'[798]

It is convenient to outline concrete examples of what an external observer would perceive as events of fragmentation and how these specific events or sets of events and processes might impact the systems in question and what is or could be the ultimate result of this impact.

[795] Ibid 383.
[796] This links to the filtering which was discussed above within the examples of structural couplings between the legal system and the other systems in question.
[797] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 466.
[798] Ibid 466.

The COVID-19 Pandemic

A convenient and topical example regarding all the systems discussed in this Thesis is the SARS-CoV2 (the 'Covid-19') pandemic crisis (also the 'pandemic'). This is due to the fact that the Covid-19 pandemic could be seen as an enormous trigger of fragmentation in the world society.[799] Regarding the Covid-19 pandemic, the following can be suggested: '[i]*ts societal and economic impact is hard to quantify, but in all aspects enormous*.'[800]

Economic System

Considering the global economic system, the expectation was that the potential impact of the Covid-19 pandemic might '*trigger a global economic crisis to a level unprecedented since the 1930s*.'[801] Further, it had been pointed out that the pandemic stressed the interdependencies of the individual parts within the global economic system and how each of these links was impacted by the global crisis made individual states vulnerable to significant disruption.[802]

The external observer who is able to identify the individual systems in society is able to recognise the impact of the pandemic. The majority of persons were able and still are able to experience the impact of the pandemic on their everyday working life. An example of the past impact could be the furlough measures or similar measures amongst many industries in the world society.[803] The question is, however, how can the impact be illustrated on the global economic system itself and for this illustration is the dynamic systems theory particularly convenient.

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[799] Tobias Gehrke, 'After Covid-19: Economic Security In EU-Asia Connectivity' (2020) Asia Europe Journal 239.
[800] Frauke Austermann, Wei Shen and Assen Slim, 'Governmental Responses To COVID-19 And Its Economic Impact: A Brief Euro-Asian Comparison' (2020) Asia Europe Journal 211.
[801] Yves Hervé and Philip de Homon, 'Adjusting group transfer pricing in the COVID-19 economic crisis' [2020] International Tax Review.
[802] Tobias Gehrke, 'After Covid-19: Economic Security In EU-Asia Connectivity' (2020) Asia Europe Journal 239.
[803] John B Pinto, 'Brace for impact of coronavirus: What now? What next?' (2020) 38 Ocular Surgery 21.

Even though the global economic system is assumed to be able to perform autopoiesis, the pandemic stressed the importance of the local parts of the economic system, especially due to the measures implemented by the political system (such as closing borders and requisitioning essential equipment and supplies).[804] Even though the political system cannot insert operations into the autopoietic economic system, as the environment is not able to do this and the political system is an environment from the perspective of the economic system, it is able to irritate the economic system by the outcomes of its measures.[805] Therefore, for example the creation of the furlough programme in the UK could be seen as communication of the UK political system, however, the fact that there was no value being created by the furloughed employees impacted the economic system. Eventually, this contributed to the decrease in the amount of wealth which lead to a drop in the UK GDP. According to the Organisation for Economic Co-operation and Development (the 'OECD'), the drop in UK GDP at market prices was outlined for the year 2020 at 9.7%.[806]

From the perspective of the external observer, it can be suggested that the pandemic have lead to fragmentation in the global economic system in a number of ways. One of the areas especially affected was for example international travel either for tourism or for business. The element of international travel of human beings was one of particular caution by countries worldwide as humans were and are the means of the virus transmission. However, the system experienced the impact only through the irritation of the environment as it generally is unable to conceptualise the crisis. This, however, does not mean that the systems theory would

[804] Frauke Austermann, Wei Shen and Assen Slim, 'Governmental Responses To COVID-19 And Its Economic Impact: A Brief Euro-Asian Comparison' (2020) Asia Europe Journal 211.
[805] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 465.
[806] 'OECD Economic Outlook, June 2020' (*OECD*, 2020) <http://www.oecd.org/economic-outlook/june-2020/> accessed 15 June 2020.

suggest slower or less significant impact. It must again be borne in mind that '[a]*utopoiesis is no guarantee for survival, let alone a formula for progress.'*[807] Due to the crisis the frequency of the irritations from the environment towards the economic system was significantly increased.

As of now (August 2022) the pandemic is not as prominent as it was during the past two years. It is apparent that the pandemic did have a significant negative impact in multiple areas of the economic system. One of the examples is the G8 stock movement which suffered negative impact due to the pandemic.[808] Furthermore, the global production declined by seven percent of the GDP since the outbreak of the pandemic and the pandemic also impacted inequality of income between and within countries (local parts of the economic system) as richer countries possess more resources to address recession which is currently affecting the global economy.[809] It has been suggested that the economic impact of the pandemic is worse than the 2008 financial crisis.[810] Even though it seems that particularly the richer countries, are able to address the impact of pandemic rather effectively, there are undisputedly short term and long terms consequences such as decrease in the GDP, shock to the stock markets as above or delay in business activities.[811]

[807] Ibid 466.
[808] John Adams, Mostafa AboElsoud and Zhongxiu Zhao, *Evaluating The Economic Impact Of COVID-19 Pandemic* (Emerald Publishing Limited 2021) 89.
[809] Christian Dreger, 'Economic Impact Of The Corona Pandemic: Costs And The Recovery After The Crisis' (2022) 2 Asia and the Global Economy.
[810] David Gregosz and others, 'Coronavirus Infects The Global Economy: The Economic Impact Of An Unforeseeable Pandemic' [2020] JSTOR.
[811] Zahra Kolahchi and others, 'COVID-19 And Its Global Economic Impact' [2021] Advances in Experimental Medicine and Biology.

Political System

Similarly to the global economic system, the political system was also irritated by the pandemic. However, the irritations might have a different impact on the political system. It was suggested, that the economic system suffered due to the impact of the pandemic.[812] Since it is concerned with communication of money and the apparent decrease of global wealth, it can be suggested, that the number of operations within the system decreased.[813] The political system on the other hand experienced an enormous increase in operations as new measures were required in order to eliminate the impact of the crisis and, therefore, using its authority it was increasing the mass of operations.[814]

It is possible that some political systems became more effective due to the experience from the pandemic as the systems are cognitively open.[815] The reason for the increase in effectivity is that the cognitive openness enables a political system to incorporate operations as preventative measures and result in a better preparedness for any future threats. On the other hand, there may be political systems which are not able to survive the pressure from the irritations and may collapse. Nevertheless, an external observer will after the change be able to assess which systems have emerged sounder and stronger and which systems have emerged fragmented.

[812] Yves Hervé and Philip de Homon, 'Adjusting group transfer pricing in the COVID-19 economic crisis' (2020) International Tax Review.
[813] 'OECD Economic Outlook' (*OECD*, 2022) <https://www.oecd.org/economic-outlook/> accessed 11 January 2022.
[814] Frauke Austermann, Wei Shen and Assen Slim, 'Governmental Responses To COVID-19 And Its Economic Impact: A Brief Euro-Asian Comparison' (2020) Asia Europe Journal 211.
[815] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 468.

Legal system

The impact of the pandemic may also be seen as different regarding the legal systems. One of the main factors which influences the difference is time. It was outlined that even though time passes for everyone in the same way, the pace of the operations within the systems is different.[816] The legal system specifically is slower in its operation due to the nature of its communication.[817] Therefore, the impact of the pandemic could be potentially visible later than regarding the economic and political systems. The number of irritations the system received is potentially higher, similar to the economic and political system, however, the result of the impact of these irritations is more likely to correspond with the political system, in generally tending towards an increase in operations. This is connected with the response to the need for change and potential elevated number of conflicts within society. An illustrative example may be the House of Lords Constitution Committee's March 2021 report as to the impact of the pandemic on the Courts.[818] The report indicated that the court system was left vulnerable with fewer staff and increased number of litigants; the courts were not prepared for disruption on the scale caused by the pandemic; or for the fact that planned improvements required in the IT area could not take place, which therefore, left the Courts reliant on sub-optimal technology.[819]

An example regarding the increase of conflicts could be the aforementioned doctrine of frustration. Many contracts were certainly not performed as the result of the pandemic and provided there are no force majeure clauses, frustration may seem as a possible vitiating

[816] Ibid 382.
[817] Ibid 382.
[818] (*Select Committee on the Constitution COVID-19 and the Courts*, 2022) <https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/257/25702.htm> accessed 9 January 2022.
[819] Ibid Summary of Conclusions and recommendations.

factor to consider by the affected parties. It is up to the legal system to assess to what extent the doctrine of frustration is applicable or not and if damages can be claimed.[820]

Further, the impulse of the need of change could come from any societal system which requires new measures as a result of the pandemic and requires new legally binding rules.[821] A prime example is the Coronavirus Act 2020 which equipped the UK government with powers in a state of emergency during the pandemic. The political system irritated the legal system with the need for change in the sense of establishment emergency powers by enacting the Coronavirus Act 2020. The legal system reflected this need on its own operations and perceived that this statutory intervention created new norms in existence within the legal system. The above can be also seen from the perspective of the political system. The political system identifies the need for change which apart from the irritation of the legal system also results in self-irritation and therefore, contributes to the commencement of the legislative process within itself.[822]

International Commercial Arbitration

It is clear from the above discussion that the pandemic affected the society and its subsystems to a great extent. The system of international commercial arbitration, which is probably best characterised as being operatively open,[823]and frequently sought by businesses as the chosen mechanism for their dispute resolution, is not exempt from the impact of the pandemic.

[820] As above, when discussing frustration, it needs to be noted that prior the doctrine was established, the UK courts were arguing the doctrine of absolute obligations as per *Paradine v Jane* [1646] 1 WLUK 10 suggesting that force majeure clauses should be used by parties in order to be risk averse. Force majeure clauses are a useful tool for the parties, however, in order to cover events such as a pandemic, these events need to be explicitly included in such clause or the clause must be drafted in a way that enables such construction.
[821] N Coghlan and others, 'COVID-19: Legal Implications For Critical Care' (2020) 75 Anaesthesia 1428.
[822] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 411.
[823] With the potential of being operatively closed on the level of the particular arbitration centres.

However, the arbitration system could be seen as benefitting from the pandemic in terms of being the more frequently selected mechanism of dispute resolution.[824] As the overall number of disputes in society rose and more businesses selected arbitration as their dispute resolution mechanism, then arbitration as a system experiencee an increase in operations and, therefore, an increase in the generation of the mass of norms in existence within the system.

The question is why the system of arbitration should be selected more frequently. One of the reasons could be the style of dealings which the system of arbitration enjoys. One of the so often mentioned advantages of arbitration is flexibility.[825] Flexibility is an advantage which is, in contrast to other characteristics which are often repeated in the arbitration textbooks without appropriate supporting evidence,[826] outlined by the empirical data and confirmed as an important aspect of arbitration by respondents.[827] The existence of the 'arbitration myths,' consisting of often repeated but poorly evidenced statements in an area for further research identified by the research hereby. Unfortunately, issues of space precluded a full treatment here but remained something for the future. Further, due to the pandemic, this may become an even more significant advantage. The reason is the aforementioned style of dealing as the proceedings are often conducted via electronic means of communication.[828] Therefore,

[824] For example 'Record Number Of LCIA Cases In 2020' (*Lcia.org*, 2022) <https://www.lcia.org/News/record-number-of-lcia-cases-in-2020.aspx> accessed 26 July 2022.
[825] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 11.
[826] One of these characteristics can be for example speed which is dependent on a particular dispute and nowadays there is no clear evidence that arbitration would be generally faster than litigation. See Chapter 6 of this Thesis for details.
[827] '2018 International Arbitration Survey: The Evolution Of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 16 June 2020 7.
[828] John-Paul Boyd, 'The End Is Not Yet Nigh: Remote Dispute Resolution in the Age of COVID-19' (2020) 04 Money & Family Law 28.

instead of face-to-face litigation, the parties could enjoy a remote flexible style of dispute resolution which may be more convenient for them.[829]

Structural couplings

As previously mentioned, an impact of a fragmenting event in a certain area in society can result in fragmentation of particular subsystems of society. However, it is not only the systems which can be the objects of fragmentation, it can be the structural couplings between the systems as well. This is particularly visible in the example of Brexit when seen as a fragmenting event which impacts systems and their structural couplings (UK and EU) to a significant extent.[830] However, to complete the discussion herein with the example of the pandemic as a fragmenting event, it is perhaps the links of the economic system with the other systems which are the most impacted.

The border closures in the world set new limits to the operations of the global economic system and this form of dislocation had an impact on the links between the global economic system and other systems.[831] Many planned contracts (exchanges as perceived by the economic system) were cancelled and this had an impact in the thinning of the structural couplings between the economic system and the legal system. The frequency of irritations to the respective systems decreased as the contracts (exchanges) were unable to be performed. Therefore, not only did the pandemic cause a decrease in operation of the economic system (which could be seen as fragmentation in a sense of thinning the mass of operations), it also

[829] There is doubt that the court systems will also take measures in order to eliminate any danger of a virus spread and try to be more remote, however, the arbitration system has the possibility of the remote style of dealing already effectively incorporated.
[830] Brexit as a fragmenting event is discussed in Chapter 2 of this Thesis.
[831] Addy Pross, 'COVID-19, Globalization, De-Globalization And The Slime Mold's Lessons For Us All' (2020) Israel Journal of Chemistry.

caused a decrease in the impulses from the environment and thinned the structural couplings between the economic system and its environment.

From the above example of the Covid-19 pandemic it can be seen that the impact on the respective systems is different as they operate within different communication streams and what is relevant and negatively impacting one system does not have to have the same impact on the others. Therefore, when the notion of 'fragmentation' is discussed, it is firstly necessary to identify what kind of communication is impacted most by the fragmenting event. Further, it is convenient to outline what is the potential impact on systems in question and their structural couplings. The benefit of using the systems theory in order to outline impact on the political, economic and the legal system is that even though the level of abstraction may be higher than with other theories, it responds well to theoretical challenges (such as the analysis of a potentially fragmenting transnational institutional environment), as the systems theory is of a dynamic nature.

6. Private International Law

In Chapter 2 of this Thesis it was outlined that one of the methods for dispute resolution which is available to the UK businesses and their cross-border trading partners is commercial litigation.[832] However, if the parties indeed choose this option, they inevitably need to resolve certain legal issues in order to enforce their claims. Amongst these issues are the determination of the competent court to resolve the dispute, determination of the applicable law and finally ensuring recognition and enforcement of the final decision in a chosen state.[833] This area of law which is also known as the conflicts of laws is commonly called private international law (the 'PIL').[834]

As one of the main interests of this Thesis is enforcement of the international commercial transactions, the following sections identify and discuss the legal instruments available on the international, regional and domestic level regarding jurisdiction, recognition and enforcement of foreign judgements. The reason why jurisdiction is also relevant for the effective analysis herein is that reciprocity between individual states is required regarding legal instruments in this area of PIL as well as regarding reciprocal recognition and enforcement of foreign judgements. Hence, most of the available instruments of PIL generally include jurisdiction, recognition and enforcement of foreign judgements in one document.[835]

The above is important to establish the practical elements which individual businesses may be facing once submitting their dispute to litigation. However, further crucial point is to align

[832] For further details regarding the context of this Thesis please see Chapter 2 of this Thesis.
[833] Alex Mills, *The confluence of public and private international law: Justice, pluralism and subsidiarity in the international constitutional ordering of private law* (Cambridge University Press 2009) 20.
[834] Peter Stone, *EU private international law* (Edward Elgar Publishing 2010) 3.
[835] See for example the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.

the PIL system with the previous chapters, concretely swap the perspective from a UK business to the external observer observing the PIL in its environment and determining if the PIL system can be perceived as autopoietic.

The perspective of an external observer will benefit from the connection of the aspects of PIL with previously discussed characteristics of the legal system as autopoietic system on certain level (e.g. domestic or regional level (EU) investigated in Chapter 5 of this Thesis).

6.1. World Perspective

Firstly, it is convenient to outline the centre point for the discussion of the PIL framework. Due to the nature of this Thesis and its interest in the UK business's journey to effective enforcement of their commercial rights, it is clear that the domestic level, besides selected comparison to other states, is mainly the UK. Further, when it comes to the regional perspective, the most convenient example is the trading environment of Europe and specifically the EU. Therefore, seeing the UK as a starting point, the geographical layers are rounded on the UK base. A result of such an approach is that even the world perspective is UK centric and further EU centric.

This approach would be suitable even if the centre point were not defined as the UK, since the current development of the PIL frameworks in the international legal environment is heavily Europeanised.[836] This is due to the fact that the EU is one of the dominant members in the Hague Conference on Private International Law (the 'HCPIL').[837] The HCPIL is responsible for several international conventions in the PIL field and even though the US is another dominant member of the HCPIL, some of the crucial conventions are not ratified by

[836] A E Anton, P R Beaumont and Peter E McEleavy, *Private International Law* (W Green/Thomson Reuters 2011) 3.03.
[837] Ibid 3.03.

the US in comparison to the EU Member States.[838] This is related to another reason for the dominance of the EU, the EU is a member of the HCPIL in its own right as well as its Member States which creates a certain bipolarity and may enhance the dominance and Europeanisation of the PIL framework from a worldwide perspective.[839]

Since the perspective of the UK businesses is the selected one for the purposes of this Thesis, this approach is further reflected in the selection of the PIL instruments. The two instruments selected for the purposes of this section are the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded in Lugano in 2007 (the 'Lugano Convention 2007')[840] and the Convention on Choice of Court Agreements concluded in Hague in 2005 (the 'Hague Convention 2005').[841]

One of the main reasons for the selection of Lugano Convention 2007 is that as outlined in Chapter 2 of this Thesis, this was the preferred option as the UK submitted an application for re-accession to the convention on 8th April 2020.[842] However, as the unanimous consent of the ratifying parties was required in order to become a contracting party to the convention and the EU Commission has not recommended UK becoming part of that system and enjoy the benefits of it, this option is currently not available to the UK businesses.[843] It is still, however, convenient to outline the nature of this instrument if such unanimous consent was

[838] As one of the examples is the Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands (the Hague Convention 2005) which is further discussed in this section.
[839] A E Anton, P R Beaumont and Peter E McEleavy, *Private International Law* (W Green/Thomson Reuters 2011) 3.03.
[840]Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.
[841] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands.
[842] (*Eda.admin.ch*, 2020) <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf> accessed 28 June 2020.
[843] 'Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/index_en> accessed 17 February 2022.

acquired in the future. As mentioned in Chapter 2 of this Thesis, certain sources seemed to suggest that the EU would be not willing to give its consent and this has now been confirmed.[844]

Since the Lugano Convention 2007 was vetoed by the EU, the Hague Convention 2005 is a convenient option without the need of unanimous consent, however, this applies only to the cross-border effectiveness of choice of court agreements.[845] The UK previously deposited an instrument of accession to the Hague Convention 2005 within the Kingdom of the Netherlands as the depositary of the treaty.[846] Further, since a 'deal' was agreed between the UK and the EU, the Instrument of Accession was withdrawn with effect from 31st January 2020.[847] However, a new instrument of accession was deposited on 28th of September 2020 which remained in force and hence the UK is now a ratifying party of the Hague Convention 2005.[848]

Lugano Convention 2007

The Lugano Convention 2007 governs the jurisdiction issues and the recognition and enforcement of judgements, between member states of the EU, Switzerland[849] and the European Free Trade Association (the 'EFTA').[850] The convention is in line with the EU PIL

[844] See for example the Financial Times article 'Britain Risks Losing Access To Valuable European Legal Pact' (2020) Financial Times <https://on.ft.com/35B184t> accessed 28 June 2020.
[845] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands.
[846] 'Notification Pursuant To Article 34 Of The Convention' (*Treatydatabase.overheid.nl*, 2019) <https://treatydatabase.overheid.nl/en/Verdrag/Details/011343/011343_Notificaties_13.pdf> accessed 19 June 2020.
[847] 'HCCH | Declaration/Reservation/Notification' (*Hcch.net*, 2019) <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn> accessed 19 June 2020.
[848] 'HCCH | Declaration/Reservation/Notification' (*Hcch.net*, 2020) <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1255&disp=eif> accessed 17 February 2022.
[849] 'Lugano Convention 2007' (*Bj.admin.ch*) <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html> accessed 17 February 2022.
[850] 'EUR-Lex - 22007A1221(03) - EN - EUR-Lex' (*Eur-lex.europa.eu*, 2019) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29> accessed 19 June 2020.

discussed below and together with the EU PIL it is an attempt in harmonisation of the PIL rules between the EU states and the EFTA states.[851]

The Lugano Convention 2007 is revised convention of its predecessor, the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the 'Lugano Convention 1988).[852] The revision of the Lugano Convention 1988 was designed in conformity with the revision of the EU PIL regime from the Brussels Convention to the original Brussels I Regulation and this highlights the closeness of the two regimes.[853] It also signifies that the content is similar and, therefore, highlights the fact that being a party to the Lugano Convention 2007 would be a significant advantage for the UK, should the EU change their approach in the future. One of the main advantages would be the access to the Europeanised PIL rules for the UK business which would enhance certainty and establish structural connection similar to the pre-Brexit era.[854] On the other hand, it also underscores that, if the EU gave its consent in the future, it would provide the UK with as significant a benefit in the enjoyment of the unified system as the member states of the EU, Switzerland and EFTA without the obligations of membership. This could be potentially harmful for the EU as this could send a message that the exit from the EU still means the EU would be willing to let the exiting state enjoy the significant advantages of the de facto EU legislative framework in the PIL area.[855]

[851] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan) [2009] OJ C319/1 para. 2.
[852] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L319/9.
[853] A. E Anton, P. R Beaumont and Peter E McEleavy, *Private International Law* (W Green/Thomson Reuters 2011) 8.09.
[854] Further regarding structural coupling on a global level, please see the PIL system from the perspective of the systems theory in section 6.4 of this Chapter.
[855] However, this argument could be taken from the opposite direction as well – enabling the UK to be a member of the Lugano Convention 2007 would re-connect the EU to the UK on this level, re-creating a structural coupling.

The Lugano Convention 2007 applies in civil and commercial matters and excludes several matters including arbitration in line with the EU PIL.[856] The convention regulates jurisdiction which is incorporated in Title II and subsequently recognition and enforcement in Title III.[857] The general provisions included in Section 1 of Title II which deals with jurisdiction include in Article 2 a default rule of jurisdiction which relies on the Roman law principle known as the *actor sequitur forum rei* principle.[858] This default principle means that '*the plaintiff follows the matter's forum*', signifying the plaintiff's obligation of bringing an action in the court where the defendant is domiciled.[859]

The default rule of the domicile of the defendant is followed by special jurisdictional rules concerning various matters, similar to EU PIL and the previous Lugano Convention 1988.[860] Title II follows with concrete areas requiring specific attention as, for example, matters relating to insurance.[861] Further, special provisions are dedicated to consumer contracts which affords the enhanced protection to consumers emphasised by the EU.[862] A different jurisdiction regime, rather than the default rule per se, is provided for contracts of employment as well.[863]

The relevant provisions for the purposes of this Thesis related to jurisdictional matters are unlikely to be the specified areas above. In commercial transactions between UK businesses and their cross-border trading partners the relevant contracts are business contracts between

[856] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 Art 1.
[857] Ibid Title II-III.
[858] Arthur T von Mehren, *Hague academy of International Law, Adjudicatory Authority in Private International Law* (Brill Academic Publishers 2007) 153.
[859] Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in international law* (Oxford University Press, USA 2009) 12.
[860] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 Sec 2-6.
[861] Ibid Sec 3.
[862] Ibid Sec 4.
[863] Ibid Sec 5.

traders rather than with consumers or between employers and employees. These specific areas may be applicable in certain specific transactions, however, as the interest of this Thesis is in general business to business transactions, the specific contracts as per above are not of great relevance. The most relevant jurisdiction provisions are thus those concerning the special jurisdiction in Section 2 together with the exclusive jurisdiction in Section 6 and prorogation of jurisdiction in Section 7 of the Lugano Convention 2007.[864]

Special jurisdiction in Section 2 includes rules where the default rule may be departed from and the jurisdiction is determined according to different elements of the transaction. Article 5 deals with matters related to the place of performance of a contractual obligation which may be significant for determining the state in which courts have jurisdiction in the related dispute.[865] Apart from the place of the performance, another element possibly impacting the determination of jurisdiction are matters related to the supply of services as the place where the recipient of the services is domiciled or has a habitual residence may be determinative.[866] Similar to tortious claims including delicts and quasi-delicts, the jurisdiction may not be determined by the domicile of the defendant, preference being given to the place where such event occurred or may occur.[867] The above may be the most frequently used provisions Article 5, however, there are other specific situation included when the default principle may not apply and in order to determine if these rules are applicable it is necessary to individually assess the elements of a particular dispute.[868]

Article 6 includes certain situations where the jurisdiction may not be determined by the *actor sequitur* principle and are connected to other issues rather than the subject matter of the

[864] Ibid Sec 2,6,7.
[865] Ibid Art 5(1).
[866] Ibid Art 5(2).
[867] Ibid Art 5(3).
[868] Ibid Art 5(4-7).

contract.[869] There are different rules if there are more defendants from different countries or when a third party proceedings are involved.[870] Further, different rules may apply if there are counter-claims involved or if there are proceedings which may be combined with another action relating to rights *in rem* regarding immovable property since in this case the jurisdiction may be determined by the place where the immovable property is situated.[871]

Section 6 deals with exclusive jurisdiction which is honoured regardless on the domicile of the defendant and any contrary agreement between the parties as exclusive jurisdiction is an overriding basis for jurisdiction within Brussels I.[872] This may be relevant is certain situation, for example in the aforementioned proceedings related to rights *in rem* regarding immovable property.[873] In disputes related to the above rights *in rem* regarding immovable property the jurisdiction is determined by the place where the immovable property is situated.[874]

Article 22 further outlines that the exclusive jurisdiction is honoured in matters related to the validity of constitution, nullity or dissolution of companies or other legal persons.[875] In disputes related to the above the jurisdiction is determined by the registered seat of the particular subject.[876]

When the matters are concerned with public registers, the exclusive jurisdiction is determined by the location where the register is kept.[877] A similar approach is taken when

[869] Ibid Art 6.
[870] Ibid Art 6(1-2).
[871] Ibid Art 6(3-4).
[872] Ibid Sec 6.
[873] Ibid Art 22(1).
[874] Ibid Art 22(1).
[875] Ibid Art 22(2).
[876] Ibid Art 22(2).
[877] Ibid Art 22(3).

the dispute is related to registration or validity of patents, trademarks, designs, or similar rights as the competent courts are the courts of the state where such rights are registered.[878]

Exclusive jurisdiction which may be of a particular concern when it comes to the journey to enforcement of contractual rights by UK businesses is outlined in Article 22(5) of the Lugano Convention 2007.[879] If the matters concern enforcement of a judgement, the exclusive jurisdiction belongs to the courts of the state in which the judgement has been or is to be enforced.[880] This provision is logical and supports the effectiveness of the proceedings as the competence of the courts stays within the state where the enforcement is sought.

Apart from the special jurisdiction and the exclusive jurisdiction, the enhanced relevance for the UK business may be found in Section 7 Title II of the Lugano Convention 2007 which outlines prorogation of jurisdiction, which conventionally in English law is characterised as the agreed exclusive, or permissive, jurisdiction clause.[881] The centre point of this Section 7 is Article 23 providing the parties with autonomy regarding jurisdiction agreements.[882] There are several requirements which the parties need to follow in order to effectively agree on specific jurisdiction.

Firstly, there must be a connection of the parties to a state which is a party to the Lugano Convention 2007.[883] This requirement is fulfilled by at least one party to a dispute being domiciled in such a state.[884] This could be beneficial for the UK as it was not allowed to be a part of the Lugano Convention 2007 in the sense that the UK businesses and their partners could still benefit from such agreements under the convention provided that the trading

[878] Ibid Art 22(4).
[879] Ibid Art 22(5).
[880] Ibid Art 22(5).
[881] Ibid Sec 7 Title II.
[882] Ibid Art 23.
[883] Ibid Art 23(1).
[884] Ibid Art 23(1).

partners are domiciled in a contracting state. However, if the parties wished to nominate UK courts as the competent courts, this arrangement would not be governed by Article 23 as it operates only with nominating courts of a state which is a contracting party to the Lugano Convention 2007.[885]

The jurisdiction agreed is exclusive unless the parties agree otherwise which respects the approach of English courts letting parties agree non-exclusive jurisdiction.[886] The jurisdiction agreement must further fulfil one of the following requirements on its form. The first listed option is that the jurisdiction agreement is required to be either in writing or evidenced in writing which emphasises legal certainty.[887] The second option is that the agreement must be in a form that is in accordance to the practice of the parties which again ensures certainty and a party is less likely to be misled by unfamiliar form.[888] The third and final option is that in international trade or commerce the form of the jurisdiction agreement is in a form which follows the usual practices in such environment, which would for instance include agreements in the form of bills of lading, air waybills and road or rail consignment notes.[889] The above options are a reflection of a logical approach and it is clear that the usual practices are emphasised while maintaining a reasonable level of legal certainty.[890]

[885] Ibid Art 23(1).
[886] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan) [2009] OJ C319/1 para 106.
[887] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 Art 23(1)(a).
[888] Ibid Art 23(1)(b).
[889] Ibid Art 23(1)(c).
[890] The above also illustrates, in terms of the systems theory, how the operations of the legal system to which these norms belong to (legal systems of the ratifying parties as illustrated in section 6.4 of this Chapter) maintain the norms in line with the expectations.

Article 24, which is the second and last article of Section 7 regarding prorogation of jurisdiction, deals with implied prorogation of jurisdiction.[891] The jurisdiction agreement is implied if a defendant makes appearance in the court which commenced the proceedings.[892] This is not applicable if the appearance is made in order to contest the jurisdiction or if rules regarding exclusive jurisdiction in Article 22 apply.[893]

From the above it is clear that the system governing the determination of jurisdiction in the Lugano Convention 2007 is robust and as explained the Lugano regime and the EU PIL regime are closely aligned. The party autonomy is honoured to a reasonable extent and the convention is providing a reasonable level of legal certainty.

As previously suggested the matter related to recognition and enforcement are included in instruments which deal with determination of jurisdiction as reciprocity is required in these matters.[894] The Lugano Convention 2007 includes recognition and enforcement provisions in Title III Articles 31 to 56.[895]

Section 1 of Title III of the Lugano Convention 2007 deals with recognition of judgement between the states which are contracting parties to the convention.[896] The reciprocity is embedded in Article 33 as it is outlined that a judgement given in a contracting state shall be recognised in another contracting state of the convention without a requirement for any special procedure.[897] Further, in Articles 34 and 35 the convention includes provisions

[891] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan) [2009] OJ C319/1 para 110.
[892] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 Art 24.
[893] Ibid Art 24.
[894] Unlike in case of applicable law per se where the reciprocity is not necessary.
[895] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 Title III.
[896] Ibid Title III.
[897] Ibid Art 33(1).

outlining situations when the judgement shall not be recognised.[898] As expected, one of the reasons for the refusal of recognition is when the judgement is not in compliance with public policy of the state where the recognition is being sought.[899]

Section 2 of Title III of the Lugano Convention 2007 provides with rules regarding enforcement in a contracting state of the judgements given in another a contracting state.[900] Generally a judgement is enforceable in the state where the enforcement is sought provided that on application of any interested party it has been declared enforceable there.[901] There was an exception for the UK as the convention stated that if the enforcement was sought in the UK, the judgement was enforceable when, on application of any interested party, it is registered for enforcement in a particular relevant part of the UK, either in England and Wales, Scotland or Northern Ireland.[902] Now that the transition period after Brexit is over the EU did not consent to the UK becoming a contracting state to the convention, this provision is clearly obsolete.

When an enforcement is sought, the party seeking it needs to submit an application to the court or a competent authority which is identified in Annex II of Lugano Convention 2007.[903] As the procedure regarding the application for enforcement is governed by the laws of the state where the enforcement is sought, there is no universal requirement that the application may only be filed with a court of a particular country as some countries may have such competencies delegated to a different authority.[904] In the Czech Republic for example, apart

[898] Ibid Art 34, 35.
[899] Ibid Art 34(1).
[900] Ibid Title III Sec 2.
[901] Ibid Art 38(1).
[902] Ibid Art 38(2).
[903] Ibid Art 39(1).
[904] Ibid Art 40.

from the district courts, such an application may be filled with the Czech equivalent of a bailiff.[905]

When the application for a declaration of enforceability of a foreign judgement is submitted, the party against whom the enforcement is sought is not entitled to make any additional submissions.[906] However, any party can appeal against the decision issued by a particular authority on the declaration of enforceability.[907]

Section 3 of the Title III of the Lugano Convention 2007 outlines certain requirements regarding the application for declaration of enforceability.[908] In order to successfully apply for declaration of enforceability the particular party needs to produce an authorised copy of the judgement including a certificate given by the state which issued the judgement.[909] One of the core specifications outlined in Article 56 is that there is no requirement of legalisation or similar formalisation of the authorised copy of the judgement and the certificate (for example notarisation).[910] The court or the competent authority may require the judgement and the certificate to be translated, however, no further formalities are required.[911] This is one of the core principles regarding the enforceability of foreign judgements as it signifies that the judgements can be perceived as a form of common currency between the contracting states.[912]

[905] Ibid Annex II.
[906] Ibid Art 41.
[907] Ibid Art 43(1).
[908] Ibid Title III Sec 3.
[909] Ibid Art 53.
[910] Ibid Art 56.
[911] Ibid Art 55(2).
[912] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 369.

The Lugano Convention 2007 is an updated version on its predecessor, the Lugano Convention 1988, and it creates a parallel regime to the original Brussels Regime created within the EU.[913] From this perspective, it is a lucrative instrument for the states outside of the EU to be part of and enjoy the common regime for the determination of jurisdiction and recognition and enforcement of foreign judgements throughout EU and EFTA Member States and Switzerland. It is, therefore, not a surprise that the UK was trying to become a contracting party to the convention.[914] However, as it was previously suggested, this may be a question of future development as currently the EU Commission has not recommended UK's re-accession.[915]

It is convenient to note that the contracting states of the Lugano Convention 2007 other than EU Member States (i.e. EFTA member states and Switzerland) were in favour of the UK again acceding to the convention, and this is understandable as UK re-accession would benefit them from the perspective of them continuing to enjoy rights of foreign judgement recognition and enforcement in the UK.[916] Therefore, this may be a point which is in UK's favour if the EU reconsiders their position in the future.

For this reason, the Hague Convention 2005 as a 'Plan B' for the UK could protect at least a certain level of legal certainty and it could potentially empower the Hague Convention itself as more countries could become interested in becoming contracting parties to the Hague

[913] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 — Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan) [2009] OJ C319/1 para 1.

[914] (*Eda.admin.ch*, 2020) <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf> accessed 28 June 2020.

[915] 'Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/index_en> accessed 17 February 2022.

[916] 'Support For The UK'S Intent To Accede To The Lugano Convention 2007' (*GOV.UK*, 2020) <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 28 June 2020.

Convention 2005. The section below outlines the Hague Convention 2005 regime followed by the Hague Judgement Convention 2019 which was designed to complement the former.[917]

Hague Convention 2005

As previously briefly outlined, the Hague Convention 2005 is an international instrument which is a result of lengthy negotiations. Originally, the Hague Conference on Private International Law aimed to create a multilateral convention which provides rules on enforcement and recognition of foreign judgements, which was perhaps a utopian proposition.[918] The development of the convention is by certain scholars compared to an ugly caterpillar which transformed with time into a beautiful butterfly – the Hague Convention 2005 as we know it today.[919]

The purpose of the convention is to enhance the effectiveness of international trade and to increase the certainty in the judicial cooperation in certain civil and commercial matters.[920] The convention is attempting the above by providing rules regarding jurisdiction and recognition and enforcement of foreign judgements by the courts of the states ratifying the convention.[921] The convention can be classified as an '*important step toward international harmonization of national conflict rules on forum selection clauses*'.[922] Even though the result of the negotiations could be seen as less extensive than originally anticipated, the potential

[917] Yvonne Guo, 'From Conventions To Protocols: Conceptualizing Changes To The International Dispute Resolution Landscape' (2020) 11 Journal of International Dispute Settlement 217.
[918] Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 6.
[919] Paul Beaumont, 'Hague Choice Of Court Agreements Convention 2005: Background, Negotiations, Analysis And Current Status' (2009) 5 Journal of Private International Law 125.
[920] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands, preamble.
[921] William Woodward JR., 'Saving The Hague Choice Of Court Convention' (2008) 29 University of Pennsylvania Journal of International Law 664.
[922] Ved Nanda, 'The Landmark 2005 Hague Convention On Choice Of Court Agreements' (2007) 42 Texas International Law Journal 774.

of the convention may be promising and a positive future development could secure its success.[923]

From the above, as the EU did not consent to the UK's re-accession to the Lugano Convention 2007 the Hague Convention 2005 serves as a measure that provides at least a partial safety net until and if a full safety net is developed regarding jurisdiction determination and the recognition and enforcement of foreign judgements. As was previously suggested, UK accession to the Hague Convention 2005 may encourage more states to become contracting parties and, therefore, extend the applicability of the convention to a larger geopolitical area.

The Hague Convention 2005 consists of five Chapters commencing with its scope and definitions.[924] The convention applies to exclusive choice of court agreements in the area of civil and commercial matters.[925] The exclusivity of an agreement signifies that the parties are committed to a particular court or courts of a contracting state of the convention and thus are in theory protected against parallel proceedings.[926]

In case of non-exclusive agreements, whilst the parties do indicate a preferable court of choice, either party, retains the option of proceeding in any different jurisdiction of their choice which considers itself competent to determine the dispute.[927] Therefore, as indicated in Article 1, the Hague Convention 2005 is only applicable to exclusive jurisdiction agreements. Concerning the area of civil and commercial matters, Article 2 excludes 18 different sub-areas from the scope of applicability of the convention.[928] The excluded matters are for example

[923] Andrea Schulz, 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements' (2006) 2 Journal of Private International Law 269.
[924] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Arts 1-4.
[925] Ibid Art 1(1).
[926] Louise Merrett, 'Interpreting Non-Exclusive Jurisdiction Agreements' (2018) 14 Journal of Private International Law 39.
[927] Ibid 39.
[928] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 2.

related to contracts of employment, matters of status or legal capacity of legal persons, insolvency, competition, or rights *in rem* in immovable property.[929] Exclusion from scope in this broad manner could be seen as unexpected, however, it is not surprising when the excluded matters are contrasted with other PIL instruments, especially those which operate within the EU PIL as for example the Brussels Recast regulation.[930]

The Hague Convention 2005 aims to facilitate international judicial cooperation by providing a set of rules governing jurisdiction agreements and recognition and enforcement of judgements based on these agreements.[931] The importance of uniform PIL rules was stressed above. Without these rules trading partners from different countries would have far less certainty (and potentially much inconvenience) in subjecting their disputes to effective determination and enforcement, particularly if the parties have different preferences as to the country and mechanism before and by which their dispute should be resolved. Reliance of the parties solely on different national PIL rules could result in parallel disputes or forum shopping.[932] Further, if the dispute is resolved, the winning party needs to have the judgement enforced in a country where the other party has assets which can satisfy the claim.[933] This could be the same country where the judgement was issued, however, it does not need to be always the case.

If there is not a set of rules which would unify enforcement of foreign judgements the winning party may face lengthy disputes resolving PIL issues under national PIL rules as well as lengthy

[929] Ibid Art 2.
[930] 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 L351/1.
[931] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands, preamble.
[932] Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 3.
[933] Ibid 3.

substantive disputes on the merits under national law before eventual refusal of enforcement by the jurisdiction or jurisdictions in which assets are located. To be able to avoid similar problems like the above, in 1992 the United States (the 'US') proposed to the HCPIL the creation of a new convention which would include PIL rules.[934] However, due to the complexity of the area of PIL and differences in the national laws the development of such convention did not seem to be achievable in the scale proposed by the US.[935] Where the members seemed to be more willing for cooperation was in the area of the enforceability of jurisdiction agreements and enforcement of decisions arrived at by courts asserting jurisdiction on the basis of these agreements.[936] This course of events gave the grounds for creation of the Hague Convention 2005.

The first party to ratify the convention was Mexico on 26th September 2007 with entry into force on 1st October 2015.[937] The EU ratified the convention on 11th June 2015 with entry into force on 1st October 2015. The EU ratification of the Hague Convention 2005 allows EU businesses to rely on a stable set of rules if they incorporate a jurisdictional clause (i.e. a choice of court agreement) in their contracts with their non-EU trading partners. The motivation on the EU side was to promote legal certainty and also to 'boost the economic growth'.[938]

[934] 'Letter From The Department Of State To The Permanent Bureau Dated 5 May 1992' (*US Department of State*, 1992) <https://www.state.gov/documents/organization/65973.pdf> accessed 20 February 2019.
[935] Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 3.
[936] Ibid 3.
[937] 'HCCH | #37 - Status Table' (*Hcch.net*, 2018) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 24 April 2019.
[938] 'European Commission - PRESS RELEASES - Press Release - Choice Of Court Convention: EU Businesses Receive A Major Boost For International Trade' (*Europa.eu*, 2014) <http://europa.eu/rapid/press-release_IP-14-1110_en.htm> accessed 24 April 2019.

Amongst the ratifying parties, apart from the new addition of the UK,[939] there is also Singapore where the Hague Convention 2005 entered into force on 1st October 2016.[940] In Denmark, the Hague Convention entered into force on 1st September 2018 which had followed Montenegro on 1st August 2018.[941] There are three parties which have signed, but not yet ratified the Hague Convention 2005 and, in the absence of ratification by those parties the convention is, therefore, not effective in their territories.[942] These parties are People's Republic of China, Ukraine and United States.[943]

There are a few remarks that can be highlighted regarding the signatories who did not ratify the Hague Convention 2005. Firstly, it is a fact that it was the initiative of the United States' (the 'US') to begin the negotiations to draft a new PIL convention, yet the US did not ratify the instruments even though it is available for ratification. On the other hand, this situation means that there is a possibility in the future that the US might become a ratifying party. This event would have presumably a great impact and could encourage more states to ratify the convention and realise the full potential of this international instrument. The same could be argued concerning the People's Republic of China ('China'). The fact that China is one of the signatories as of 12th September 2017 could encourage more parties to be interested in the convention.

In future, the Hague Convention 2005, could perhaps become the global instrument that its original contracting states intended it to be. Since the UK became a contracting party after having ceased to be a member of the EU, this may be a further motivation for the US and

[939] The UK accessed the convention on 28th September 2020 with entry into force on 1st January 2021.
[940] 'HCCH | #37 - Status Table' (*Hcch.net*, 2018) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 24 April 2019.
[941] Ibid.
[942] Ibid.
[943] Ibid.

China to ratify the convention and thus it may facilitate an increased potential impact for the Hague Convention 2005 in the future. However, this depends on other circumstances and on potential deals which the UK will have with other countries.

According to the outline published by the HCPIL regarding the Hague Convention 2005, there are three main principles on which the convention is based.[944] These are that the nominated court must generally hear the case, any court which is not chosen must generally decline to hear the case and any judgement issued by the chosen court must be generally recognised and enforced in the contracting states, subject to the specified grounds for refusal, as for example incompatibility with the public policy of the country where the recognition and enforcement are sought.[945]

Concerning scope, the Hague Convention 2005 in its Chapter I (Scope and definitions) includes provisions which define its application (Article 1) further limited by exclusions from its scope (Article 2).[946] In addition, in Chapter I the convention includes definition of exclusive choice of court agreements (Article 3) and other definitions such as, for example, a definition of judgements and residence in a state (Article 4). Article 1 sets out three basic limitations of scope. It is provided that the cases where the Hague Convention 2005 applies must be international, there must be exclusivity of the court of choice agreement in existence, and it must concern civil or commercial matters.[947] The basic limitations are further narrowed down by the articles that follow. Article 2 (1) sets out an exclusion for consumer contracts and for

[944] 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements, Outline Of The Convention' (*Assets.hcch.net*, 2013) <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 25 July 2020.
[945] Ibid Article 9(e).
[946] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 1-2.
[947] Ronald A Brand and Paul Herrup, *The 2005 Hague Convention On Choice Of Court Agreements* (Cambridge University Press 2008) 15.

contracts of employment, which indicates that the Hague Convention 2005 applies mainly to contracts between traders.[948]

As above, there are many further exclusions listed in Article 2 (2) which concern some specific matters, for example the status and legal capacity of natural persons or family law matters, however, similar matters are usually governed by special treaties and, moreover, some of these matters are generally not viewed as part of the civil and commercial matters in international commercial trade.[949] Further, the number of exclusions brings an illusion that the scope of the Hague Convention 2005 is very limited and prompts doubts as to any real impact of the convention. However, by excluding the said matters directly from the scope should, contrary to the perception of ineffectiveness, have a positive impact on usage of the convention in practice.[950] This is further supported by the common usage of the choice of court agreement in many international trade contracts.[951]

There are, however, certain 'scope issues' connected with some of the exclusions. A significant feature is, according to Professor Beaumont, that the contracts of insurance and reinsurance are not excluded from the scope of Hague Convention 2005 and thus the convention is not following the EU Brussels I regime in this matter entirely.[952] However, it is convenient to note that the conflict between the Hague Convention 2005 and the Brussels I regime may only relate to non-large risks as Brussels I regime jurisdiction agreements are effective for contracts of reinsurance and insurance of large risks.[953] Further Beaumont

[948] Andrea Schulz, 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements' (2006) 2 Journal of Private International Law 248.
[949] Ibid 249.
[950] Ibid 249.
[951] Ibid 249.
[952] Paul Beaumont, 'Hague Choice Of Court Agreements Convention 2005: Background, Negotiations, Analysis And Current Status' (2009) 5 Journal of Private International Law 143.
[953] 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 L351/1 Section 3 .

outlines other issues, amongst others the exclusion of tenancies of immovable property.[954] This exclusion may prove problematic, as tenancies of immovable property may be a part of complex international trading contracts, therefore, this may create difficult situations for traders.[955]

Chapter I which governs the scope of the Hague Convention 2005 also includes a definition of the exclusive choice of court agreement.[956] The agreement is perceived as exclusive unless agreed otherwise by the parties, must be in writing or must be documented by any other means of communication and it is viewed as independent of the contract should it be included in one.[957]

Article 5 of the Hague Convention 2005 provides for rules regarding jurisdiction.[958] It is outlined that unless the jurisdiction agreement is null and void the chosen court should have jurisdiction and should hear a dispute to which the jurisdiction agreement applies.[959] This is one of the three main principles which are imbedded in the convention.[960]

Further, Article 6 sets out the second core principle on which the convention is based, which is the obligation of the non-chosen court to suspend or dismiss proceedings to which the exclusive jurisdiction agreement applies, subject to exceptions such as when the jurisdiction agreement is null and void or when the chosen court decides not to hear the case.[961]

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[954] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 2(2)(l).
[955] Paul Beaumont, 'Hague Choice Of Court Agreements Convention 2005: Background, Negotiations, Analysis And Current Status' (2009) 5 Journal of Private International Law 143.
[956] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 3.
[957] Ibid Art 3.
[958] Ibid Art 5.
[959] Ibid Art 5.
[960] 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements, Outline Of The Convention' (*Assets.hcch.net*, 2013) <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 25 July 2020.
[961] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 6.

Chapter III of the Hague Convention 2005 outlines rules regarding recognition and enforcement of foreign judgements resulting from proceedings in accordance with an exclusive jurisdiction agreement pursuant to the convention.[962] This is the third core underlining principle on which the convention is based.[963] The recognition and enforcement of the judgement in question is conditioned by its effectivity and enforceability in the state in which the said judgement was issued.[964] Further, Article 9 sets out situations in which the court of another jurisdiction may refuse the recognition and enforcement.[965] The recognition and enforcement may be refused if, for example, the exclusive jurisdiction agreement was null and void or when the judgement was obtained by fraud or the recognition and enforcement would be contrary to the public policy of the state where the recognition and enforcement is sought.[966]

From the above it is clear that the Hague Convention 2005 is based on strong principles and has a potential for significant usage in the future. The extent of the potential is worth observing in the future, as for the UK, the re-accession to the Lugano Convention 2007 was not allowed by the EU.[967] Accession to the Hague Convention 2005 could be, therefore, a part of a potential solution for the UK businesses navigating the fragmenting institutional environment for the time being.

The future potential of the Hague Convention 2005 could be significant, especially as it is an international instrument that is both simple rather than complex and comprehensive rather

[962] Ibid Chapter III.
[963] 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements, Outline Of The Convention' (*Assets.hcch.net*, 2013) <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 25 July 2020.
[964] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Art 8(3).
[965] Ibid Art 9.
[966] Ibid Art 9.
[967] 'Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/index_en> accessed 17 February 2022.

than incomplete. If the Hague Convention 2005 is contrasted with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'NYC 1958'), there are many similarities. [968] The NYC 1958 is not complex and its success is not questionable. In this sense, trying to mimic a successful international convention which operates in a related area of law is not demonstration of misjudgement. Quite the opposite, it cannot be expected that an international instrument of this nature should be successful at the point of its entry into force. The NYC 1958 entered into force on 7th June 1959 and as of today (August 2020) has been ratified by 169 parties.[969] It is clear that this number of ratifications did not happen in 17 years. It is, therefore, perhaps too early to be dismissive about the Hague Convention 2005 as it stands now. An illustration of this case could be the recent ratification of Singapore on 2nd June 2016.[970] There is no certainty in the predictions of future impact, however, assessing the similarities between the Hague Convention 2005 and the NYC 1958, there is no reason for premature scepticism.

Even though there are many questions regarding the Hague Convention 2005, as the re-accession to the Lugano Convention 2007 did not occur for the UK, the accession to Hague Convention 2005 is a reasonable option for the time being. As some authors even outline, '*the Hague Choice of Court Convention brings the international community closer than it has ever been to a reliable system for mutual recognition and enforcement of judgements*.'[971]

[968] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[969] Convention N, 'Contacting States » New York Convention' (*Newyorkconvention.org*, 2022) <http://www.newyorkconvention.org/countries> accessed 17 February 2022.
[970] 'HCCH | #37 - Status Table' (*Hcch.net*, 2019) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 22 June 2019.
[971] William Woodward JR, 'Saving The Hague Choice Of Court Convention' (2008) 29 University of Pennsylvania Journal of International Law 657.

Hague Judgements Convention 2019

The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the 'Hague Judgements Convention 2019')[972] is a relatively new instrument which is not yet in force and as of now (March 2022) has six signatories which are Costa Rice, Israel, Russia, Ukraine, USA and Uruguay.[973] As it is apparent from the preparatory works and from the convention itself, that the Hague Judgements Convention 2019 is not aiming to deal with applicable law nor with determination of jurisdiction and is solely focused on recognition and enforcement of foreign judgements regarding the rules of PIL.[974]

The roots of the work leading to the Hague Judgements Convention 2019 date back to 1992 as this is where the origins of the Hague Convention 2005 can be found as well.[975] However, as pointed out in the previous section, the consensus in many areas regarding jurisdiction determination and the recognition and enforcement of foreign judgements was impossible to reach between the numerous parties.[976] Therefore, the Hague Convention 2005 is only related to choice of court agreements and the recognition and enforcement of foreign judgements which result from such agreements.[977] The Hague Judgements Convention 2019 can be, therefore, seen as a next step in the development of the negotiations which began in

[972] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands.
[973] 'HCCH | #41 - Status Table' (*Hcch.net*, 2020) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137> accessed 17 March 2022.
[974] 'Prel. Doc. No 1 Of December 2018 - Judgments Convention: Revised Draft Explanatory Report' (*Assets.hcch.net*, 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 17 August 2020.
[975] Ibid 4.
[976] Ibid 4.
[977] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands.

1992.[978] The 'Judgements Project' was agreed in 2012 and a Working Group was established which met five times since 2013 to draft the new convention.[979]

The objective of the convention is to promote judicial cooperation and as a result to improve international trade, investment and mobility.[980] Some authors suggest that the Hague Judgements Convention 2019, together with other instruments, can be seen as a rival framework for recognition and enforcement to the international commercial arbitration framework which is governed by, amongst other instruments, the New York Convention 1958.[981]

The structure of the Hague Judgements Convention 2019 is intuitive and starts with scope provisions, followed by exclusions and definitions.[982] The scope of the convention is the area of civil and commercial matters and the convention is applicable to the recognition and enforcement in one contracting state of a judgement issued in another contracting state.[983] Amongst other matters such as status and legal capacity of natural persons,[984] the convention does not apply to arbitration and related proceedings.[985]

Provisions regarding the recognition and enforcement of a foreign judgement are included in Chapter II of the Hague Judgements Convention 2019.[986] The state of the court which issued a particular judgment is referred to as the state of origin and must be a contracting party to

[978] 'Prel. Doc. No 1 Of December 2018 - Judgments Convention: Revised Draft Explanatory Report' (*Assets.hcch.net*, 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 17 August 2020 4.
[979] Ibid 4.
[980] Ibid 5.
[981] For example Yvonne Guo, 'From Conventions To Protocols: Conceptualizing Changes To The International Dispute Resolution Landscape' (2020) 11 Journal of International Dispute Settlement 218.
[982] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Chapter I Art 1-3.
[983] Ibid Art 1.
[984] Ibid Art 2(1)(a).
[985] Ibid Art 2(3).
[986] Ibid Art 4 -15.

the convention.[987] The state in which the recognition and enforcement is sought is referred to as the requested state and similarly must be a contracting party to the convention.[988] As is usual for similar legal instruments, the courts of the requested state do not review the judgement on its merits.[989] Further, the judgement in question may be recognised provided that it has effect in the state of origin and enforced only if it is enforceable in the state of origin.[990] Amongst the most significant principles embedded in the convention is the principle of the mutual recognition, which is regarded as one of the most important requirements for effective enforcement of a foreign judgment under the convention.[991]

Even though the notions of recognition and enforcement are at times treated as one concept, the Hague Judgements Convention 2019 recognise them as two separate notions.[992] The notion of recognition of a foreign judgement is a necessary prerequisite for the following enforceability, however, it also has a legal effect itself as it forms a bar of a *res iudicata* in regard to the already decided issues with respect to other litigation.[993] An example of the separation can be seen in the above rule incorporated in Article 4 (3) of the convention outlining that in order for the judgement in question to be recognised and enforced in the requested state it must be both recognised and enforceable in the state of origin.[994] The practical illustration of the significance of the separation of the two notions can be seen in cases where enforcement is not needed for example when it is held that the defendant does

[987] Ibid Art 4(1).
[988] Ibid Art 4(1).
[989] Ibid Art 4 (2).
[990] Ibid Art (3).
[991] 'Prel. Doc. No 1 Of December 2018 - Judgments Convention: Revised Draft Explanatory Report' (*Assets.hcch.net*, 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 17 August 2020 23.
[992] Ibid 25.
[993] Ibid 25.
[994] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Chapter I Art 4(3).

not owe any obligations to the claimant.[995] The interest of the defendant is then for the requested state to recognise the fact that there are no owed obligations and to bar any further claims in the same matter.[996]

The Hague Judgements Convention 2019 follows with the bases for recognition and enforcement.[997] There are a few points which is convenient to outline regarding the bases outlined in Article 5.[998] Firstly, the exhaustive list in Article 5 is subject to Article 6 which outlines that '*Notwithstanding Article 5, 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*.'[999] Therefore, it is apparent that the approach towards rights *in rem* in immovable property is common as in other similar legal instruments of PIL.[1000] Further, the exhaustive nature of the list outlined in Article 5 is subject to Article 15 which states that '*Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law*.' [1001] It is, therefore, required to interpret the bases for recognition and enforcement outlined in Article 5 in conjunction with the other impacting provisions.

It is beyond the scope of this Thesis to analyse each base for the recognition and enforcement separately in a detailed discussion, however, it is convenient to outline how the bases are categorised. Article 5 is composed by three paragraphs each of them containing bases for recognition and enforcement which are connected in a certain way.[1002] The first paragraph is

[995] 'Prel. Doc. No 1 Of December 2018 - Judgments Convention: Revised Draft Explanatory Report' (*Assets.hcch.net*, 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 17 August 2020 26.
[996] Ibid 26.
[997] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Chapter I Art 5.
[998] Ibid Art 5.
[999] Ibid Art 6.
[1000] See for example Article 6 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.
[1001] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Chapter I Art 15.
[1002] Ibid Art 5.

the most extensive and include bases which are related to the state of origin and outline requirements of which at least one needs to be met in order for the judgement in question to be eligible for recognition and enforcement.[1003] The bases listed in the first paragraph could be categorised into three main groups, the first group of bases are related to the defendant while the second group concerns consent and the third is based on connection between the claim and the State of origin.[1004]

The second paragraph modifies the bases of the first paragraph with respect to judgements issued against consumers and employees.[1005] The third paragraph of Article 5 relates to judgements ruling on residential leases of immovable property or the registration of immovable property. In these matters, the recognition and enforcement may be granted only if the judgement was issued by the state in which is the property in question situated.[1006]

Another significant area which the Hague Judgements Convention 2019 provides for is the refusal of recognition and enforcement and the rules related to this area.[1007] The first group of defences against recognition and enforcement is included in the first paragraph of Article 7 and outlines situations in which the requested State may refuse recognition and enforcement based on either defective matters related to the proceedings or defective matters related to the content or the judgement in question.[1008] The second group is based on *lis pendens* and outlines situation where the requested State may refuse or postpone

[1003] Ibid Art 5(1).
[1004] 'Prel. Doc. No 1 Of December 2018 - Judgments Convention: Revised Draft Explanatory Report' (*Assets.hcch.net*, 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 17 August 2020 34.
[1005] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Chapter I Art 5(2).
[1006] Ibid Art 5(3).
[1007] Ibid Art 7.
[1008] 'Prel. Doc. No 1 Of December 2018 - Judgments Convention: Revised Draft Explanatory Report' (*Assets.hcch.net*, 2018) <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> accessed 17 August 2020 60.

recognition or enforcement if there are pending proceedings between the same parties and the same subject matter.[1009]

From the above it is apparent that the Hague Judgements Convention 2019 has a solid potential regarding the recognition and enforcement of foreign judgements and if the convention proved successful it would undoubtedly bring more certainty for UK businesses provided that the UK became a contracting party to the convention and provided that the convention was ratified by relevant countries including, in particular, by EU and EFTA Member States. However, the element which is rather significant in this case is the time. In this instance, it is the time it would take for the Hague Judgements Convention 2019 to become a significant international instrument which could be comparable in geographical scope to the NYC 1958. On one hand, there are sovereign states with complex political and legal systems for which such a step as ratification of an international convention regarding the matter of recognition and enforcement of foreign judgements could be a lengthy process. On the other hand, there is the potentially fragmenting transnational institutional environment which may have a destabilising effect on future accession to this instrument. This may be especially the case with the pandemic as the economic system on the international level and on the national levels is experiencing such stress and relative decline.[1010] The sovereign states in question may put an extra effort into saving and improving channels which can be saved, improved or repaired. It is perhaps easier to be able to repair connections which were fragmented by political actions (in this case Brexit is a convenient example) rather than repair connections

[1009] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2019] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands Chapter I Art 7(2).
[1010] Ethan Goffman, 'In The Wake Of COVID-19, Is Glocalization Our Sustainability Future?' (2020) 16 Sustainability: Science, Practice and Policy 48.

fragmented due to public health disaster as the impact of the global pandemic is not artificial but could be rather seen as organic.

The following two sections regarding the PIL rules outline situation on regional level for which the EU PIL rules were used as an example due to the geographical and political connection to the UK as well as due to the fact that the EU PIL rules provided an effective framework before they ceased to apply in the UK. Further, the penultimate section indicates generally the problematic nature of national private international rule and their usage. For the purposes of the penultimate section selected UK PIL rules were outlined.

6.2. Regional Perspective

Regarding the regional level of the rules which operate in the area of recognition and enforcement of foreign judgements it is convenient to briefly outline the historical development to be able to see on which basis is the EU PIL regime founded.

The EU PIL regime is often labelled as a 'Brussels regime'. The Brussels regime includes several legal instruments of a different applicability. Despite their application on non-EU states, the Lugano Conventions of 1988 [1011] and 2007 [1012] are considered as part of the Brussels regime.[1013] As the Lugano Conventions were considered above, this section considers the rest of the instruments which create the Brussels regime - the Brussels Convention 1968,[1014] the

[1011] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L319/9.
[1012] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3.
[1013] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005).
[1014] Consolidated version of 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial [1972] OJ L299/32.

Brussels I Regulation[1015] and the Brussels I Regulation (recast)[1016] – with the emphasis on the most recent instrument.

Brussels Convention 1968[1017]

Historically, it is possible to mark the Brussels Convention 1968[1018] as the first instrument creating the environment of the Brussels regime entering into force in 1973 being signed by six contracting parties.[1019] The convention was amended four times and the latest amendment resulted in its final version which dates back in 1996.[1020] The convention applied to civil and commercial matters and included rules regarding determination of jurisdiction in Title II and recognition and enforcement of foreign judgements in Title III.[1021]

The Brussels Convention 1968 divides recognition and enforcement into separate sections where Section 1 outlines provisions regarding recognition and Section 2 provides for rules related to enforcement.[1022] The rules related to recognition and enforcement embedded in the convention reflect traditional expectations in the area such as the removal of domestic requirements for special procedures for judgements issued by other contracting states to be recognised.[1023] The grounds for refusal of recognition are not as extensive as for example in the Hague Judgements Convention 2019, however, certain traditional grounds, such as when

[1015] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2002] OJ L12/1.
[1016] 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 L351/1.
[1017] Although it could be argued that this convention can be seen on global rather than regional level, from the perspective to its functionality with respect to geographical location, it was placed in this section.
[1018] Consolidated version of 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial [1972] OJ L299/32.
[1019] 'Convention on jurisdiction and the enforcement of judgements in civil and commercial matters', (*The European Council; Council of the EU*, 29 December 1972) <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=1968001> accessed 23 September 2020.
[1020] Peter Stone, *EU private international law* (Edward Elgar Publishing 2010) 18.
[1021] Consolidated version of 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial [1972] OJ L299/32 Title II-III.
[1022] Ibid Sec 1-2.
[1023] Ibid Art 26.

the judgement contradicts the public policy of the state where the recognition is sought, are present.[1024]

In order for a foreign judgement to be enforced, the Brussels Convention 1968 requires application by any interested party.[1025] Article 32 sets out the meaning of such application in the individual contracting states which does not negatively impact the comprehensiveness of the convention since there are only six contracting parties.[1026] The procedure for such application is traditionally governed by the law of the state where the application is sought.[1027] The party against whom the enforcement is sought may appeal once the decision authorising enforcement is issued, however, not before.[1028]

From the above it is clear that the Brussels Convention 1968 provided for a basic set of rules regarding recognition and enforcement and it is clear that the recent PIL instruments, such as the Lugano Convention 2007, include similar rules in certain areas.[1029] However, the further development in the Brussels Regime marked an improvement of the rules and the Brussels Convention 1968 was superseded by the Brussels I Regulation (except for certain overseas territories of France and the Netherlands).[1030]

The Brussels Convention 1968 was one of the possibilities that the UK could take advantage of in the absence of better alternatives for reciprocal enforcement after the transition period ended, as the Convention remains in force internationally and Section 2(1) of the Civil

[1024] Ibid Art 27; However, the EU limits the interpretation of public policy by its Members, see for example Case C-7/98 Dieter Krombach v André Bamberski [2000] European Court Reports 2000 I-01935.
[1025] Ibid Art 31.
[1026] Ibid Art 32.
[1027] Ibid Art 33.
[1028] Ibid Art 36.
[1029] For comparison see the rules of recognition and enforcement embedded in the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 as discussed above in Section 6.1 of this Thesis.
[1030] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2002] OJ L12/1 Art 68.

Jurisdiction and Judgments Act 1982 stated that: '*The Brussels Conventions shall have the force of law in the United Kingdom, and judicial notice shall be taken of them*.'[1031] However, on 1st of February 2021 the UK notified the EU that the Brussels Convention 1968 ceased to apply in the UK after the transition period and subsequently Section 2 of the above Act was erased.[1032]

Brussels I Regulation and Brussels I Regulation (recast)

As indicated above, the Brussels I Regulation (the 'Brussels I') superseded the Brussels Convention 1968.[1033] One of the aims of Brussels I was improvement in the area of enforcement of foreign judgements.[1034] As Brussels I was repealed by the Brussels I Regulation (recast) (the 'Recast Regulation') and the validity of Brussels I for most states including the UK has ended on 9th of January 2015, this section is focused on the Recast as it is the most recent regulation in effect.[1035]

As it was in the case of Brussels I regulation, the Recast Regulation is also divided into two main areas with the first one being the rules regarding jurisdictions and the second the area of recognition and enforcement of judgements with a foreign element.[1036] Chapter I of the Recast Regulation deals with the scope and definitions while Chapter II provides for rules

[1031] Civil Jurisdiction and Judgments Act 1982 s. 2(1).
[1032] 'The UK's Notification Regarding The Brussels Convention 1968 And The 1971 Protocol, Including Subsequent Amendments And Accessions, Having Ceased To Apply To The United Kingdom And Gibraltar From 1 January 2021, As A Consequence Of The United Kingdom Ceasing To Be A Member State Of The European Union And Of The End Of The Transition Period' (*Consilium.europa.eu*, 2021) <https://www.consilium.europa.eu/> accessed 17 February 2022.
[1033] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2002] OJ L12/1 Art 68.
[1034] Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation: Second revised edition* (Sellier European Law Publishers 2012) 8.
[1035] 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 L351/1 Art 80. It is worth noting that the Brussels I Regulation still applies on judgements issued in Denmark and on judgements issued before 10th of January 2015.
[1036] Ibid.

regarding determination of jurisdiction under different circumstances.[1037] The default rule for determining jurisdiction is the principle of *actor sequitur forum rei* which means that the competent court in a dispute with a foreign element will be the court of the state where the defendant is domiciled.[1038]

The Recast Regulation and its rules regarding jurisdiction follow the structure of the instruments which historically developed alongside the Brussels Regime and which were outlined in the world perspective section above where the Lugano Convention 2007 is discussed.[1039] There are general provisions outlined in Section 1 of Chapter II Recast Regulation, the *actor sequitur forum rei* principle being imbedded in Article 4.[1040] Section 1 is followed by rules regarding special jurisdiction which are applicable in situations where there are further details which impact determination of jurisdiction rather than being reliant purely on the *actor sequitur* principle.[1041] For example where a dispute is related to a contract, the competent court to resolve the dispute may be the court of the state where the place of performance of obligation is question is located.[1042]

In Section 3 the Recast Regulation outlines rules which are applicable in matters relating to insurance, generally providing enhanced protection for the insureds in relation to those primary insurance contracts not concerning what are categorised as large risks.[1043] Further, Section 4 provides for specific rules related to consumer contracts.[1044] Besides other provisions, a consumer is able to bring an action against the other party regardless of the

[1037] Ibid Chapter I and II.
[1038] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in international law* (Oxford University Press, USA 2009) 12.
[1039] For more details please see Section 6.1 above.
[1040] 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 L351/1 Art 4.
[1041] Ibid Section 2.
[1042] Ibid Art 7 (1)(a).
[1043] Ibid Section 3.
[1044] Ibid Section 4.

domicile of the other party in the courts of the state in which the consumer is domiciled.[1045] Another specific group of contracts where there are different rules provided by the Recast is imbedded in Section 5 which focuses on individual contracts of employment and determination of jurisdiction in disputes arising from such contracts.[1046] Regardless of the domicile of the parties, or the any contrary agreement by the contracting parties, the courts of a specific state will have jurisdiction over disputes regarding rights *in rem*, status disputes regarding legal persons, entries in public registers and similar.[1047] In case of these disputes there are rules outlining the determination of exclusive jurisdiction and, as above, the *actor sequitur forum rei* principle will not be applicable.[1048]

Parties to a dispute, however, do have freedom to determine which court or courts will be competent to resolve their potential dispute subject to the mandatory effect of the exclusive jurisdiction, and specified protections, referred to above.[1049] This autonomy is outlined in Section 7 Recast and the agreed jurisdiction is viewed as exclusive unless the parties agree otherwise.[1050] There are certain requirements that need to be fulfilled in order for the jurisdiction agreement to be effective.[1051] The jurisdiction agreement must be either in writing or evidenced in writing, or in a form which is usual for the practices of the parties, or in an appropriate form according to the practice of international trade or commerce if the contract exist within international trade or commerce.[1052]

[1045] Ibid Art 18.
[1046] Ibid Section 5.
[1047] Ibid Section 6.
[1048] Ibid Section 6.
[1049] Ibid Section 7.
[1050] Ibid Art 25.
[1051] Ibid Art 25.
[1052] Ibid Art 25 (1)(a),(b),(c).

Section 9 of the Recast provides with rules regarding matters of *lis pendens* and outline the principles which should be followed by the courts if there is such a situation where there are more than one courts seized regarding the same cause of action between the same parties.[1053]

From the perspective of enforcement and recognition of foreign judgements, the relevant provisions are imbedded in Chapter III and IV Recast Regulation.[1054] Chapter III begins with rules regarding recognition in Section 1 followed by enforcement in Section 2.[1055] Foreign judgements issued by other states which are parties to the Recast Regulation will be recognised by other member states without a need for a special procedure.[1056] There are certain requirements which must be fulfilled by the party which is seeking recognition, however, these requirements are what can be reasonably expected, namely, a copy of the judgement in question and a certificate for which the form is provided by the Recast Regulation in its Annex I.[1057]

Article 39 of the Recast Regulation provides the core principle that there is reciprocity in enforcement of the judgements between the Member States.[1058] There does not need to be any special declaration of enforceability when a party is seeking enforcement of a judgement in a Member State other than the Member State where the judgement was issued.[1059] With the enforceability of the judgement, any protective measures which the judgement includes, are carried over in effect to the Member State where the enforceability is sought.[1060]

[1053] Ibid Section 9.
[1054] Ibid Chapter III and IV.
[1055] Ibid Section 1 and 2.
[1056] Ibid Art 36.
[1057] Ibid Art 37, 53, Annex I.
[1058] Ibid Art 39.
[1059] Ibid Art 39.
[1060] Ibid Art 40.

The treatment of a judgement originating from a Member State should be the same as a domestic judgement is treated in the Member State where enforcement is sought.[1061] There are, however, rules provided in relation to refusal of recognition and enforcement in Section 3 of Chapter III Recast Regulation.[1062] One of the more traditional grounds for recognition is where recognition of a judgement manifests to be contrary to the public policy of the Member State in which enforcement is sought.[1063] Further, the Recast Regulation outlines additional grounds for refusal of recognition such as elements of lack of fair proceedings in relation to the defendant or when the judgement in question is irreconcilable with a judgement issued in the Member State where the enforcement of the judgement in question is sought.[1064] Subsequently, the Recast Regulation outlines that if there are grounds for refusal of recognition present in a case, this automatically created grounds for the refusal of enforcement.[1065] It is important to note that the refusal of recognition and enforcement is considered on application of any interested party.[1066] Further, it is important to note that even though the ground for refusal in Recast Regulation Article 45(1)(a) is public policy of the Member State addressed, the interpretation of public policy by the Member State is limited by the EU.[1067]

It is clear that the Brussels Regime with the Recast Regulation as its flagship is a robust instrument which, relying on the principle of reciprocity, brings a great level of certainty to the parties which are involved in cross-border trade. The societal developments affect the

[1061] Ibid Art 41(1).
[1062] Ibid Chapter III Section 3.
[1063] Ibid Art 45 (1)(a); it is not the aim of this Thesis to deal with public policy issues in detail, however, it should be noted that that the public policy of a Member State is inclusive of the public policy of the EU and that EU law effectively limits the extent of the national public policy of EU Member States. For further information see for example Jeremy Richardson, *European Union: Power And Policy-Making* (Taylor & Francis Group 2004).
[1064] Ibid Art 45(1)(b)(c).
[1065] Ibid Art 46.
[1066] Ibid Art 45(1) and Art 46.
[1067] For more details please see Case C-7/98 Dieter Krombach v André Bamberski [2000] European Court Reports 2000 I-01935.

development of the rules of private international law and it seems that the reproduction of the legal system results, by interaction with the EU political system, in amendment of the rules imbedded in the instruments accordingly as can be seen by the transition from the Brussels Convention 1968 to the Brussels I Regulation through to the Recast Regulation. It is important to note that all of these instruments are underpinned by the reciprocity of their effect as between the legal systems of the contracting states.

The European Enforcement Order

The Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (the 'EEO') is a device which facilitates a swift enforcement of uncontested judgements in one Member State while originating in another Member State.[1068] The aim of the EEO is to facilitate circulation of judgements which result from uncontested claims in a speedier way as there is no need for approval in the Member State where the enforcement is sought.[1069]

The EEO is applicable in civil and commercial matters and is not applicable for example on status disputes, matrimonial matters, bankruptcy, social security or arbitration matters.[1070] Article 3 of the EEO defines uncontested claim and outlines that a claim is regarded as uncontested if the debtor expressly agrees with the settlement which is then approved by courts or there has never been an objection from the debtor.[1071] Further, the claim is regarded as uncontested if the debtor does not appear in the court after filing in initial

[1068] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.
[1069] Ibid Preamble para 9; Art 1.
[1070] Ibid Art 2.
[1071] Ibid Art 3.

objection in the course of the court proceedings or if the debtor agrees with the claim in an authenticated instrument.[1072]

When a party is interested in enforcement of an uncontested claim in line with the EEO, the judgement is question needs to be certified as a European Enforcement Order in the Member State which has issued the judgement in question.[1073] The requirements of certification are set out in Article 6 of the EEO and the enforcement of the certified judgement is set out further in Chapter IV of the EEO.[1074] The enforcement procedures are governed by the law of the state where the judgement is sought to be enforced and the certified judgement is enforced under the same conditions as if the judgement was issued by the Member State where the enforcement is sought.[1075]

There are grounds for refusal of the enforcement set out in Article 21 EEO, which are generally effective if the certified judgement is irreconcilable with an earlier judgment in any Member State or a third country.[1076] There is no possibility of a review of the certified judgement on its substance in the Member State where the enforcement is sought.[1077]

The EEO is, just as outlined in the case of Recast Regulation above, based on the principle of reciprocity and both instruments are part of the programme of implementation of mutual recognition of decisions in civil and commercial matters.[1078] Reciprocity is the core principle in the area of private international law governing the jurisdiction, recognition and enforcement of foreign judgements while with regard to the determination of applicable law,

[1072] Ibid Art 3.
[1073] Ibid Art 5.
[1074] Ibid Art 6; Chapter IV.
[1075] Ibid Art 20.
[1076] Ibid Art 21.
[1077] Ibid Art 21(2).
[1078] Ibid Preamble para 4.

even though the EU has structured its rules on the basis of reciprocity, it is possible to adopt the measures into a national legal system on unilateral basis.[1079]

6.3. Domestic Perspective

When it comes to the domestic perspective, what needs to be outlined is that there are as many different rules regarding the enforcement of a foreign judgements as there are nations. Due to the existence of the international and the regional rules outlined in the above sections, the national rules may be avoided and thus associated barriers of language and additional costs connected with an investigation of the respective national rules may be avoided.

However, where there are no applicable rules on the international level or the regional level, this may cause extensive issues especially with respect to the party which is trying to enforce their claims. This Thesis selects English law as the example of the domestic level. Although this is the jurisdiction a UK business may not have to deal with, it is a helpful example because it is familiar to UK businesses.

With respect to enforcing the claim in the UK, this means investigating what regime governs the enforcement of judgements originating from countries other than the UK. This section outlines national laws which are applicable in cases where there is no other instrument at the state level between the concerned states in place. Therefore, what is being outlined is the statutory regime which is applicable to the judgements originating in Commonwealth states governed by the Administration of Justice Act 1920 and the regime which is applicable to the judgements from certain states governed by the Foreign Judgments (Reciprocal Enforcement)

[1079] As an example can be outlined the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 which converts the Rome I Regulation regarding applicable law as retained EU law.

Act 1933. Further, when there are no other instruments of private international law in place and the judgement originates from a non-Commonwealth state, the regime governing the enforcement of such judgement will be govern by the common law regime.

Administration of Justice Act 1920

The Administration of Justice Act 1920 (the 'AJA 1920') includes provisions which apply to the enforcement of judgements obtained in Commonwealth states.[1080] The AJA 1920 is not an extensive statute and outlines rules which need to be followed in order to enforce a judgement which was issued in one of the Commonwealth states within twelve months from the date of issue of the judgement in question.[1081] This period can be, however, extended by the court.[1082]

The party seeking to enforce the judgement in question needs to apply to the courts in the said period in order to have the judgement registered in the court. The procedure is governed by the Civil Procedure Rules (the 'CPR') Part 74 and Practice Direction (the 'PD') Part 74A.

The AJA 1920 also provides grounds for refusal of the registration which may be seen as an equivalent to the grounds for refusal of the enforcement of the judgement.[1083] The courts will not order the registration of a judgement if for example the court of the state where the judgement in question was issued decided the case without jurisdiction or if the judgement was obtained by fraud.[1084]

The above illustrates a set of national rules which are applicable on foreign judgements, however, it needs to be noted that these are rules which are applicable on judgements issued

[1080] Administration of Justice Act 1920 s. 9.
[1081] Ibid s. 9(1).
[1082] Ibid s. 9(1).
[1083] Ibid s. 9(2).
[1084] Ibid s. 9(2).

by the courts of Commonwealth states. Therefore, in this instance the regional rules were not applicable and, for that reason, the situation in these cases remains unchanged and is not impacted by the consequences of Brexit. Nevertheless, the outline of the rules is important as it points to the statutory provisions and illustrates the parallel operation of the rules of common law which are discussed below, but it must always be borne in mind that they provide no assistance to UK businesses seeking to enforce their contractual rights against assets located in EU Member States.

Foreign Judgments (Reciprocal Enforcement) Act 1933

The Foreign Judgments (Reciprocal Enforcement) Act 1933 (the 'FJREA 1933') is applicable on foreign judgements issued by certain states which treat UK judgements in a reciprocal manner.[1085] The FJREA 1933 governs enforcement of foreign judgements originating mostly in non-Commonwealth states under the circumstances that there are mutual obligations recognised.[1086] The AJA 1920 and FJREA 1933 are parallel to each other and are exclusive.[1087]

The mechanism of enforcement in FJREA 1933 is similar to the AJA 1920. There is a difference in the time period of the possible application for registration of a foreign judgement where it is six years in comparison to twelve months in AJA 1920.[1088] Another difference is that while AJA 1920 is not mutually exclusive with the common law principles, therefore, the parties able to enjoy the applicability of AJA 1920 can chose to apply common law principles instead, the FJREA 1933 in its Section 6 states that if the FJREA 1933 is applicable, common law principles shall not be used.[1089]

[1085] Foreign Judgments (Reciprocal Enforcement) Act 1933 Preamble.
[1086] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 404.
[1087] Ibid 404.
[1088] Foreign Judgments (Reciprocal Enforcement) Act 1933 s. 2(1).
[1089] Ibid s. 6; Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 404.

The procedural aspect is similar to AJA 1920 as the procedural rules applicable are generally CPR 74 and PD 74A. Further, the FJREA 1933 outlines the grounds for setting the registered judgement aside.[1090] The judgement must be set aside if the courts of the state where the judgement in question was issued did not have jurisdiction or for example if the judgement was obtained by fraud.[1091] The rules imbedded in Section 4 FJREA 1933 are, however, more extensive than AJA 1920 and it seems that the even though similar, FJREA 1933 is more detailed.

The outline of the regime provided by FJREA 1933 completes the statutory regime which is available to parties with interest of enforcing certain foreign judgements. As pointed out above, the common law rules will be available to parties should they wish to omit the application of the AJA 1920, however, Section 6 FJREA suggest a different approach regarding the application of FJREA 1933.

Common law regime

The common law regime regarding enforcement of foreign judgements is applicable in the situations where a party is interested in enforcing a judgement in the UK and no other rules of private international law between the UK and the country where the judgement in question was issued are in place. The common law regime in the UK is underlined by the doctrine of obligation which means that when a judgement in country A is issued against party X and between the said country A and party X is a connection which justifies the jurisdiction in the dispute, the issued judgement will imbed an obligation which then is enforceable in other

[1090] Foreign Judgments (Reciprocal Enforcement) Act 1933 s. 4.
[1091] Ibid s. 4(1)(a).

countries accordingly.[1092] However, the connection between the country A and party X must be sufficient, if it is not sufficient, the judgment itself cannot create such an obligation and, therefore, the UK courts may refuse to recognise and enforce such foreign judgement lacking the required connection.[1093] The above principle was outlined by Blackburn J in the case *Schibsby v Westenholz and Others* where the foreign judgement in question was issued by the French courts against a Danish defendant residing in London.[1094] In this case it was ruled that due to the lack of any connection between France and the Danish defendant residing in London, without any property belonging to the defendant situated in France and with the disputed contract having no connection to France, the foreign judgement could not be enforced in the UK.

Although the common law rules are not based solely on the principle of reciprocity there is an element of reciprocity in the existence of obligation, however, as it is clear from the statutory regime, reciprocity and the aim of the circulation of judgements is one of the aims of the system nevertheless.[1095] Generally, a foreign judgement is able to be enforced if it satisfies several conditions. Firstly, the courts of the country where the judgement was issued must have had jurisdiction over the dispute.[1096] Secondly, the decision must be final and conclusive.[1097] Thirdly, the decision must be for a sum of money, the decision must not be regarding taxes, fines or other penalties.[1098] Fulfilling the above conditions is a predisposition for a foreign judgement to be enforceable in the UK.[1099] The judgement in question will need

[1092] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 404; in this section enforcement is understood to include recognition as well.
[1093] Ibid 404.
[1094] *Schibsby v Westenholz and Others* [1870-71] LR 6 QB 155.
[1095] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 370.
[1096] Ibid 370.
[1097] Ibid 370.
[1098] Ibid 370.
[1099] Ibid 370.

to, however, fulfil further conditions which are applicable after the decision passes the first set of 'hurdles'.

The judgement in question which a party seeks to enforce must be 'on the merits.'[1100] In *The Sennar No 2* Lord Brandon outlined the meaning of the requirement of the merits in a dual way.[1101] Either, the notion can be perceived in a negative way as a judgement which is not in core procedural, or in a positive way that is must be a decision '*which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned*.'[1102]

Defences to enforcement under common law

Once it is clear that the conditions are fulfilled, the party seeking enforcement of a foreign judgement should be able to rely on the common law rules regarding enforcement. There are, however, possible grounds for refusal of enforcement or, in another words, defences available to the party against whom enforcement is sought.

If there is new evidence presented to the courts, then the debtor of the judgement should be able to rely on the defence of such new evidence as this is how domestic judgements are treated and there is no ground for discrimination in the case of a foreign judgement.[1103]

Further, the UK courts would not enforce a foreign judgment which involves the breach of principles of natural justice as outlined in *Jet Holdings Inc. and Others v Patel*.[1104] If for

[1100] *D S V Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar and 13 Other* Ships [1985] 1 WLR 490 (*The Sennar No 2*).
[1101] Ibid 499.
[1102] Ibid 499.
[1103] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 392.
[1104] *Jet Holdings Inc. and Others v Patel* [1990] 1 QB 335.

example the principle of *audi alteram partem* is not followed and the defendant does not have an opportunity to present their case, the court may refuse to enforce the foreign judgement for breach of natural justice principles.[1105] A connected issue and a ground on which the UK courts may refuse enforcement of a foreign judgment is breach of substantial justice as illustrated in *James Masters v Jonathan Victor Leaver*.[1106] In this case it was outlined that if a decision on liability states the form of the assessment of quantum to be by jury but the assessment is performed by a judge, this must be treated as denial of substantial justice.[1107]

As was explained in relation to the statutory regime, the defence of fraud is available to the debtor of the foreign decision and, provided the foreign judgement was obtained by fraud, the debtor can rely on this defence.[1108] This defence can be sustained even in a situation when the debtor does not raise the defence of fraud in the foreign enforcement proceedings as illustrated in *Syal v Heyward*.[1109]

Perhaps the most notorious notion when it comes to discussing defences against enforcement of foreign judgements in different regimes is the phenomenon of public policy. It is beyond the scope of this Thesis to provide a detailed analysis of the perception of public policy amongst different regimes, however, it is important to point out that the perception of public policy is a concept which differs in its content amongst countries and regions. The usage of the defence of public policy is not as rare when it comes to the family law matters, however, in commercial matters this defence is barely used and the UK courts do not

[1105] Ibid 345.
[1106] *James Masters v Jonathan Victor Leaver* [2000] ILPr 387.
[1107] Ibid 395.
[1108] *Abouloff v Oppenheimer & Co* [1882] 10 QBD 295.
[1109] *Syal v Heyward and Another* [1948] 2 KB 443.

generally refuse enforcement of foreign judgements on the grounds the judgement in question being contrary to public policy.[1110]

In the controversial case of *Israel Discount Bank of New York v Hadjipateras* the approach of the Court of Appeal was that it would be willing not to enforce a judgement which was based on a transaction which would be against public policy in the eyes of English law.[1111] However, this proposition was criticised as the courts should assess the judgement and its substance from the perspective of the defence of public policy and not the transaction regarding which the judgement is issued.[1112] The approach of the courts was firmly outlined in the recent case of *Lenkor Energy Trading Dmcc v Irfan Iqbal Puri*.[1113] In this case it was confirmed that the judgement itself and not the underlining transaction is subject to assessment with regards to public policy.[1114]

When a dispute of the same matter is decided more than once in different jurisdictions, the bar of *res iudicata* will appear and create a defence for a debtor of a foreign judgement.[1115] In case where one of the decisions is domestic, the courts will honour the domestic judgement and will not enforce the foreign judgement.[1116] When there are two foreign judgements regarding the same matters, it will depend which of the judgements was rendered first and this is the one which will be able to be enforced.[1117]

[1110] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 397; as previously noted, the issues of public policy are not discussed in detail as they are not of the prime focus of this Thesis. It is, however, necessary to point out that even public policy can be viewed as operating on different levels. The most relevant for the purposes hereby is the public policy in existence on the national level and on the EU level which by its nature is less complex than on the national level.
[1111] *Israel Discount Bank of New York v Hadjipateras and Another* [1984] 1 WLR 137.
[1112] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 397.
[1113] *Lenkor Energy Trading Dmcc v Irfan Iqbal Puri* [2020] EWHC 1432 (QB).
[1114] Ibid.
[1115] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 397.
[1116] Ibid 397.
[1117] Ibid 398.

Another defence available regarding enforcement of foreign judgements is outlined in the Protection of Trading Interests Act 1980 (the 'PTIA 1980'). Section 5 PTIA 1980 provides for restriction on enforcement of certain overseas judgements.[1118] In Section 5(3) PTIA 1980 it is outlined that a judgement for multiple damages is not enforceable.[1119] Multiple damages judgement for the purposes of PTIA 1980 means a judgement '*for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given.*'[1120] Therefore, if the foreign judgement includes multiplication of damages, the enforcement is restricted.[1121]

The courts will also refuse to enforce a foreign judgement which was issued contrary to a valid dispute resolution agreement between the parties of the dispute. This principle is outlined in section 32 of the Civil Jurisdiction and Judgements Act 1982 (the 'CJJA 1982'). If a foreign court determines that such an agreement between the parties to a dispute is not valid, the UK courts are not bound by this decision as outlined is Section 32(3) CJJA 1982.

It is worth noting that a different approach may be taken by the English common law regime when it comes to the recognition and enforcement of judgements *in rem* rather than *in personam*. Judgements *in rem* are effective against the world and do not operate only between the parties and concern the status of persons or rights tied to property.[1122] Generally, the rules presented above will be applicable to judgements *in rem* in a similar manner as to judgements *in personam*.[1123] One of the notable differences is that while the above analysis

[1118] Protection of Trading Interests Act 1980 s. 5.
[1119] Ibid s. 5(3).
[1120] Ibid s. 5(3).
[1121] One of the possibilities as per the origin of this approach may be seen as follows, the US courts in the past upheld decision granting multiple punitive damages (for details please see Jerry J. Phillips, 'Multiple Punitive Damages Awards' (1994) 39 Vill. L. Rev. 433), however, on the WTO level, the approach of the US law towards multiple punitive damages was refused (see for example Netherlands Action Under Article XXIII:2 to Suspend Obligations to the United States, L/61 adopted on 8 November 1952, IS/62).
[1122] Jonathan Hill, *International Commercial Disputes in English Courts* (3rd edn Hart Publishing, 2005) 401.
[1123] Ibid 401.

considered recognition and enforcement subsumed under 'enforcement' regarding judgements *in rem* it is worthwhile to separate the two notions once again. The reason is that for judgements *in rem* the requirement of recognition is the core and recognition is what the creditor of a judgement *in rem* is likely to seek from foreign courts as the enforcement will be primarily an issue of the court issuing the said judgement *in rem*.[1124]

6.4 Systems theory perspective and PIL

As suggested at the beginning of this chapter, it is necessary to align the systems theory with the PIL system. There are a few reasons why this alignment is necessary. Firstly, it will provide the reader with a complete picture as practical elements of the aspects of PIL are connected. Secondly, it puts the contents of this Chapter in context and outlines the possible application of the findings generated in Chapters 4 and 5 of this Thesis to the systems of interest and to the situation when a UK business seeks to enforce judgement generated in a dispute with a foreign element.

The matter which needs to be addressed is if the PIL system can be seen as autopoietic in terms of the systems theory. The short answer is no. In determining this outcome, however, the synthesis of the previous discussion needs to be produced.

Firstly, a general reminder of the components of an autopoietic system is crucial. An autopoietic system is composed of structures and operations.[1125] Structures are composed of codes and programmes.[1126] In an autopoietic legal system, codes filter operations which

[1124] Ibid 401.
[1125] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 85.
[1126] Ibid 193.

belong to the system using the binary code of legal/illegal.[1127] The programmes which can be identified as legal norms are objects of judgements of valid/invalid.[1128] Operations of the system are events in time which produce the structures and are the main tool how autopoiesis of the system is performed.[1129] The autopoiesis of a system can be seen as a reproduction of the system itself through its operations which need to generate enough programmes in order for the codes to come into being.[1130] An autopoietic system can further be structurally coupled with other systems (even though the system does not recognise existence of another autopoietic system as it is only able to recognise its environment without any specific units).[1131] Structural coupling can be seen as the connection between the autopoietic system with its environments through the same structures (although these structures will have different values for the autopoietic system and the environment, an example of a structural coupling in case of a legal system and an economic system this could be the notion of 'property').[1132]

Once the above general perception is established, the application on a specific situation is desirable. Such situation which is the core for this Thesis is the journey to enforcement of a judgement generated in a dispute resolution with a foreign element. An example can be a UK business which obtained a judgement generated by courts of a particular country as an outcome of dispute resolution with a foreign element. In order to progress with the discussion, the example must be further specified.

[1127] Ibid 209.
[1128] Ibid 209.
[1129] Ibid 85.
[1130] Ibid 193.
[1131] Ibid 381.
[1132] For further discussion regarding structural coupling between different systems, please refer to Chapter 5 of this Thesis.

Model scenario 1 – the Hague Convention 2005

In the first scenario, the world perspective of the PIL system will be addressed. An example would be a contract between a UK business and a business from the EU, for example Czech Republic. The hypothetical contract needs to include a dispute resolution clause indicating an exclusive choice of court agreement as per Article 1 of the Hague Convention 2005. As both, the UK and the EU ratified the Hague Convention 2005, if there is a valid dispute resolution clause of this nature in the hypothetical contract, the Hague Convention 2005 is applicable if a dispute arises and cannot be resolved by any relevant means other than litigation.

In this model scenario, provided that the requirements are fulfilled, it could be for example English Courts which the parties choose to submit their dispute to. Once the English Court renders a judgement, the judgement creditor may seek to enforce such judgement in a country where for example the judgement debtor resides. Considering the UK business being the judgement creditor and the Czech business being the judgement debtor, the UK business may seek enforcement in the Czech Republic. According to Article 8 of the Hague Convention 2005, the Czech Court further recognises and enforces the judgement rendered by the English court.

Provided that this is what happens in the model scenario, this situation now needs to be translated in the systems theory perception.

The operations of the system will be the conflict and the dispute resolution itself (i.e. filling an action etc) and then further the application for recognition and enforcement to the Czech Court followed by the enforcement action itself. The structures of the systems here will be the code and the programmes, i.e. the norms. Since this application is concerned with the PIL system, it will be the norms of the PIL system that are of interest, i.e. the Hague Convention

2005. The coding firstly determines that an operation belongs to the system and further attributes a value to the norm. In the model scenario, the code would recognise that the dispute resolution and the application for recognition and enforcement of the judgement operates within the norms imbedded in the Hague Convention 2005 and further distinguishes that the value legal (the judgement will be recognised and enforced) is attributed. Further, the operation produces an assessment regarding the validity – the judgement will be recognised and enforced and thus producing another operation of the system – the enforcement action itself.

The above illustrates the dynamic nature of the operations and the structural nature of the codes and programmes. However, one of the most important matters which needs to be addressed is if the above sequence is a part of an autopoietic system and if it is, is it possible that this is a PIL system on the global level. As it may be clear from the beginning of this section, the latter is unlikely. However, it does seem that the sequence is a reproduction of operations and from the outset it appears that this is how autopoiesis occurs within a legal system. This will likely be the case, however, it will likely be the legal systems on the national level which will be the systems that are performing the autopoiesis in this case. There are a few reasons which support this conclusion. Firstly, the norms of the Hague Convention 2005 belong to each legal system which ratify the convention. This by itself illustrates that when the dispute is being resolved in the English Court, it is the English legal system which performs the autopoiesis. Since the code generates the programmes, it does not matter which is the law applicable to the merits from the perspective of autopoiesis.[1133] Once the judgement is rendered, it is the Czech legal system which is activated.

[1133] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 193.

Another reason to assume that the PIL on the global level is not an autopoietic system is connected with the conclusions generated in Chapter 5 of this Thesis. There does not seem to be autopoietic legal system on the global level and further supporting this, it is the domestic courts of each national legal system which are involved in the process as there cannot be a reference to a global system of international commercial litigation.[1134]

The last point which is worth noting is that the way how this scenario operates can be seen involving structural coupling of the legal systems – the UK and the Czech legal system. As above, the structural coupling means connection between a system and its environment (UK legal system and its environment and Czech legal system and its environment). The structure which connects these two systems is the Hague Convention 2005 and particularly the norms, i.e. the programmes which both systems source for themselves.

Model Scenario 2 – The Brussels Regime

In this case, it needs to be noted that since the Brussels Regime ceased to apply in the UK, the application on the previous example of UK business and Czech business contract will be limited. The application is still possible in case of prorogation of jurisdiction as per Article 25 of the Brussels Recast where if the jurisdiction is determined by the agreement of the parties regardless of their domicile and determines a court of a Member State, that court will have jurisdiction over their dispute.[1135] If the recognition and enforcement is then sought in a different country, yet still a Member State, the courts of that country will recognise and enforce the judgement.[1136]

[1134] For further details, please refer to Chapter 5.
[1135] In case of no dispute resolution clause, the scenario may operate either similar to Model Scenario 1 or Model Scenario 3. This is similar in case of Lugano Convention 2007.
[1136] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012

From the above it is clear that the Model Scenario 1 is not applicable if the parties choose to have their dispute resolved by the English Courts. Therefore, in Scenario 2 the UK and the Czech business incorporate a dispute resolution clause which outlines that the parties will submit their dispute to the Czech Courts. Further, once the judgement is rendered (assuming the UK business is the judgement creditor) the courts of the EU Member States will enforce the judgement. This means that if the UK business further seeks to enforce the judgement in Slovakia (the Czech business may have assets there), the judgement will be enforceable.

In this situation, as again, it is the national courts dealing with the dispute, it could be suggested that again it is the domestic legal systems which are performing the autopoiesis. With the difference that the English legal system will not be involved and the structural coupling in place will be between the Czech legal system, Slovak legal system and EU legal system.

The outstanding matter to cover is if there is an EU PIL functioning as an autopoietic system. The answer again would be negative. It has been suggested that the EU legal system is an autopoietic system, however, there EU system is not the one performing the autopoiesis at this stage. The EU legal system would be activated for example in matters of interpretation of the EU law which would be dealt with by the CJEU, however, the scenario above as presented does not include the operations of this nature. Nevertheless, similarly to the Hague Convention 2005 the systems is question will be structurally coupled, as suggested as they each source the same programmes, i.e. the Recast Regulation in this example.

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 Chapter III, subject to refusal of recognition and enforcement.

Model Scenario 3 – The English Legal system

In order to present the last scenario, there needs to be another alteration to the set up made. Since it is the English PIL rules which needs to be applied for illustration, there needs to be a contract between a UK business and a business from a country with which there is not bilateral, unilateral or regional agreement in place. Currently, one of the examples is Russia.[1137]

The Model Scenario 3, therefore, will be a contract between a UK business and a Russian business. Further, to facilitate the illustration, in Model Scenario 3.1 the English courts will be competent to resolve the dispute and the judgement creditor will seek enforcement in Russia and in Model Scenario 3.2 the Russian Courts have render decision and the enforcement is sought in the UK.

In both of these situations, the legal systems of the respective countries will be activated. Either resolving the dispute by the English legal system and then moving to Russian legal system or vice versa. Since there is no question about regional or international level, the matter to address is if the PIL can be seen as an autopoietic system on the domestic level. The answer is again no and from the above it is clear why. It is the national legal systems which are the actors performing the autopoiesis and the norms of the PIL system are effectively the norms of the domestic laws belonging to the legal system rather than being separate from it. The difference here is that there may not be such a structural coupling in place as in case of the previous scenarios.

[1137] As of March 2022, however, this may be further impacted by the Russia-Ukraine war.

6.5 Concluding remarks

The above illustrated the norms of the PIL system on different level of hierarchy. This evaluation was critical in order to be able to detect the programmes which are used once a dispute with a foreign element arises. Once the programmes were identified, it was necessary to apply the systems theory perception in order to illustrate if the PIL system on any level of hierarchy can be perceived as autopoietic.

The application on the Model Scenarios above brought an important aspect of consideration – if there is an international or regional legal instrument in place, this does not mean that the respective PIL system is autopoietic, however, it does illustrate that there is a firm structural coupling between the legal systems in question.

The implication of the above is that if there is a such instrument missing, the structural coupling is missing as well. This may mean that the relevant rules of PIL in operation may be different and the UK business may be at a disadvantage. The disadvantage is particularly prominent if there is no valid dispute resolution clause in place, which may the case if the UK business is not informed. Before the end of transition period, when the Brussels Recast applied in the UK, the regime acted as a 'safety net' for the UK business even if there was no dispute resolution clause in place. In situation of missing dispute resolution clause in a contract between a UK and an EU business, there may be a situation, where there is no bilateral agreement between the countries in place and this may create additional costs and obstructions as national PIL rules will be activated.

The prima facie solution for this would be to ensure a valid dispute resolution clause is incorporated in the contract. Further, for the UK business it may be advantageous to consider

other methods of dispute resolution rather than litigation. One of such methods rending a binding order would be arbitration which is discussed in the following Chapter 7 in a structured approach as this Chapter 6. The system of international commercial arbitration will be discussed from the perspective of its structure and then it will be investigated how systems theory may apply in order to further analyse the system.

7. International Arbitration

7.1 Introduction

In the previous chapter it was outlined what are the elements of private international law doctrine (the 'PIL') and how selected norms of PIL operate on global, regional and domestic level. Further, the outline of the PIL system was linked to the systems theory. The systems theory facilitated the comprehension of how parties to a dispute are affected by the PIL norms on different levels in terms of applicability of those norms on the journey to enforcement of the creditor of the judgement, for the purposes of this Thesis, the UK business.

It was outlined that in terms of the systems theory, the PIL system is not autopoietic on any of the discussed levels and it was illustrated that the PIL system on regional and international levels is forming a part of a national legal system through structural couplings.[1138]

International Commercial Arbitration ('international arbitration' or 'arbitration') could be used by the parties if they wish to have their dispute resolved by other means rather than litigation yet still wish to obtain a binding decision. This Chapter illustrates some of the main aspects of international arbitration as a method for resolution of commercial disputes between parties in a dispute with a foreign element. It is also necessary to connect the system of international arbitration with the systems theory as it was done for the PIL regime.

This Chapter hence starts with the structural aspects of international arbitration including legal framework in which this system operates. The Chapter further discusses recognition and

[1138] For more detailed discussion please see Chapter 6 section 6.4.

enforcement as this is an important connecting notion of this thesis and is concluded by analysis of the system of international arbitration from a perspective of systems theory.

For illustration purposes there are three main arbitration institutions used in this chapter. These are the London Court of International Arbitration (the 'LCIA'); Hong Kong International Arbitration Centre (the 'HKIAC); and the Singapore International Arbitration Centre (the 'SIAC'). These institutions were selected as they are amongst the major institutions used worldwide.[1139] The HKIAC is further chosen for illustration of fragmentation due to current unstable political situation and its potential impact on favourability of HKIAC.[1140] Additionally, in certain parts the Arbitration court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (the 'CZAC') is used for illustration and comparison of this tribunal with limited popularity worldwide to the world most popular centres.

7.2 Varieties of form affecting arbitration

When discussing varieties of form affecting arbitration it is necessary to investigate what type of arbitration is available to the parties. Generally, the two main types of arbitration which are relevant for the discussion hereby are the institutional arbitration and ad hoc arbitration.[1141] Additionally, it is possible to differentiate between international and domestic arbitration; the New York Convention 1958 (the 'NYC') itself states that its provision apply to

[1139] 'Which Institution And Why: A Comparison Of Major International Arbitration Institutions' (*Uk.practicallaw.thomsonreuters.com*, 2019) <https://uk.practicallaw.thomsonreuters.com/9-204-3989?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 1 September 2019.

[1140] Although, there seems to be divided views regarding the relative impact as some practitioners suggest that the fears are 'unfounded'. See for example 'Hong Kong Arbitration Remains Resilient Despite Detractors' (*Lexology*, 2020). <https://www.lexology.com/library/detail.aspx?g=c676482b-40dc-46e5-9e1e-74d7c617a079> accessed 18 February 2022.

[1141] See for example Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 26; or Giuditta Cordero-Moss (ed), *International Commercial Arbitration: Different Forms and Their Features* (Cambridge University Press 2013).

foreign awards (and non-domestic awards)[1142] as opposed to domestic awards.[1143] This Thesis is, however, focused on arbitration between parties originating from different countries, therefore, the domestic arbitration is used in this Chapter only for comparative purposes.

Further, one could point out that there are different forms of arbitration regarding the time when the parties decide to subject their dispute to arbitration. From this perspective, the parties either decide to subject their dispute to arbitration before a dispute arises, therefore having a pre-dispute arbitration agreement; or after the dispute arises (not having an arbitration agreement prior the dispute), therefore having a post dispute arbitration agreement. This differentiation, however, is more connected with the time when the parties enter into the arbitration agreement rather than a specific type of arbitration.

Due to the above, the main forms affecting arbitration discussed in this section are institutional arbitration and ad hoc arbitration.

Institutional arbitration

Institutional arbitration is an arbitration governed in terms of its procedure by the rules of an arbitration institution provided for by the parties, whose dispute is subjected to arbitration, by including these rules in their arbitration agreement.[1144] In the United States (the 'US') the wording used for institutional arbitration is 'administered arbitration' meaning effectively that there is an institution which is administering the process.[1145] Spencer also lists arbitration with limited administration which can be seen as a 'hybrid' between the two above categories

[1142] For further explanation of 'foreign' and 'non-domestic' notions see section 7.3. of this Thesis.
[1143] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) art 1(1).
[1144] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 26.
[1145]Glen H Spencer, 'Administered vs. non-administered arbitration' (1999) 54 Dispute Resolution J. 43.

of institutional[1146] arbitration and ad hoc arbitration.[1147] Parties to a dispute may contract an institution to play a role in appointing arbitrators or have further role in their proceeding excluding major administrative tasks: this could be seen as partly administered.[1148]

Ad hoc

Opposite to institutional arbitration, ad hoc arbitration is not governed by institutional rules and as the name suggests, parties in this case agree to arbitrate not specifying any particular institution.[1149] The US wording for this form of arbitration is 'non-administered arbitration', in certain circumstances using the ad hoc title, similarly meaning an arbitration which is not administered by any independent institution and is managed by the parties and arbitrators.[1150]

Comparison of the forms

As stated above, when parties decide to specify fully which institution is dedicated to resolve their dispute and they opt for full administration of their dispute by the said institution it can be suggested that this is the category of institutional arbitration. The question is what are the advantages of choosing this category over leaving the dispute to be resolved by ad hoc arbitration. George points out that institutional arbitration does provide parties with enhanced certainty as the ad hoc category requires further cooperation after a dispute has emerged.[1151] The issue in this situation is that the parties could be seen as demonstrating

[1146] For the purposed of this Thesis institutional and administered are considered as synonyms using 'institutional arbitration' as the main phrase.
[1147] Glen H Spencer, 'Administered vs. non-administered arbitration' (1999) 54 Dispute Resolution J. 43.
[1148] Carita Wallgren-Lindholm, 'Ad Hoc Arbitration V. Institutional Arbitration' [2013] International Commercial Arbitration 61.
[1149] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 26.
[1150] Glen H Spencer, 'Administered vs. non-administered arbitration' (1999) 54 Dispute Resolution J. 43.
[1151] Joyce J George, 'The advantages of administered arbitration when going it alone just won't do' (2002) 57 Dispute Resolution J. 66.

weakness if they tried to communicate or cooperate effectively.[1152] If the institutional option is chosen, the parties are likely to avoid the need for extensive cooperation between each other in order to successfully proceed with resolution of their dispute. This can be beneficial if the parties are in an especially problematic and difficult dispute.

When parties draft their arbitration agreement, the costs of the future potential proceeding may be one of the aspects they consider. As all disputes are individual, there is not a straightforward answer to which form of arbitration is more economical. The major arbitration institutions set out a schedule of fees for institutional arbitration and for some of the elements of ad hoc proceedings (generally appointment fees if the parties decide to use an institution simply for appointment of their arbitrator(s)).[1153] In case of institutional arbitration the two major additional fees are the administrative fee and the arbitrators' fee. Usually, these fees are each a lump sum plus percentage, both figures dependent on the value of the dispute.[1154] In case of LCIA, there is a registration fee of a set value and then hourly calculated costs of the tribunal's personnel.[1155] If the parties choose ad hoc arbitration and request an assistance of an institution with the appointment, the appointment fee is a lump sum[1156] or a lump sum and an hourly rate of the personnel.[1157]

[1152] Ibid 66.
[1153] See for example LCIA at 'Schedules Of Costs' (*Lcia.org*, 2019) <https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx> accessed 1 September 2019; HKIAC at '2018 Schedule Of Fees' (Hkiac.org, 2019) <https://www.hkiac.org/content/2018-schedule-fees> accessed 1 September 2019; or SIAC at 'Singapore International Arbitration Centre | SIAC Schedule Of Fees' (Siac.org.sg, 2019) <http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees> accessed 1 September 2019.
[1154] See for example HKIAC at '2018 Schedule Of Fees' (Hkiac.org, 2019) <https://www.hkiac.org/content/2018-schedule-fees> accessed 1 September 2019; or SIAC at 'Singapore International Arbitration Centre | SIAC Schedule Of Fees' (Siac.org.sg, 2019) <http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees> accessed 1 September 2019.
[1155] LCIA at 'Schedules Of Costs' (*Lcia.org*, 2019) <https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx> accessed 1 September 2019.
[1156] 'Singapore International Arbitration Centre | SIAC Schedule Of Fees' (Siac.org.sg, 2019) <http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees> accessed 1 September 2019.
[1157] LCIA at 'Schedules Of Costs' (*Lcia.org*, 2019) <https://www.lcia.org/Dispute_Resolution_Services/schedule-of-costs.aspx> accessed 1 September 2019.

An advantage for the parties to a dispute of choosing institutional arbitration could potentially be the fact that if they know the value of their dispute, as they can potentially calculate the approximate costs. This can be problematic with the LCIA, however, as the hourly rates are agreed prior to the appointment by the LCIA court.[1158] The rates reflect the complexity of the case and do not usually exceed £450.[1159] Even though there is no firm sum set, the LCIA is still a popular venue, therefore, the above is presumably not an issue for the parties.

If the ad hoc option of the arbitration is selected, the parties can calculate costs for example for the mentioned appointment of arbitrator(s) if they request the appointment from a certain institution. This can seem as a less costly option. A potential downside is that the administration is left to the parties. This may be problematic if the parties are not experienced or have limited resources. On the other hand, if the parties to a dispute are two large corporations, there could potentially be strong experienced legal teams standing behind each of those disputants and could make the ad hoc arbitration more cost effective than it would have been had the parties have chosen the institutional option.

Another area where the two categories of arbitration differ is flexibility.[1160] Ad hoc arbitration may be more advantageous as the parties are able to tailor the proceedings to their needs.[1161] As some studies suggest, the most frequently mentioned rules which are likely to be selected are the UNCITRAL Arbitration rules.[1162] Wallgren-Lindholm points out that it is not generally recommended to select the rules of a specific institution as rules governing an ad hoc

[1158] Ibid.
[1159] Ibid.
[1160] Carita Wallgren-Lindholm, 'Ad Hoc Arbitration V. Institutional Arbitration' [2013] International Commercial Arbitration 61.
[1161] Ibid 61.
[1162] '2018 International Arbitration Survey: The Evolution Of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 1 September 2019.

arbitration as these rules are '(…) *unlikely to work properly or effectively without the involvement of the institution*.'[1163] This is understandable as the rules are designed to work under the supervision of the institution which issued the rules.[1164] The UNCITRAL Arbitration rules are discussed below in section 7.3. The above suggests, that even though ad hoc arbitration may be more flexible in the sense that the parties are able to select individual elements themselves (e.g. the mentioned rules), there are still limits to this flexibility. These limits manifest themselves in a form of effectivity, i.e. the parties may agree to use institutional rules while opting for ad hoc arbitration; yet it is not potentially effective for them to do so and the UNCITRAL Arbitration Rules may be the most sensible compromise between an ad hoc arbitration regulated only by the curial law and an institutional arbitration administered by the regulation of the chosen institution.[1165]

When comparing these two forms of arbitration it would be useful to determine the frequency of choosing the former or the latter by the parties of a dispute. The question is how this data can be established. One option is to seek the statistics of the arbitration institutions and compare them to the statistics of ad hoc arbitration. It is rather clear what is the problematic aspect concerning this approach. The determination of the numbers of ad hoc arbitration is difficult as there are no general records of these disputes. Some empirical studies do include data connected with the usage of these alternative categories of arbitration amongst business.

[1163] Carita Wallgren-Lindholm, 'Ad Hoc Arbitration V. Institutional Arbitration' [2013] International Commercial Arbitration 61.
[1164] Ibid 61.
[1165] Jonathan Hill, 'Determining the seat of an international arbitration: party autonomy and the interpretation of arbitration agreements' (2014) 63 International and Comparative Law Quarterly 517.

One of these studies is the International Arbitration: Corporate attitudes and practices 2008 report published by PricewaterhouseCoopers (PWC) in cooperation with Queen Mary University of London (the '2008 Study').[1166] This 2008 Study suggest that '(…) *86% of awards were rendered by arbitration institutions rather than through ad hoc arbitrations*'.[1167] Even though there is empirical data available, when analysing these figures it is necessary to investigate the method and the sample of the participants. Firstly, it is important to point out that there were 82 participants involved in the 2008 Study, most of the responding persons being general counsel and the participants being across different sectors and different continents. This number is undoubtedly high for these type of research studies, as it is generally difficult to obtain participants amongst businesses.[1168] The counter point is how representative is the number of 82 participants of the whole system of international arbitration. It is imaginable that the result could have been different if companies which use mainly ad hoc arbitration were chosen instead.

In comparison to the 2008 Study there is the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration report (the '2015 Study').[1169] The methodology of the 2015 Study uses data from 763 participants.[1170] This is almost ten times higher than the number of data subjects in the 2008 Study. Interestingly, it is outlined that

[1166] 'International Arbitration: Corporate Attitudes And Practices 2008' (PWC 2008) <https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> accessed 4 September 2019.
[1167] Ibid 4.
[1168] This is one of the problematic points of this Thesis as well, the researcher tried to obtain participants via multiple means, yet without success.
[1169] '2015 International Arbitration Survey: Improvements And Innovations In International Arbitration' (White & Case 2015) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 4 September 2019; as cited before, there is also a 2018 study ('2018 International Arbitration Survey: The Evolution Of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 1 September 2019), however, the 2018 study does not include preference as to institutional or ad hoc arbitration.
[1170] '2015 International Arbitration Survey: Improvements And Innovations In International Arbitration' (White & Case 2015) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 4 September 2019 51.

79% of respondents listed that they choose the institutional arbitration over the ad hoc option; a comparison to previous studies is also followed stating that the result of 79% is '(…) *consistent with findings in previous surveys of 73% (2006) and 86% (2008) of arbitrations being institutional rather than ad hoc.*'[1171] Having more data compared, this result would suggest that, even though there are companies which choose ad hoc arbitration over the institutional option, these companies are in minority.[1172]

7.3 Legal framework from a global perspective

The research is mainly focused on the enforcement of the resolution of disputes regarding international commercial transactions. The focal point of this Chapter is international arbitration as a method of dispute resolution. The enforcement of the claims resulting from disputes between the parties which are subject to arbitration is dependent on recognition of a binding award by the country in which the enforcement is sought. Therefore, the notions of enforcement and recognition are closely interconnected and as is illustrated below, the legal instruments discussed generally include both notions together, rather than deal with them separately.

This section includes discussion of the legal system of international arbitration and focuses particularly on the global system of recognition and enforcement of arbitral awards by national legal systems. The discussion begins with the UNCITRAL Model Law on International Commercial Arbitration (the 'UNCITRAL Model Law') and the UNCITRAL Arbitration Rules.[1173]

[1171] Ibid 17.
[1172] This point can be contrasted with discussion outlined in Chapter 5 in section 5.5. Even though the system of International Arbitration seems to be operatively open, the fact that the parties prefer institutional arbitration may indicate that the operations in their majority are reappearing and adopting same structures rather than involving more versatile and perhaps less certain sets of norms as per ad hoc arbitration.
[1173] Although this is soft law and may be seen as not belonging to either level, these instruments were placed in the global perspective as they are created by transnational institution.

Further, international conventions relevant to international arbitration are discussed and, finally, a brief discussion is dedicated to the arbitration rules of selected arbitration tribunals (LCIA compared to SIAC and HKIAC).

UNCITRAL

The United Nations Commission on International Trade Law (the 'UNCITRAL') is an important legal body of the United Nations (the 'UN') focusing on modernisation and harmonisation of the legal rules of international trade.[1174] UNCITRAL has produced various sets of rules throughout the period of its existence; the most important for the purposes of this Thesis are the UNCITRAL Model Law and the UNCITRAL Arbitration Rules. The former being a non-binding set of rules provided for countries to help them with building a solid system of national rules for international arbitration; the latter being a contractual set of rules provided for the parties to agree on their usage when they decide to choose ad hoc arbitration as an option to resolve their dispute. The following two subsections provide a brief discussion of the above in turns in order to be able to provide a holistic picture of the sources of international arbitration.

UNCITRAL Model Law on International Commercial Arbitration[1175]

The UNCITRAL Model Law was adopted by the UN in 1985, with amendments adopted in 2006.[1176] As previously mentioned, the UNCITRAL Model Law does not have the form of an international binding instrument, its nature is advisory and it is up to individual states to adopt

[1174] 'About UNCITRAL | United Nations Commission On International Trade Law' (*Uncitral.un.org*, 2019) <https://uncitral.un.org/en/about> accessed 4 September 2019.
[1175] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 September 2019.
[1176] Ibid.

the rules.[1177] The rules were designed with an intention to facilitate the unification and harmonisation of the system of international arbitration within national laws.[1178] The UNCITRAL Model Law covers the whole arbitration proceeding beginning with general provisions concerning, amongst other elements, the scope, definitions and general principles.[1179] Further, there are provisions regarding the arbitration agreement,[1180] followed by the composition of the arbitral tribunal,[1181] the jurisdiction of arbitral tribunal,[1182] interim measures and preliminary orders,[1183] and the conduct of arbitral proceedings.[1184] The last three chapters deal with the finalisation of the proceedings, including the making of awards and the termination of proceedings,[1185] recourse against award,[1186] and – of a particular interest to this Thesis – the recognition and enforcement of awards.[1187] The above chapters form Part One of the UNCITRAL Model Law. Part Two includes explanatory notes and the last part – Part Three, includes recommendations regarding the interpretation of selected articles.[1188]

From the perspective of individual countries and their legal systems, it is convenient to have a 'package of norms' provided by a reputable international body such as UNCITRAL. The fact that the UNCITRAL Model Law is not binding could be seen as advantageous as there does not need to be a consent and every state can adjust the rules according to their own legal system.

[1177] Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press 2013).
[1178] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 September 2019 vii.
[1179] Ibid Chapter I.
[1180] Ibid Chapter II.
[1181] Ibid Chapter III.
[1182] Ibid Chapter IV.
[1183] Ibid Chapter IV A.
[1184] Ibid Chapter V.
[1185] Ibid Chapter VI.
[1186] Ibid Chapter VII.
[1187] Ibid Chapter VIII.
[1188] Ibid Arts 23-39.

This feature does eliminate the problem of trying to find a compromise amongst sovereign states which everybody finds acceptable. The challenge of finding such compromise is illustrated by the discussion in Chapter 6 of this Thesis on the Hague Convention 2005.[1189] The Hague Convention 2005 was supposed to be a global instrument in the area of private international law, however, due to the problems of finding compromise it was stripped back so as to regulate only the limited sub-area of choice of court agreements (as opposed to a holistic system of rules determining jurisdiction as, for example, the Lugano Convention 2007).[1190]

As suggested above, even though the UNCITRAL Model Law is not binding, it does provide a guidance and recommendations which the individual states are free to adopt, or be inspired by, in their legislative initiatives. Chapter VIII discusses the recognition and enforcement of awards, hence, it is convenient to investigate the nature of those provisions to be able to compare further the features of these provisions with their counterparts in other legal instruments.

Chapter VIII of the Model Law is composed by two Articles – Article 35 and Article 36. Article 35 deals with recognition and enforcement per se while Article 36 sets out grounds for refusing recognition and enforcement.[1191] Article 35 states that an arbitral award shall be recognised as binding, provided it is brought to the court in writing in order to make the award enforceable (subject to conditions such as the grounds for refusal).[1192] The original of the

[1189] Convention of 30 June 2005 on Choice of Court Agreements [2005] deposited at Ministry of Foreign Affairs of the Kingdom of the Netherlands.
[1190] Giesela Ruhl, 'The Effect of Brexit on the Resolution of International Disputes: Choice of Law and Jurisdiction in Civil and Commercial Matters' in Armour, John and Horst Eidenmuller (eds), *Negotiating Brexit* (1st edn Beck/Hart, 2017) 65; Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 – LUGANO.
[1191] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 September 2019 Chapter VIII.
[1192] Ibid Art 35 (1).

award must be provided and if the award is not in the language of the competent court, then the court may require the party to supply a translation.[1193] This is a generally normalised provision, which is included in various legal instruments dealing with international arbitration.[1194]

As per above, Article 36 of the UNCITRAL Model Law provides grounds for refusing recognition or enforcement of an arbitral award. The grounds for refusal are as follows: incapacity of a party to an arbitration agreement; invalidity of the agreement under the law of the agreement or under the law of the state in which the award was made.[1195] Further, the award would not be recognised if the party against whom the award is directed did not get a proper notice of the arbitrator appointment or was not able to present her case.[1196] The award will also not be enforced if the dispute is not contemplated by the arbitration agreement[1197] or if it is lacking required procedural requisites.[1198] Similarly, if the award has been set aside or is not binding in the country of origin, the recognition and enforcement may be refused.[1199] The court may also refuse to recognise and enforce an award if there is lack of arbitrability[1200] or if there is a conflict with public policy of the state where the recognition and enforcement is being sought.[1201] The above grounds of refusal are generally similar to other international instruments.[1202]

[1193] Ibid Art 35 (2).
[1194] See for example the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[1195] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 September 2019 Art 36 (1) (a) (i).
[1196] Ibid Art 36 (1) (a) (ii).
[1197] Ibid Art 36 (1) (a) (iii).
[1198] Ibid Art 36 (1) (a) (iv).
[1199] Ibid Art 36 (1) (a) (v).
[1200] Ibid Art 36 (1) (b) (i).
[1201] Ibid Art 36 (1) (b) (ii).
[1202] Ibid Art 36 (1) (b) (ii).

In certain circumstances the UNCITRAL Model Law includes similar provisions to those contained in binding international legal instruments. In this case a contracting state to a binding international legal instrument would adopt the provisions of those binding instruments. However, there may be a situation when for example a convention includes only a part of the process comprising arbitration proceedings and in this situation the UNCITRAL Model Law has the potential to cover the gaps.[1203]

UNCITRAL Arbitration Rules[1204]

The UNCITRAL Arbitration Rules were first adopted in 1976 and their main function is to assist parties in the settlement of various commercial disputes via arbitration.[1205] There are three versions of the Rules: those adopted in 1976; the revised version of 2010; and the version of 2013.[1206] The version adopted in 2013 does also incorporate the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration, therefore, the parties do have several options as to which version to agree on.[1207] The UNCITRAL Arbitration Rules are a convenient framework and their popularity is an evidence of this fact. It was suggested above, that according to some of the surveys conducted, the UNCITRAL Arbitration Rules are the most favourable rules to contract on by the parties for disputes settled via ad hoc arbitration proceedings.[1208]

[1203] Ibid, as the New York Convention includes mainly rules for recognition and enforcement but other parts of the proceedings are not included.
[1204] *UNCITRAL Arbitration Rules (1976), With Amendments As Adopted In 2013* (United Nations Commission on International Trade Law 1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> accessed 5 September 2019.
[1205] 'UNCITRAL Arbitration Rules | United Nations Commission On International Trade Law' (*Uncitral.un.org*, 2019) <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed 5 September 2019.
[1206] Ibid.
[1207] Ibid.
[1208] '2018 International Arbitration Survey: The Evolution Of International Arbitration' (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 5 September 2019.

As the UNCITRAL Arbitration Rules are rules which the parties have to agree on, their nature is different from the UNCITRAL Model Law. The UNCITRAL Model Law is for the individual states, while the UNCITRAL Arbitration Rules aim vertically lower to the parties. Individual states can be reached on this level as well if they are a party to a commercial dispute and decide with the counterparty (or counterparties) to contract on the basis that the Arbitration Rules will govern their arbitration proceedings.

The content of the UNCITRAL Arbitration Rules is arranged intuitively, therefore, the Rules start with introductory provisions including the scope of application, notice and calculation of time, response to such, representation and assistance, and designating and appointing authorities.[1209]

Further, the Rules deal with the composition of the arbitration tribunal.[1210] This area includes the number of arbitrators, their appointment, disclosures by and challenge of arbitrators, replacement of an arbitrator, repetition of hearings if the replacement occurs and exclusion of liability.[1211] The appointment of the tribunal can be sometimes left to the institutions. This situation may occur if for example parties cannot reach consent when composing the tribunal.[1212] It was pointed out above that some of the institutions have fee illustrations for the appointment of arbitrators in ad hoc proceedings.[1213]

Section III of the Rules includes provisions for the arbitration proceeding. There are general provisions included such as the place of arbitration, language, statements of claim and

[1209] *UNCITRAL Arbitration Rules (1976), With Amendments As Adopted In 2013* (United Nations Commission on International Trade Law 1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> accessed 5 September 2019 Section I.
[1210] Ibid Section II.
[1211] Ibid Section II.
[1212] Ibid Art 8.
[1213] 'Singapore International Arbitration Centre | SIAC Schedule Of Fees' (Siac.org.sg, 2019) <http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees> accessed 5 September 2019.

defence and their amendments.[1214] Further, this Section includes pleas as to the jurisdiction of the tribunal, further written statement, periods of time, and interim measures.[1215] Finally, there are provisions dealing with evidence, hearings, experts, default, closure of hearings and waiver of right to object.[1216]

The last part of the core Rules is dealing with the actual award. These provisions include the decisions, form and effect of the award, applicable law, settlement or other ground for termination or interpretation of the award.[1217] Additionally, provisions as to any correction of the award is included as well as any additional award.[1218] The last provision of Section IV deals with costs – there is definition of the costs, fees and expenses of the arbitrators, allocation of costs and deposit of costs.[1219]

A useful part of the UNCITRAL Arbitration Rules is the Annex, which includes model arbitration clauses for contracts, possible waiver statements and statements of independence for the arbitrators.[1220] The content of the Annex provides parties with enhanced certainty especially when it comes to the arbitration clause for contracts should they wish to contract subject to the UNCITRAL Arbitration Rules.

Due to the UNCITRAL expertise, both texts discussed above can be relied upon by the parties as a valuable source of the rules governing international arbitration. The UNCITRAL Model Law and the UNCITRAL Arbitration Rules could both be seen as being similar to the binding international conventions in the sense that they need to be adopted or agreed on in order for

[1214] *UNCITRAL Arbitration Rules (1976), With Amendments As Adopted In 2013* (United Nations Commission on International Trade Law 1985) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf> accessed 5 September 2019 Section III Arts 17-122.
[1215] Ibid Arts 23-26.
[1216] Ibid Arts 27-32.
[1217] Ibid Section IV Arts 33-37.
[1218] Ibid Arts 38-39.
[1219] Ibid Arts 40-43.
[1220] Ibid Annex.

them to be binding. However, the difference is that the UNCITRAL Model Law is not there to be ratified and has only an advisory function. The UNCITRAL Arbitration Rules are different in the sense that if they are agreed upon, this will be effective between the parties to the particular dispute and would not have an impact on external actors nor on the regulatory domain of the state.

International Conventions

After briefly outlining the UNCITRAL legal instruments, it is convenient to discuss the top of hierarchy of the binding legislation concerning international arbitration. From this perspective, the area of binding legislation with an international impact is the one consisting of international conventions. It is not a purpose of this research to identify all the international treaties relevant to international arbitration in existence, however, it is necessary to identify the main international conventions currently in effect in order to be able to present analysis of the international arbitration as a system from the perspective of the systems theory.

A useful indicator which can be used for the identification of the most impactful international conventions and treaties regarding international arbitration is the Yearbook Commercial Arbitration which has been published by the International Council for Commercial Arbitration (the 'ICCA') since 1976.[1221] The ICCA is a nongovernmental organisation (the 'NGO') with its NGO status accredited by the United Nations, whose main aim is to focus on promoting and improving arbitration as a method of dispute resolution.[1222]

[1221] 'Yearbook Commercial Arbitration, Yearbook Table Of Contents - ICCA' (*Arbitration-icca.org*, 2018) <https://www.arbitration-icca.org/publications/yearbook_table_of_contents.html> accessed 8 December 2018.
[1222] 'About - ICCA' (*Arbitration-icca.org*, 2019) <https://www.arbitration-icca.org/about.html> accessed 4 March 2019.

Prior discussing the New York Convention 1958 it is worth pointing out the existence of the Yearbook Commercial Arbitration (the 'YCA'), the most recent YCA was published in 2022,[1223] however, for illustration of the content the previous publications from 2017 is sufficient.[1224] The 'YCA' consolidates material about international arbitration proceedings from around the world and includes decisions from arbitration tribunals, court decision on arbitration conventions and the major points of development in the international arbitration area[1225]. The YCA is divided into six main parts, commencing with National Reports (Part I), Arbitration Rules (Part II), Recent Developments in Arbitration Law and Practice (Part III) followed by Arbitral Awards (Part IV) with the main Part V consisting of Court Decisions on the main Arbitration Conventions – New York Convention 1958 (Part V – A); European Convention 1961 (Part V – B); Washington Convention 1965 ((Part V – C); Panama Convention 1975 (Part V – D) and finally with Part V – E including Other Court decisions in Arbitration.[1226] The YCA is a valuable source of information on international arbitration and outlines the main convention on international arbitration which will be discussed further.[1227]

As set out in the introduction to the Section 7.2 of this Thesis, the focal point of this Thesis is the enforcement of judgements or awards in determinative dispute resolution processes and, therefore, apart from the elementary details of the conventions such as number of the parties which ratified the convention in question, the direction of the discussion in this subchapter will be orientated towards the issues connected with the recognition and enforcement of

[1223] 'Available Now: The ICCA Yearbook Commercial Arbitration XLVI | ICCA' (*Arbitration-icca.org*, 2022) <https://www.arbitration-icca.org/available-now-icca-yearbook-commercial-arbitration-xlvi> accessed 17 March 2022.
[1224] Albert Jan Van den Berg, *Yearbook Commercial Arbitration, Volume XLII 2017* (Kluwer Law International 2017).
[1225] 'Publications - ICCA' (*Arbitration-icca.org*, 2018) <https://www.arbitration-icca.org/publications.html> accessed 8 December 2018.
[1226] 'Yearbook Commercial Arbitration, Yearbook Table Of Contents - ICCA' (*Arbitration-icca.org*, 2018) <https://www.arbitration-icca.org/publications/yearbook_table_of_contents.html> accessed 8 December 2018.
[1227] This mass of communication in Luhmann terms indicate the possible development of international arbitration towards operative closure. For further discussion please see Chapter 5 section 5.5 and the analysis provided at the end of this Chapter 7.

arbitral awards. The main areas of discussion are the scope of the particular convention; the question of agreement to arbitrate, specifically if the convention in question defines the agreement and sets out requirements for such agreement; grounds for refusal of recognition and enforcement, and if the convention provides rules on the procedural aspect of arbitration.

New York Convention 1958

The New York Convention 1958[1228] (the 'NYC') is ratified by 169 (as of February 2022) states.[1229] The large number of parties to the NYC signifies its world-wide importance as a global instrument. The main purpose of the NYC is to ensure that a foreign arbitral award is recognised and enforced in a territory of a party to the NYC ('foreign' in this context means originating in a territory of a different country rather than the country where the enforcement is sought).[1230] Professor van den Berg recognises two main actions which the NYC focuses on; the first being the recognition and enforcement of arbitral awards which are not domestic; the second being the referral of disputes by courts to arbitration when they are made the subject of court proceedings in breach of an agreement by the parties of the dispute to refer that dispute to arbitration.[1231]

Scope

Article I of the NYC sets out the scope of applicability. There are two basic definitions that arbitral awards must satisfy for the NYC to apply: firstly, the award must have been made in

[1228] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[1229] New York Convention, 'Contacting States » New York Convention' (*Newyorkconvention.org*, 2022) <http://www.newyorkconvention.org/countries> accessed 18 February 2022.
[1230] Ibid Art I.
[1231] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 2 July 2019.

a different state from the state in which the enforcement is sought; secondly, the award must not be a domestic award.[1232] The question which arises at this point is why there are two seemingly similar definitions which both require that the award is not a domestic award. This arrangement is, as van den Berg points out, incorporated in the convention due to a request from different contracting states to the NYC and arrangements in their legal systems.[1233]

The first definition is quite straightforward and easy to apply, the second definition (i.e. that the award be a non-domestic award), requires further explanation. Van den Berg lists three different interpretations of the non-domestic definition which can be all subsumed under this non-domestic category: (i) an award which, although made in the state in which enforcement is sought, was issued under the arbitration law of a different state (i.e. was made pursuant to a foreign curial law); (ii) an award made in the state where the enforcement is sought and also made under the arbitration law of that same state which, however, involves a foreign element (e.g. one party's domicile is in another state); and finally (iii) an award which is not made under any arbitration law (i.e. 'de-nationalised' award).[1234]

With the individual examples of interpretation of the non-domestic category, it is clearer why this additional definition was incorporated in the NYC. Essentially, the non-domestic category of awards allows the scope of the applicability of the NYC to be wider.

Even though the NYC is one of the conventions with the greatest international applicability there are certain disadvantages as well as advantages which can be discussed.

[1232] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art I (1).
[1233] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 4 July 2019.
[1234] Ibid.

As per above, the scope is limited by several rules. The NYC clearly excludes domestic awards from its applicability. On one hand it could be argued that when there is a willingness to harmonise the system of international arbitration, why not include the domestic arbitration in one document which could help harmonise the system. A counter argument is that many states have developed their own system of domestic arbitration and there could be a great reluctance amongst states worldwide to let part of their legal system be subject to limitations imposed by international convention which let part of their sovereignty be taken away. Due to the potential reluctance of the states, the whole effort in trying to achieve further harmonisation could fail.

Another argument connected with the scope of the NYC is that there is the possibility of commercial reservation in a sense that a party can decide that it would limit the scope of NYC applicability only to disputes in commercial matters upon signature, ratification or accession to the NYC.[1235] According to van den Berg, the commercial reservation is utilised by approximately a third of the contracting states.[1236] It could be argued that the interpretation of what is exactly meant by 'commercial matters' may be problematic as there are many legal systems involved, however, in practice, this notion has been interpreted broadly.[1237]

When seeking the meaning of certain terms of a legal instrument, similar instruments could be proven useful in this matter. For example, the above discussed UNCITRAL Model Law provides guidance on how the term 'commercial' should be interpreted.[1238] The guidance includes matters which are of commercial nature, not required to arise solely from contract

[1235] Ibid.
[1236] Ibid.
[1237] Ibid.
[1238] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 July 2019.

such as for example transactions involving supply of goods or services; distribution agreements; or commercial representation or agency.[1239] The list included in the guidance is not exhaustive.[1240] As it was pointed above, the UNCITRAL Model Law is soft law and it is up to the individual states to adopt this system of rules, however, the UNCITRAL Model Law is widely adopted by legal systems and by most of the ratifying parties of the NYC.[1241]

A disadvantage of the possibility of reservation is that it limits the scope of the NYC and by narrowing its scope opposes the desired harmonisation in the international arbitration system. [1242] However, if reservations were not permitted, that could be met with by reluctance amongst the countries as to participation.[1243] There may be certain legal matters in which countries require their own system of rules for a variety of reasons, the most significant being perhaps differences in legal culture. If there were no reservations permitted, the respective countries may not be willing to ratify and, therefore, the NYC would bring less benefits in the overall system. On the other hand this means that the norms of the NYC in reserved areas would not extend to contracting states making their reservations thereby denuding the structural connection with their respective legal systems.

Arbitration agreement

A further area of interest is that of the arbitration agreements by which parties subject their disputes to arbitration. Conveniently, Article II of the NYC deals with agreements to arbitrate

[1239] Ibid Art 1 (1).
[1240] Ibid Art 1 (1).
[1241] Although not the UK; 'Overview Of The Status Of UNCITRAL Conventions And Model Laws' (*Uncitral.un.org*, 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/overview-status-table.pdf> accessed 9 September 2019.
[1242] Harmonisation as a phenomenon can be perceived from different angles, the systems theory angle is discussed at the end of this Chapter.
[1243] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 4 July 2019.

between parties to a dispute.[1244] There are several points which can be highlighted and which cause debate. The first issue is that the NYC requires disputants to enter into a written agreement about their willingness to make their potential dispute subject to arbitration. Therefore, the written form is crucial. It could be argued that this requirement is too strict.

The potential problem could arise when two businesses have been trading with each other for many years, but the original written contract is not available anymore and suddenly a dispute arises. If the original contract included a written arbitration agreement and is available then it is in compliance with the NYC regarding the written form (subject to satisfactory proof of validity). When, however, the original contract is lost and one party is refusing to subject the dispute to arbitration, then there is a problem. Even though the requirement of written form can be seen too strict, it also can be seen as a firm rule which can enhance legal certainty provided that the parties are well informed about this requirement.

Van den Berg further provides an insight in the situation in practice concerning the requirements of Article II NYC. He acknowledges that with the development in international trade, especially concerning the means of communication which developed in the recent decades, the strict requirement for the arbitration agreement in writing may not be addressing the needs of international trade.[1245] As the requirement may not correspond with the practice in international trade today, it is more frequent that the courts interpret this

[1244] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art II.
[1245] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 4 July 2019.

requirement in a more flexible way.[1246] The UNCITRAL Rules provide a definition of arbitration agreement in writing in Chapter II, Option I, Article 7 (3) which reads as follows:

'*An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means*.'[1247]

It is apparent, that the interpretation shifts from a strict requirement of an agreement in writing to the requirement that that there must have been a record of the agreement. The above Article 7 has been amended in 2006 in response to practitioners pointing out that there are cases where the strict requirement to draft the arbitration agreements in writing is not practical.[1248] It was also stated in the Explanatory Note by UNCITRAL[1249] (the 'Explanatory Note') that it would be convenient in cases where the will of the parties to arbitrate is not debatable, the arbitration agreement should be recognised.[1250] Further the Explanatory Note comments on the shift of the interpretation of the agreement in writing stating that there are now two alternatives, the first is honouring the text of the NYC and leaves the requirement unchanged (Article 7(2) of the UNCITRAL Model Law '*The arbitration agreement shall be in writing*');[1251] however, the second, as cited above, requiring the record (in any form) and,

[1246] Ibid.
[1247] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 July 2019 Chapter II, Option I, Art 7(3).
[1248] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 July 2019 28.
[1249] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, purely for informational purposes, included in the *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 July 2019 28.
[1250] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 July 2019 28.
[1251] Ibid Chapter II, Option I, Art 7(2).

therefore, no longer requiring signatures of the parties or exchange of messages.[1252] The above illustrates, that the legal instruments, even though in a form of soft law as the UNICTRAL Model Law is, are able to respond to requirements of the dynamics of international trade.

Additionally to the changes in interpretation brought by the soft law, there is another possibility which is similar to incorporation of terms in the common law, the test '*appears to be that the other party is able to check the existence of an arbitration clause*'.[1253] Similarly to incorporation by notice in the common law where the term is incorporated if there is a sufficient notice which comes before or at the contract formation as seen in *Thornton v Shoe Lane Parking*.[1254] Furthermore, it appears that the arbitration clause can be incorporated if there is a 'continuing trading relationship' between the parties in which there is an arbitration clause being used.[1255] The above again, is similar to common law principles when a term can be incorporated by previous course of dealing subject to a sufficient notice, as per *J Spurling Ltd v Bradshaw*[1256], and consistency in the previous dealing as per *McCutcheon v David MacBrayne Ltd*.[1257] The last possibility, as pointed out by van den Berg, is when the arbitration agreement is a well-known international trade practice in the industry area in question.[1258] A link to the common law principles can be found here as well, in the case of *British Crane Hire*

[1252] Ibid 28.
[1253] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 4 July 2019.
[1254] *Thornton v Shoe Lane Parking* [1971] 2 QB 163.
[1255] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 4 July 2019.
[1256] *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461.
[1257] *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125.
[1258] Albert Jan van den Berg, 'The New York Convention Of 1958: An Overview / ICCA Website - 2003' (*Arbitration-icca.org*, 2003) <https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 4 July 2019.

Corp Ltd v Ipswich Plant Hire Ltd[1259] the Court of Appeal held that a clause can be incorporated into a contract between the parties if there is a common understanding between the parties that the clause is a standard term of trade custom.[1260]

The UNCITRAL Model Law also deals with the possibility of incorporation of an arbitration agreement in Chapter II, Option I, Article 7 (6) where it is stated that the arbitration agreement can be seen as incorporated when the reference to it in a contract between the parties is '*such as to make the clause part of the contract*.'[1261]The wording is leaving the precise rules to the individual states. In common law it could be presumed that the reference in question would need to meet the requirements of the legal principles as outlined above.

Further, a problem which is brought by the second paragraph of the Article II[1262] is that there is a list of elements which shall be included in the 'agreement in writing' defined by the first paragraph of the Article II.[1263] The requirements include an arbitration clause embodied in a contract or an arbitration agreement with the parties' signature or contained in an exchange of letters or telegrams.[1264] When using grammatical interpretation, the list of requirements would be possibly interpreted in an exhaustive manner. However, as per below, it has been indicated that the second paragraph of Article II of the NYC should not be interpreted as exhaustive.[1265] The non-binding Introduction of the consolidated version of the NYC itself

[1259] *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303 (QB).
[1260] Ibid 310.
[1261] *UNCITRAL Model Law On International Commercial Arbitration (1985), With Amendments As Adopted In 2006* (United Nations Commission on International Trade Law 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 4 July 2019 Chapter II Option I Art 7(6).
[1262] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art II.
[1263] Ibid Art II.
[1264] Ibid Art II.
[1265] Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006).

refers[1266] to the UNCITRAL Recommendation from 2006 (also non-binding although issued by the legal body of the United Nations) which amongst other information states that the countries who ratified the NYC should apply the second paragraph of Article II of the NYC '*recognizing that the circumstances described therein are not exhaustive*'.[1267]

An argument which could be used against the effectiveness of the UNCITRAL Recommendation 2006 is indicated in the fact that there are various types of interpretation and some states may not allow their competent authorities to use any other method of interpretation rather than the strict grammatical method which does not allow an individual to look beyond the written words.

Article II of the NYC also does not provide a complete definition of the arbitration agreement. If parties decide to subject their dispute to arbitration, there is a clear requirement on the written form, subject to interpretation, and a list of illustrative written forms (recommended to be read as non-exhaustive) that may be used to provide for arbitration as an option. However, further specification of the required arbitration agreement is not provided. This can be seen from different perspectives. Firstly, the completion of the requirements could be confusing for parties and they may design an arbitration agreement which is later seen as void due to the poor design of the agreement and its inability to meet all criteria precisely. It can be, therefore, viewed as bringing unwanted uncertainty for the parties. The other side of the fact is that due to developments in modern technology there are countless possibilities for self-checking that the parties have in the process of drafting an arbitration agreement, one

[1266] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art I.
[1267] Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006).

relevant example being the London Court of International Arbitration website which provides recommended clauses for parties wishing to subject their disputes to arbitration.[1268]

Further, in support of the view that the lack of a complete definition of an arbitration agreement is not as problematic as it may seem, is the fact that courts appear to be interpreting the arbitration agreement in a more liberal manner than in the past.

The English Court of Appeal dealt with the interpretation of the arbitration agreement for example in the case of *Fiona Trust & Holding Corp v Privalov*.[1269] In this case the Court of Appeal stated that when assessing the arbitration agreement, the liberal interpretation should be adopted. [1270] This approach indicates that rather than applying a strict interpretation, the courts will construe the agreement to arbitrate between the parties with regards to their true intention. This view is supported by the Full Federal Court of Australia in the case of *Rinehart v Hancock Prospecting Pty Ltd*[1271] where the court was dealing with uncertainty of the arbitration agreement and ruled that the words 'any dispute under this deed' should be interpreted in a liberal way taking into an account the intention of the parties.[1272] However, it is clear that the interpretation of arbitration agreements will differ from jurisdiction to jurisdiction and the interpretation will also depend on the national legislation, or common law, of the particular state that jurisdiction.

The above illustrates that even though the NYC could be seen as at the top of the hierarchy when it comes to the legal framework of international arbitration, certain issues cannot be

[1268] 'Recommended Clauses' (*Lcia.org*, 2018) <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx> accessed 12 December 2018.
[1269] *Fiona Trust & Holding Corp v Privalov* [2006] EWHC 2583 (Comm).
[1270] Ibid.
[1271] *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13.
[1272] Ibid 13.

discussed in isolation with only NYC articles being present.[1273] In comparison to the common law approach of English and Australian courts in interpretation of the arbitration agreements the Highest Court of the Czech Republic has adopted a strict interpretation of arbitration agreements and continues to do so as illustrated in one of its recent decisions No. 23 Cdo 1098/2016[1274] where it determined that the interpretation of the arbitration agreements was to be conducted in a strict literal manner. In the decision No. 23 Cdo 1098/2016 the Highest Court ruled that when there is an invalid agreement on how the arbitrators are to be appointed (in the said arbitration clause it was agreed that the arbitrators were appointed by the claimant), the whole arbitration agreement is invalid.[1275]

It is clear that the NYC provides a general 'setting of the scene' for the enforceability of the arbitration agreement in outlining certain requirements (written form, indication of required elements) but a core definition of validity is not included. Apart from the differences in the approach of different states, it is also important to highlight the fact that each case must be also addressed individually taking the legal framework into account and the result will depend on the particular details of each case.

Grounds for refusal

The NYC further states circumstances under which the recognition and enforcement of the foreign arbitral award may be refused.[1276] The reasons for refusing the recognition and enforcement being that: (a) the parties to the arbitration agreement were under some incapacity or the agreement is not valid under the law which the parties subjected themselves

[1273] This point is particularly important for the discussion of the international arbitration system and the systems theory.
[1274] The decision of the Highest Court of the Czech Republic No 23 Cdo 1098/2016 published on 8.11.2016 accessible at: http://kraken.slv.cz/23Cdo1098/2016.
[1275] Ibid.
[1276] Ibid Art V.

to; (b) the party against whom the award is invoked was not given proper notice of the arbitrator's appointment, was not notified about the arbitration proceedings or was not able to present their case; (c) the award is connected to a different dispute than the one for which the arbitration agreement was entered into or that the award contains decision on matters which are beyond the scope of the arbitration agreement; (d) the arbitration tribunal was not composed in compliance with the arbitration agreement or the arbitration proceeding was not in compliance with the arbitration agreement or with the law of the country where the recognition and enforcement is sought; and (e) the award is not yet legally binding on the parties or was set aside or suspended by the competent authority of the country in which it was issued or according to which legal system it was issued.[1277] The above reasons can be used by the party against which the award is invoked and the burden of proof lays upon that party.[1278]

Further, recognition and enforcement can be refused if the competent authority of the state where recognition and enforcement is sought finds (a) the dispute is not capable of being subject to arbitration according to the legal system of that country or (b) the recognition or enforcement is not in compliance with the public policy of that country.[1279] Another possibility to limit the scope of effect of the NYC in more general terms is by any of the states themselves. This limitation is set out in Article I paragraph (3) NYC where it is stated that the states upon signature, ratification or accession to NYC may limit the scope of NYC on the basis of reciprocity (therefore the state will only recognise or enforce an award issued by a state which is also a party to the NYC).[1280] Further, a state which is a party to the NYC can reserve

[1277] Ibid, Art V (1) (a)-(e).
[1278] Ibid Art V (1).
[1279] Ibid Art V (2) (a)-(b).
[1280] Ibid Art I (3).

the applicability of the NYC only to disputes in commercial matters.[1281] One of the greatest advantages of the NYC is undoubtedly the wide impact due to the high number of ratifying parties. This gives arbitration a unique position amongst determinative dispute resolution processes.

The centre point of a discussion about the grounds for refusal set out in the NYC could be viewed generally as the difference in interpretation by different countries which is understandable taking into account cultural and language differences.[1282] The limitation to the refusal grounds set out in Article V is that the first five areas for refusal require the disputant against whom the award is invoked to raise them with the competent authority.[1283] When there is a lack of arbitrability or the award is assessed as violating public policy, the initiative lies within the competent authority itself.[1284] The arising question connected with the interpretation is whether the list is considered as exhaustive or not, similarly to the list of required elements concerning the arbitration agreement. Some scholars point out that the refusal grounds are generally considered as exhaustive, however, some also state that this is not strictly correct and in certain jurisdictions there may also be further refusal grounds concerning the procedure.[1285] As per above, the possibility exists of the countries declaring that the NYC is only applicable on the grounds of reciprocity or of them using the commercial reservation,[1286] effectively adding to the refusal grounds outlined in Article V. In addition,

[1281] Ibid, for information on reciprocity and reservation of parties to NYC can be accessed via http://www.newyorkconvention.org/countries.
[1282] See for example Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 431.
[1283] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art V (1).
[1284] Ibid Art V (2).
[1285] See for example Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 431.
[1286] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art I (3).

there could be differences arising from language and style in which the NYC is incorporated by the ratifying states.[1287]

This brings back the requirement of a holistic approach when assessing the rules in the legal instruments provided for in the system of international arbitration and a need to evaluate further their effect in the national jurisprudence of any particular state in question. In connection with the refusal grounds, the NYC does not state any possibilities for waiver of the refusal grounds (for example as a possibility by the creditor of the arbitration award). With the refusal grounds in Article V paragraph II it is quite clear, that because the initiative originates from the competent authority, it is rather absurd to imagine any possibility of waiver by a party of the refusal grounds should the competent authority decide that there is lack of arbitrability of the subject matter of the dispute or when any recognition or enforcement would be violating public policy. A less absurd situation is the possibility of waiver of the refusal grounds in case of the refusal grounds stated in Article V paragraph I when the initiative must come from the parties. However, the applicability in practice is questionable. A possibility where the rejection could be useful is illustrated on the following example.

The example being that there are two parties, Party A and Party B, both businesses. Party A being a Czech business and Party B being a German business. They have entered into an arbitration agreement which was written and fulfils all the requirements imposed by the NYC. However, in case of Party A, there was only one representative who signed the agreement instead of two which is legally required for all contracts that Party A enters into according to the Czech law which applies to Party A. Nevertheless, the dispute resulted in a binding arbitral

[1287] Andrew Tweeddale and Keren Tweeddale, *Arbitration of commercial disputes: international and English law and practice* (OUP 2005) 412.

award which is now being invoked against Party B. The dispute was dealt with by the Czech Arbitration Tribunal and now Party A seeks to have the award recognised and enforced in Germany where Party B has its assets. Party B does not want to fulfil its obligation according to the award and wants to prolong the process to the longest possible time. Party B, therefore, proves to the competent authority that Party A was incapable of signing the arbitration agreement as not all required representatives were present. Due to the above, the competent authority refuses to recognise and enforce the award and Party A has no other option than to submit the dispute to a court. In the meantime Party B sells assets and goes into administration. Eventually, Party A obtains a court decision but is not successful in enforcing the claim as Party B is liquidated notwithstanding its unfilled obligations.

However, if there was a possible waiver of the refusal grounds stated in Article V paragraph 1, or at least for some of them, Party A through their representatives could waive the incapacity, proving that the intention of Party A was to enter into the arbitration agreement anyway and the economic value of the result of the dispute would be saved.[1288] There are a few flaws in the above. The first would be the question of the circumstances behind the incapacity of Party A. It is Party A who should be ensuring that they responded to all legal requirements when they were entering into the arbitration agreement. Party A could argue that it was their intention to subject the dispute to arbitration, however, what if the award was not in favour of Party A but Party B? In such case, Party A could claim incapacity and it is hard to imagine that Party B would be capable of using the same waiver. Even though a waiver in this situation could be seen as beneficial to the legal system, it could bring a certain imbalance. Another argument here is that the situation above is outlined only taking into an

[1288] Possibility of ratification by the appropriate body of the party in incapacity may be available in certain jurisdictions, however, this discussion is beyond the scope of this Thesis.

account the NYC and not further elements of the legal system as for example the national legislation, which may enable the issue of protective orders to safeguard assets until resolution of the dispute.[1289]

An arising question which relates to the refusal grounds is if they should be revised and the revised version should take any potential development into an account including more precise wording and clear definition as to the amount of discretion that the NYC gives to the individual states in the area of refusal grounds. There are various mechanisms which the NYC could adopt in order to unify the interpretation. These mechanisms could be a supreme court; a unitary dispute settlement process; or an executive committee issuing binding regulations.

Procedural aspect of recognition and enforcement within the NYC

A further area for discussion is the procedural aspect of recognition and enforcement contained in the NYC. Article III provides that the arbitral awards shall be recognised as binding and shall be enforced in accordance with the procedural rules set out in the national law of the state in question.[1290] The NYC outlines several conditions and limitations. The limitations are the refusal grounds which were discussed above. The conditions, which are set out in Article III, are that the states shall not impose harsher conditions or higher fees that are imposed on recognition or enforcement of the domestic awards.[1291] There are, therefore, two issues to be discussed.

Firstly, the fact that the NYC leaves the procedure to the contracting states and the rule that the procedure should not differ in the question of costs and the nature of the conditions from

[1289] For example The Civil Procedure Rules 1998 Part 25.
[1290] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art III.
[1291] Ibid Art III.

the procedure dealing with domestic arbitral awards. As per the above issues, this too could be seen from different perspectives. On the one hand, it could be argued that the delegation of the procedure to the national laws means that there is a lack of harmonisation and even though the recognition and enforcement is granted, subject to further limitations, by the NYC, the most important part (i.e. the actual process of the recognition and enforcement) is not integrated. On the other hand, contrary to this argument, absent that delegation states could be reluctant to ratify a convention that aims to 'steal' the procedural power from them. Another point is that it would be almost impossible to try to harmonise the procedure amongst the ratifying parties. Such an endeavour would most likely lead to a never ending iterative process of discussion, suggestion and amendment that could completely undermine the political will for reciprocal enforcement.

Secondly, the fact that the conditions that the NYC actually sets out require the same costs and same approach to the procedure of recognition and enforcement of foreign awards as applied to domestic awards, could be seen positively. At least there are some conditions which the states should follow, even if the procedure is set out by their national laws. This, however, does not deal with the fact that the national laws still could be very much different from each other. Nevertheless, the fact that this rule ensures that the foreign awards are not discriminated against in comparison to domestic awards could be seen of a great significance.

In conclusion, the major issue which is interlinked with all areas of the above discussion, is that a convention cannot be too limiting as it is not a regional but a global instrument, and, therefore, there is a need to respect and accommodate the sovereignty of the contracting states and the reality that the desire for sovereignty is likely to give rise to possible reluctance on the part of states to limit to any great extent their procedural autonomy. If the NYC was

more detailed or was missing the possibility of reservations for example, it is likely that a great number of the states would not sign the convention, or at least would not ratify it and become contracting states to it. Another argument for a short succinct text is that it is possibly easier for states to integrate the requirements of a short convention with their own legal and judicial processes as well as obtain a true translation (the convention has only a few authorised language versions - Chinese, English, French, Russian and Spanish) [1292] . Further, the application and the use of the NYC can be seen as a success, it has been in force for more than 50 years and it has more than two thirds of UN states ratifying it. To conclude with a famous quote, Professor Albert Jan van den Berg, one of the most respected authorities on the NYC, said at the ICCA congress which celebrated 40 years of the NYC that: '*If it ain't broke, don't fix it.*'[1293]

The above discussion also brings in points for connecting the norms included in the NYC to Luhmann's perspective of the systems theory. In the analysis at the end of this Chapter are the characteristics of the NYC attributed to the individual elements of the autopoietic system and even though it is suggested in Chapter 5 section 5.5 that international arbitration is not likely to be an autopoietic system, the norms are likely to be integrated in various autopoietic systems.[1294]The point above also includes the perspective of harmonisation which is discussed from a Luhmann perspective at the end of this Chapter 7.

[1292] Ibid Article XVI.
[1293] (*Arbitration-icca.org*, 2018) <https://www.arbitration-icca.org/media/1/13318252772820/new_ny_conv.pdf> accessed 5 January 2019.
[1294] For detailed discussion please see Section 7.7 of this Chapter 7.

The ICSID Convention

The Convention on the settlement of investment disputes between States and nationals of other States was concluded in Washington in 1965 (the ICSID Convention).[1295] The ICSID Convention established the International Centre for Settlement of Investment Disputes (hence the abbreviation 'ICSID'). The ICSID Convention is specific in creating a unique forum for settling investment disputes between states and foreign investors.[1296] The intention behind the creation of the ICSID Convention was, amongst other reasons, to create a system which may be preferable to the resolution of investment disputes by subjecting them to litigation.[1297] As of today (February 2022), the ICSID Convention has been signed by 163 states and ratified by 155.[1298]

The content of the ICSID Convention is different to NYC discussed above; mainly due to a specificity of the disputes and the establishment of the ICSID itself. The relevance for the purposes of this Thesis can be seen in the fact that one party to a dispute to which the ICSID Convention is applicable could be a foreign investor which is not a state, thus this party could be a business.[1299] Even though the number of the cases in not overwhelming[1300] (although the amount of investment according to some authors is),[1301] due to the above it is useful to include a brief discussion as per the content of the ICSID Convention.

[1295] 'UNTC' (*Treaties.un.org*, 2019) <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028012a925> accessed 16 September 2019.
[1296] Jieying Ding, 'Enforcement in International Investment and Trade Law: History, Assessment, and Proposed Solutions' (2016) 47 Geo J Int'l L 1137.
[1297] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18th March 1965, entered into force 14th October 1966) 575 UNTS 159 (ICSID Convention) Preamble.
[1298] 'Database Of ICSID Member States' (*Icsid.worldbank.org*, 2022) <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> accessed 18 February 2022.
[1299] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18th March 1965, entered into force 14th October 1966) 575 UNTS 159 (ICSID Convention) Art 25.
[1300] 'ICSID Web Stats 2018-2' (*Icsid.worldbank.org*, 2018) <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-2%20(English).pdf> accessed 17 September 2019.
[1301] Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001).

Scope

The first Chapter of the ICSID Convention is concerned with the establishment of the ICSID itself and so it does not begin with the introductory provisions including scope and definitions as do other conventions.[1302] Articles 1-24 deal with the establishment and organisation of the ICSID and administrative aspects surrounding its establishment.[1303]

Chapter II is titled 'Jurisdiction of the Centre' and, in three articles (Article 25-27), deals with the jurisdiction of ICSID.[1304] It is provided that the jurisdiction covers investment disputes between a contracting state and a national of another contracting state under a condition that the parties provide consent in writing to subject their dispute to the ICSID.[1305] It is not possible for parties to withdraw their already given consent unilaterally.[1306]

The definition of who is the 'national of another contracting state' is provided further in Article 25 (2). It could be either a natural person who is a national to a contracting state to the ICSID Convention, however, this must be a different contracting state to the one which is a party to the investment dispute.[1307] Therefore, this person must be a foreigner to that state party. Apart from a natural person, it is also possible that the national of another contracting state is a legal person, provided the nationality of this person is in another contracting state rather than the contracting state which is a party to the dispute; or if there is sufficient foreign control over such person while being a national to the contracting state who is a party to the dispute.[1308]

[1302] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18th March 1965, entered into force 14th October 1966) 575 UNTS 159 (ICSID Convention) Section I Arts 1-24.
[1303] Ibid Section I Arts 1-24.
[1304] Ibid Section I Arts 1-24.
[1305] Ibid Art 25 (1).
[1306] Ibid Art 25 (1).
[1307] Ibid Art 25 (2) (a).
[1308] Ibid Art 25 (2) (b).

Arbitration agreement

The ICSID Convention does not require an arbitration agreement per se; the process is marginally different. As mentioned above, to be able to subject a dispute to ICSID arbitration, there must be consent in writing of the two parties to the dispute.[1309] Article 26 further specifies that the understanding of the consent is one which excludes any remedy other than arbitration.[1310] The ICSID Convention provides that there may be a requirement by a contracting state to firstly use all administrative instruments available in that said state in order to be able to demand the consent to the ICSID arbitration.[1311]

Chapter III deals with conciliation and provides rules for those proceedings, hence the interest for this Thesis is in Chapter IV which provides rules for arbitration.[1312] As there is no arbitration agreement, the process differs from the NYC. There is the requirement of the written consent and further one of the parties has to request the arbitration proceedings according to Article 36.[1313] The request is directed to the Secretary-General and it has to include details about the parties and the nature of the dispute as well as the written consent of the parties.[1314] After the Secretary-General reviews the request, he then must notify the parties of registration or of a refusal to register.[1315] This process replaces the arbitration agreement requirement.

[1309] Ibid Art 25 (1).
[1310] Ibid Art 26.
[1311] Ibid Art 26.
[1312] Ibid Chapter IV.
[1313] Ibid Art 36.
[1314] Ibid Art 36.
[1315] Ibid Art 36.

Grounds for refusal

Article 37-49 contain rules concerning the constitution of the tribunal, its powers and function and the award.[1316] Section 5 of the ICSID Convention includes three articles: Article 50 deals with interpretation; Article 51 deals with revision of the award; and Article 52 provides for annulment of the award.[1317] The annulment of the award, which can be requested by either party to the dispute, means that the award is no longer in place and at a request of either party the dispute can be submitted to a new tribunal according to the ICSID Convention.[1318]

The grounds for annulment can be put in contrast to the provisions giving grounds for refusal of recognition and enforcement of an award in other conventions.[1319] The grounds for annulment are as follows: the party may request an annulment if the tribunal was not properly constituted, or if the tribunal exceeded its powers, further, when a member of the tribunal was involved in corruption; also when a fundamental rule of procedure was departed from; or if there was no reasoning included in the award.[1320] There is a time limit to make the application for the annulment of 120 days from the date on which the award was rendered.[1321] In case of suspicion of corruption, the time limit runs from the point of discovering reasons for believing that there was corruption and no more than three years after the award was rendered.[1322]

If the grounds for annulment are contrasted with grounds for refusal of enforcement of an award included for example in the NYC, it is apparent that the grounds for annulment differ

[1316] Ibid Arts 37-49.
[1317] Ibid Arts 50-52.
[1318] Ibid Art 52 (6).
[1319] See for example Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art V.
[1320] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18th March 1965, entered into force 14th October 1966) 575 UNTS 159 (ICSID Convention) Art 52 (1).
[1321] Ibid Art 52 (2).
[1322] Ibid Art 52 (2).

to a great extent. The ground which is similar to both conventions relates to the constitution of the arbitration tribunal.[1323] Both, the NYC and the ICSID Convention, include an incorrect composition of the arbitration tribunal as a ground for refusal and annulment (i.e. refusal of the recognition and enforcement of an NYC award and ground for annulment of an ICSID award respectively). [1324] The rest of the grounds for refusal of the recognition and enforcement of an award in the NYC are not matched by annulment in the ICSID Convention. This fact could potentially facilitate enforcement of an award made under the ICSID Convention in circumstances when the enforcement of such an award could be resisted under the NYC.

Procedural aspects

The reason why the recognition and enforcement of an award made under the ICSID Convention can be potentially more straightforward in comparison to the NYC is that in Section 6 of the ICSID Convention, which deals with recognition and enforcement of the award, there are no further grounds for refusal included.[1325] Therefore, the only situation when a contracting state can refuse to recognise and enforce an award would be when the award is annulled pursuant to Article 52 of the ICSID Convention as discussed above. This interpretation is clear as the parties are allowed to request annulment within a time limit of 120 days from when the award was rendered (except for corruption) and it is imaginable that within these 120 days the award could be able to be recognised and enforced.

[1323] See NYC Art V 1 (d) and the ICSID Convention Art 52 (1) (a).
[1324] Ibid Art 52 (1) (a).
[1325] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18th March 1965, entered into force 14th October 1966) 575 UNTS 159 (ICSID Convention) Section 6.

Further, the award could have been already recognised and enforced given the length of the time limit. Article 52 states that under certain circumstances, the award could stay enforcement pending the decision of an ad hoc Committee which deals with the annulment, if so requested by the annulment applicant.[1326] This possibility gives the annulment of the award slightly different characteristics than the refusal of recognition and enforcement. The grounds for annulment seem to cover larger periods of time, starting from the rendering of the award and continuing for up to 120 days (except for corruption), in which time scale the award could have been already recognised and enforced. On the other hand, the grounds for annulment do not extend to those issues that typically give rise to grounds for refusal of recognition and enforcement under the NYC, therefore, from this perspective the area of potential impact of the annulment rules is narrower.

The ICSID convention is an important international instrument, despite the fact that the parties comprise of both a contracting state and a person (natural or legal) from another contracting state. It is still important to include the ICSID convention to this section as the person from another contracting state could be an investor based in the UK. The number of disputes dealt with by the ICSID are not many: however, ICSID can be viewed as an effective instrument in the field of international arbitration of investment disputes.[1327]

The above international instruments were selected in order to provide an illustration of the norms which are part of the international arbitration legal framework. The NYC is one of the major conventions. Regarding the ICSID, even though the number of the ratifying parties is significant, the focus of the convention is more specific than the NYC. Globally, there are many more instruments which include norms related to international arbitration, for example the

[1326] Ibid Art 52 (5).

[1327] The view on the norms of ICSID is addressed from Luhmann's perspective at the end of this Chapter 7.

Mercosur Treaties[1328] or the Montevideo Convention,[1329] however, for the purposes of this Thesis, the above normative framework is sufficient in order to provide the desired analysis regarding the systems theory.

7.4 Legal Framework from a regional perspective

The European Convention on International Commercial Arbitration 1961

Another instrument which is convenient to discuss is the European Convention on International Commercial Arbitration 1961[1330] (the 'ECICA'). The ECICA was placed in the section of the regional perspective as it is functionally located to impact mainly European countries. The main aim of ECICA is to promote the development of European trade.[1331] The Preamble indicates several characteristics of the ECICA. Firstly, as above, it identifies the main aim and also indicates the territorial impact of the convention. The ECICA is ratified by 31 countries (the United Kingdom not being a ratifying party, however, it is convenient to outline ECICA and its principles to illustrate the regional level), mainly from the European territory, all of the countries also being parties to the NYC.[1332] The ECICA acknowledges the existence of the NYC and in several areas adopts the same wording as the NYC. This shows the emphasis of effectiveness and support for the main aim of the convention, promotes legal certainty and limits potential discrepancies between the NYC and ECICA.

[1328] Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (adopted 26th March 1991, entered into force 29th November 1991) 2140 UNTS 257.
[1329] Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (adopted 8th May 1979, entered into force 14th June 1980) 1439 UNTS 87.
[1330] European Convention on International Commercial Arbitration (adopted 21 April 1961, entered into force 7 January 1964) 484 UNTS 349.
[1331] Ibid Preamble.
[1332] Ibid.

As suggested, the ECICA was not designed with an intent of a global impact.[1333] One of the main aims of the ECICA was to enhance legal certainty in the area of international arbitration for countries of the now former Eastern bloc.[1334]

Scope

The first area of discussion of the ECICA is the scope of its application. The scope of its application is wider in terms that, whilst the NYC applies to foreign arbitral awards and deals with the recognition and enforcement of such awards,[1335] the ECICA applies to arbitration agreements concluded for the purpose of settling disputes arising from international trade[1336] as well as to arbitral procedures and awards based on above agreements.[1337] However, the scope of the ECICA is generally narrower in terms of the nature of the relationship between the parties who enter into the arbitration agreement.

While the NYC gives options to countries to opt for only commercial use (the commercial reservation); the ECICA automatically applies only in the area of international commercial arbitration, as even its title suggests. Therefore, the scope of the application is both wider and narrower in different aspects. The ECICA provides parties with further details concerning the organisation of the arbitration which can be useful when drafting their contracts.

Similarly to the NYC, the scope of application does not include domestic awards. It is clear from the Preamble, that the reason for drafting the ECICA was the promotion of the cross-

[1333] Dominique Hascher, 'Commentary On The European Convention 1961', *Yearbook Commercial Arbitration Volume XXXVI 2011* (Wolters Kluwer 2011) 504.
[1334] Ibid 507.
[1335] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) Art I.
[1336] European Convention on International Commercial Arbitration (adopted 21 April 1961, entered into force 7 January 1964) 484 UNTS 349 Art I (1)(a).
[1337] Ibid Art I (1)(b).

border European trade. Therefore, it is understandable that the domestic awards were left out or left to be dealt with by the national legislation. On the other hand, there is a significant difference between the number of states which ratified the NYC and the ECICA. With a significantly smaller number ratifying the ECICA, it could be argued that an extension of the scope to encompass domestic awards could be less difficult. However, the reluctance of sovereign countries to adhere towards a convention which limits their sovereignty is persistent here as well.

Arbitration agreement

The ECICA, being applicable to arbitration agreements, provides further guidance with regard to the arbitration agreement. The concept of an arbitration agreement is defined as any clause in a contract, or an arbitration agreement, being signed by the parties (or included in their letter or teleprinter communication), or any further agreement which is authorised as an arbitration agreement by the laws of a state party which ratified the ECICA whose laws do not require a written form of such agreement.[1338] This is an interesting difference from the NYC, where the written form is required. Therefore, it is clear that the ECICA text requires a more flexible approach. However, the practical impact of this flexibility is questionable.

As it was outlined above, the countries which ratified the ECICA also ratified the NYC. The NYC requires a written form, therefore, the written form is obligatory for the countries who ratified the NYC and will be a part of their legal systems. The understanding of an arbitration agreement is similar to the one defined by the NYC.

[1338] Ibid Art I (2)(a).

The ECICA, however, provides for further details regarding the content of arbitration agreements. These details are included in Article IV which is one of the core articles of the ECICA dealing with the organisation of the arbitration.[1339] The first paragraph of Article IV gives the parties options for individual elements which constitute an arbitration agreement. The parties can submit their dispute to a chosen arbitral institution, and, if this is the option they choose, the rules of the particular institution will apply;[1340] or to an ad hoc arbitral procedure,[1341] in which case the parties are free to appoint arbitrators or choose the way the arbitrators are appointed, free to determine the place of arbitration, and free to set out the procedure for the arbitrators.[1342]

Further details, as to the content of the arbitration agreement are included in Article VII which deals with applicable law.[1343] It is outlined that the parties have autonomy in selecting the applicable law when drafting the arbitration agreement. The above, provides the parties with options as to the content of their arbitration agreement. It is convenient that these options are set out as they can help with a certain harmonisation of the requirements of the arbitration agreements between the states which ratified the ECICA. The NYC leaves such issues to national law.

Grounds for refusal

Further, the area of interest of the discussion are the grounds for the refusal of recognition or enforcement of the award. Concerning the ECICA, the article which outlines the refusal grounds is Article IX.[1344] The ECICA adopts different wording in comparison to the NYC and

[1339] Ibid Art IV (1).
[1340] Ibid Art IV (1)(a).
[1341] Ibid Art IV (1)(b).
[1342] Ibid Art IV (1)(b)(i)-(iii).
[1343] Ibid Art VII.
[1344] Ibid Art IX.

the scope of the refusal grounds differ. Article IX outlines that the setting aside of the arbitral award in one country constitutes a ground for the refusal of recognition or enforcement in another country only if the setting aside was made in the country of origin or in the country under whose law the award was made and this setting aside was for one of the listed reasons.[1345]

The reasons are similar to the refusal grounds listed by the NYC. One of the main differences is that the ECICA in paragraph 1 of Article IX by its different specification enables the international recognition or enforcement to awards which have been annulled in the country of their origin for reasons other than the reasons listed in Article IX.[1346] This means that '*an award remains enforceable notwithstanding its becoming a nullity on other grounds in the country where it was made*'.[1347] This is an interesting difference between the two conventions.

Procedural aspect

The final area of interest is the question of procedure. The procedure in question is not the arbitration procedure but the procedure connected with recognition or enforcement of arbitral awards. In comparison to the NYC, the ECICA includes some elements of arbitral proceedings, especially regarding ad hoc arbitration. However, the ECICA does not specify further procedural aspects concerning the rules which are applicable on recognition or enforcement of the awards. Therefore, it is likely that the procedural rules of the enforcing state (i.e. the state where the recognition or enforcement of the award is sought) will apply.

[1345] Ibid Art IX.
[1346] Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXXVI 2011* (Kluwer Law International 2011) 537.
[1347] Ibid 537.

The ECICA is acknowledging the existence of the NYC and can be perceived as a convention which specifies certain areas that both conventions impact and includes additional provisions outside of the scope of the NYC. On one hand the scope of the ECICA is wider, however, the general scope is narrower as it applies only in the area of international commercial arbitration. The ECICA provides certain guidance for the parties regarding the content of the arbitration agreement. Further, the ECICA includes similar provision regarding the grounds for refusal of the recognition or enforcement of the award, however, there are certain differences. The refusal grounds in the NYC are more general and they include violation of the public policy, while the ECICA includes fewer express refusal grounds (which might appear to enhance the international effectiveness of the awards); but by so doing the ECICA may facilitate a non-exclusive interpretation of those express grounds whereby contracting states would supplement those grounds with additional grounds from their own legal orders. As to the procedural rules regarding the recognition or enforcement of the awards, the ECICA does not outline any special requirement (in comparison to the NYC which states that the applicable procedural rules are procedural rules of the country where the recognition or enforcement is sought).[1348]

7.5 Legal framework from a domestic perspective

In order to follow similar structure as in the previous Chapter 6 discussing the PIL system, it is convenient to outline the relevant normative environment of international arbitration on the national level, for the purposes of this Thesis, the outlined example of national legislation is the legal system of England and Wales. The main focus will be on Arbitration Act 1996,

[1348] The relationship between the two conventions is addressed in the systems theory perspective at the end of this Chapter 7.

however, it is important to note that the Foreign Judgments (Reciprocal Enforcement) Act 1933 which is discussed in section 6.3 of Chapter 6 does also include provision related to arbitration as s. 10A states that the provisions of the Act applies to arbitral awards accordingly except for s. 1(5) and s. 6.[1349]

Additionally, the Arbitration (International Investment Disputes) Act 1966 includes provisions for enforcement of ICSID awards[1350] and the Arbitration Act 1950 in the remaining provisions of ss 35 to 44 provides for enforcement of awards outside of the scope of NYC and the Arbitration Act 1996.[1351] For the purposes of placing the national legislation within the systems theory at the end of this Chapter 7 however, discussion of the main instrument, i.e. the Arbitration Act 1996 is sufficient.

Arbitration Act 1996

As for PIL when the national level was considered, the English legal system is the most convenient jurisdiction. It is a sophisticated commercial jurisdiction that is familiar to UK businesses. It is also a real possibility that the UK business might contract for UK arbitration, although enforcement of any resulting order, may be required in another jurisdiction.

The Arbitration Act 1996 (the AA 1996) is possibly the most significant statute for the English legal system which concerns international arbitration. The AA 1996 is relevant for the purposes of this Chapter 7 considering the LCIA is a popular venue for international arbitration, and, therefore, provisions applicable on arbitration where the seat of arbitration is in England and Wales or Northern Ireland are of interest. Additionally, certain provisions do apply to

[1349] Foreign Judgments (Reciprocal Enforcement) Act 1933 s. 10A.
[1350] Arbitration (International Investment Disputes) Act 1966 Preamble.
[1351] Arbitration Act 1950 s. 35.

proceedings seated outside England and Wales or Northern Ireland.[1352] These are from Part I (Arbitration pursuant to an arbitration agreement), sections 9-11 (stay of the arbitration proceedings) and section 66 (enforcement of arbitral awards).[1353] Further, Part III of the Arbitration Act 1996 (Recognition and enforcement of certain foreign awards) applies to the foreign award as a whole. Part II of the AA 1996 is not of a direct interest of this Thesis as it mainly includes provisions regarding domestic arbitration. Interestingly, the AA 1996 is not based on the UNCITRAL Model law, however, does include similar provisions.[1354]

Scope

From section 2 of the AA 1996 where the scope is imbedded, it is clear that Part I of the AA 1996 applies when the seat of arbitration is in England and Wales or Northern Ireland[1355] following with the outline of the sections above (9-11 and section 66) which apply also when the seat is outside England and Wales or Northern Ireland.[1356] The AA 1996 defines the seat as the juridical seat in section 3 meaning the legal seat or the domicile of arbitration rather than its geographical location.[1357] Further the AA 1996 outlines the significance of the mandatory provisions which cannot be contracted out by the parties.[1358] The mandatory provisions are listed in Schedule 1 of the AA 1996 and are concerned for example with the immunity of the arbitrators (section 29) and enforcement of the arbitral award (section 66).

[1352] Arbitration Act 1996 Section 2.
[1353] Ibid Section 2.
[1354] 'GAR Know How: Commercial Arbitration: England & Wales' (*Globalarbitrationreview.com*, 2019) <https://globalarbitrationreview.com/jurisdiction/1005766/england-&-wales> accessed 27 September 2019; 'GAR Know How: Commercial Arbitration: Czech Republic' (*Globalarbitrationreview.com*, 2018) <https://globalarbitrationreview.com/jurisdiction/1004943/czech-republic> accessed 27 September 2019.
[1355] Arbitration Act 1996 Section 2(1).
[1356] Ibid Section 2(2).
[1357] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 144.
[1358] Arbitration Act 1996 Section 4.

Arbitration Agreement

Section 6 of the AA 1996 defines arbitration agreement and outlines that it is an agreement by which the parties agree to submit present or future disputes to arbitration.[1359] Any agreements to which the AA 1996 apply must be in writing, which means that they must be either made in writing, regardless of signature, made by exchange of communication in writing or evidenced in writing.[1360] The AA 1996 also outlines the separability of the arbitration agreement outlining its continuous validity despite the invalidity of an agreement of which the arbitration agreement forms a part.[1361]

Stay of proceedings

As outlined above, sections 9-11 impact arbitrations with their seats outside of England and Wales or Northern Ireland and are mandatory provisions are per Schedule 1 of the AA 1996. These sections concern stay of legal proceedings.[1362] Section 9 is the most general, as section 10 concerns interpleader issues and section 11 refers to where Admiralty proceedings are stayed.[1363] Section 9 of the AA 1996 outlines that on an application the court shall grant a stay unless the arbitration agreement is null and void.[1364] This is an important point and it illustrates the interlink between the court system and the system of international arbitration. In Luhmann's perspective, as it is outlined at the end of this Chapter 7, this can be viewed as a structural coupling between the legal system and the system of arbitration and, in particular, international arbitration seated in England and Wales or Northern Ireland.

[1359] Ibid Section 6.
[1360] Ibid Section 5(2).
[1361] Ibid Section 7.
[1362] Ibid Sections 9-11.
[1363] Ibid Sections 9-11.
[1364] Ibid Section 9(4).

Proceedings

Section 12 refers to the power of the court to extend time for commencement of arbitral proceedings and the following sections of the AA 1996 provide for the commencement of the proceedings and aspects of the dispute resolution processes of the arbitral tribunal including for example the jurisdiction of the arbitral tribunal in section 30 or the powers of the court in relation to arbitral proceedings in sections 42-45. These supportive powers of the court are concerned with the enforcement of peremptory orders of the tribunal or securing attendance of witnesses.[1365] This is another interesting point from the perspective of systems theory as this can be seen as a strong structural coupling between the legal system and the system of arbitration and international arbitration seated in England and Wales or Northern Ireland. It is beyond the scope of this Thesis to discuss the provisions in detail, however, it is worth outlining the aspect of enforcement in section 66 as this applies to international arbitration as well.[1366]

Enforcement

Section 66 of the AA 1996 provides one of the most fundamental rules for the system of arbitration as it outlines that an award which is made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgement of a court.[1367] The leave will not be given if the award debtor shows that the tribunal lacked substantive jurisdiction.[1368] There are several ways how the award can be challenged including said lack of jurisdiction or serious irregularity. [1369] Such serious

[1365] Ibid Section 42-43.
[1366] Ibid Section 2(2)(b).
[1367] Ibid Section 66(1).
[1368] Ibid Section 66(3).
[1369] Ibid Section 68.

irregularity could be for example when the tribunal exceeded its power or when the award was obtained by fraud.[1370] These grounds being similar in approach to the challenge of an enforcement of a foreign judgement discussed in Chapter 6 of this Thesis in Section 6.3.

Part II ss 99-104 – foreign awards

An important part of the AA 1996 is the Part III as mentioned above, which concerns recognition and enforcement of certain foreign awards. Reference might also be made to the continuation of Part II of the Arbitration Act 1950 as outlined above.[1371] Further, ss 100 to 104 are concerned with recognition and enforcement of the NYC awards. Section 100(1) outlines that the NYC award is an award which is made in pursuance of arbitration in a state which is a party to the NYC other than the UK. A NYC award may, by leave of the court, be enforced in the same manner as a judgement of a court.[1372] This is important in a similar manner to section 66 mentioned above. With regards to international arbitration, section 66 and Part III of the AA 1996 operate to achieve the same purpose – an award which is an outcome of a dispute with a foreign element will be recognised and enforced by the courts and this applies to the awards generated by a tribunal where the arbitration has its seat in England and Wales or Northern Ireland as well to the NYC awards (and certain other awards as per section 99).

In line with the previous discussion Part III of the AA 1996 provides grounds for refusal of recognition and enforcement in its section 103.[1373] The grounds for refusal are in line with the previous discussion and it is apparent that the rules concern similar aspects, for example incapacity of a party to the arbitration agreement or the arbitration agreement not being valid

[1370] Ibid Section 68(2).
[1371] Ibid Section 99.
[1372] Ibid Section 101(2).
[1373] Ibid Section 103(2).

under the law to which the parties subjected it.[1374] Correlation of Part II and section 66 is addressed in section 104 where it is outlined that nothing in the above provisions affects any right to rely upon or enforce a NYC award at common law or under section 66.

The above brief outline of some of the selected provisions of the AA 1996 provides us with the aspects which are forming a part of the legal system yet do impact arbitration proceedings and effectively are part of the arbitration system as well. This outline is particularly useful for the discussion at the end of this Chapter 7 when the systems are contrasted, and their linkage outlined.

7.6 Arbitration rules

Arbitration rules issued by the arbitration institutions are another source of recognition and enforcement in international arbitration. As per above, the rules of arbitration institutions are activated when the parties choose to subject their dispute to institutional arbitration.[1375] In this section, the rules issued by the London Court of International Arbitration (the 'LCIA') are used for illustration with comparison to rules of the Singapore International Arbitration Centre (the 'SIAC') and the Hong Kong International Arbitration Centre (the 'HKIAC'). The purpose of this illustration is similar to the national legislation above – the nature and some of the content can be used when the linkage between the legal system and the system of international arbitration is discussed at the end of this Chapter 7. It is not the aim of this section to exhaustively describe the rules.

Regarding the timeline of the arbitration proceedings the rules of the arbitration institution apply to most of the timeline of the dispute. For illustration, the LCIA Rules include 32 Articles

[1374] Ibid section 103(2).
[1375] Gary B Born, *International arbitration: law and practice* (Kluwer Law International Alphen aan den Rijn 2012) 36.

comprehensively titled as per their content.[1376] The first 13 Articles of the LCIA Rules deal with the pre-procedural aspects of the arbitration proceedings. Article 1, for example, provides the parties with requirements connected to a request for arbitration under the LCIA Rules.[1377] Further, the provisions deal with the rules for formation of the tribunal;[1378] requirements towards the arbitrators;[1379] or communication between the parties and the tribunal amongst other details.[1380]

The LCIA Rules then follow with Articles 14 to 25 which can be perceived as the core rules for the proceedings. These provisions include for example: conduct of proceedings;[1381] oral hearings;[1382] jurisdiction and authority;[1383] or interim and conservatory measures.[1384] Further, the LCIA Rules do include provision concerning witnesses[1385] and experts which may be appointed to give commentary about specific issues subject to the tribunal consulting with the parties regarding the appointment.[1386] The LCIA tribunal also possesses additional powers which it is able to utilise in the arbitration proceedings.[1387] These additional powers give the tribunal rights to, for example, order any party to make any documents, goods, samples and similar items under the control of the said party available for the inspection of the tribunal.[1388]

[1376] 'LCIA Arbitration Rules' (*Lcia.org*, 2020) <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 27 February 2022.
[1377] Ibid Art 1.
[1378] Ibid Art 5.
[1379] Ibid Art 6.
[1380] Ibid Art 13.
[1381] Ibid Art 14.
[1382] Ibid Art 19.
[1383] Ibid Art 23.
[1384] Ibid Art 25.
[1385] Ibid Art 20.
[1386] Ibid Art 21.
[1387] Ibid Art 22.
[1388] Ibid Art 22 (iv).

The tribunal is also empowered to decide whether or not to apply strict rules of evidence[1389] or to order compliance with legal obligations as well.[1390]

Articles 26 to 32 include provisions which can be seen as focusing on other aspects of the proceedings such as the award;[1391] costs;[1392] and confidentiality;[1393] as well on general elements.[1394] The award is issued in writing and, unless the parties agree otherwise, the award also includes reasoning on which the award is based.[1395] The parties are obliged to carry out any awards immediately without any delay.[1396] The parties are also prohibited from appealing to, or from applying for review or recourse to, the courts or any other legal authority.[1397] The provision dealing with the award does not include further information about recognition or enforceability. Recognition and enforcement is, as suggested above, included marginally in the last article of the LCIA Rules.[1398]

Article 32 which includes general provisions does include a requirement that the tribunal and the parties '*…shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat*.'[1399] From the wording it is clear that the recognition and enforceability must be ensured at the seat of the arbitration which in this instance is the UK. This provision ensures that the tribunal and the parties act with reasonable care concerning the enforceability of the award.

[1389] Ibid Art 22 (vi).
[1390] Ibid Art 22 (vii).
[1391] Ibid Art 26.
[1392] Ibid Art 28.
[1393] Ibid Art 30.
[1394] Ibid Art 32.
[1395] Ibid Art 26.2.
[1396] Ibid Art 26.8.
[1397] Ibid Art 26.8.
[1398] Ibid Art 32.
[1399] Ibid Art 32.2.

In comparison, the rules of the SIAC do also contain a very similar clause stating that the tribunal and other parts of the SIAC '…*shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award*.'[1400] In contrast, the HKIAC Rules do not include such provision and the enforceability is dealt with in a provision stating that the parties waive any objections to the validity or enforcement of the award.[1401] However, there is no following rule which would require the tribunal and the parties acting in bona fidei or a request to ensure recognition and enforceability of the award. It is debatable to what extent the provisions requiring the tribunals and the parties to make reasonable effort to ensure recognition and enforcement of the award are enforceable themselves. This would be a matter of interpretation of the notion of 'reasonable effort' or 'reasonable endeavours' in any particular case.[1402] If a party sought to compel the other party or the tribunal to make a reasonable effort to ensure the recognition and enforcement of the arbitral award, determinations of fact would need to be made clearly defining what is perceived as reasonable effort in any particular case and where the lines of the notion should be drawn in order for a successful claim to be made against the party arguably in default.

The rules of the arbitration tribunals, although not very extensive, do manifest a strong relevance for the system of international arbitration. As discussed in Chapter 5, there are signs that the centres may develop into autopoietic system in time. The rules are an example of the normative aspect which belong to the system of international arbitration and it will be

[1400] Zulkifli Amin, 'Singapore International Arbitration Centre | SIAC Rules 2016' (*Siac.org.sg*, 2016) <http://www.siac.org.sg/our-rules/rules/siac-rules-2016> accessed 7 October 2019 Art 41.2.
[1401] 'The 2018 HKIAC Administered Arbitration Rules' (*Hkiac.org*, 2018) <https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf> accessed 7 October 2019 Art 32.2; Art 35.2.
[1402] Reasonable effort is more prominent in the US while reasonable endeavours are more prominent in the jurisdiction of England and Wales. See for example *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292.

illustrated below how these rules are functioning when a dispute is submitted to a selected arbitration tribunal.[1403]

7.7 Systems theory perspective and the system of international arbitration

The above discussion provided an insight into the system of international arbitration from the perspective of the legal frameworks. In comparison to the outline of PIL in the previous Chapter 6, there are significant differences. It is rather clear from the concluding remarks of Chapter 6 that the PIL system does not stand on its own, in the systems theory perspective, it is not autopoietic in its own right. This is simply because it is a normative part of the relevant domestic legal system.

The system of international arbitration, however, does have differences and some of the differences were illustrated in Chapter 5 coupled with the outline of the legal framework here in Chapter 6 of this Thesis.[1404]

It is apparent from the discussion provided so far, particularly in Chapter 5 and here in Chapter 7, that the system of international arbitration exists in parallel to litigation, however, it is not a part of any court system. The next question is, where does international arbitration stand and whether it can be located within any autopoietic system. An outline on this matter was given in Chapter 5 where it was suggested that it is not forming an autopoietic system in its own right as the mass of programmes and the evolution element is not at the same level as any regional or national legal systems.[1405]

[1403] For further details see Section 7.7 of this Chapter 7.
[1404] For details please see section 5.5 and section 5.6 of Chapter 5.
[1405] Ibid section 5.5.

When the connection of the international arbitration and the legal system was discussed, the NYC was illustrated and it was outlined that the NYC is part of the legal system of every country which has ratified the convention. However, the question posed there was how come, if it is a part of the legal system, the legal system does not recognise international commercial arbitration as a part of its own operations.[1406] This is a convenient matter which can be addressed from a perspective of a concrete situation similarly to the concluding remarks of Chapter 6.

Model scenario

In order to illustrate the process in which the system operates the trigger operation needs to be recognised. The trigger operation in analogy to the previous chapter could be seen as a party commencing an arbitration proceeding. If the seat is in England and Wales or Northern Ireland, such commencement is imbedded in section 14 of the AA 1996 and could be, for example in situation where an arbitrator is named in the arbitration agreement, by a notice from one party to the other to submit a matter to the named arbitrator.[1407] This will, however, be a conditional operation which will depend on an initial operation, namely either concluding an arbitration agreement or submitting to an arbitration after a dispute has arisen.

The legal system is not concerned with arbitration proceedings as its coding will recognise that the operation which triggers the commencement of arbitration proceedings does not belong amongst its own operations. Further, the legal system is not concerned with arbitration unless or until the arbitration produces an operation which indeed does belong to

[1406] Ibid section 5.6.
[1407] Arbitration Act 1996 Section 14(3).

the legal system. One of such examples, regardless of the seat of arbitration, can be seen in an application to a court to stay legal proceedings under section 9 of the AA 1996.

When there are legal proceedings commenced and thus an operation entered the legal system, the legal system can react to an operation which will result in a stay of the proceedings if a party against whom the legal proceeding had been brought applies to the court to stay proceedings so far as they concern a matter subject to a valid arbitration agreement.[1408] The legal system will recognise that this dispute is no longer within its own boundaries. From the perspective of arbitration, the norms of the AA 1996 will be seen as part of itself and, therefore, able to function as the structural coupling between the two systems. This would support one of the possible views generated in section 5.6 of Chapter 5 which opposes characterising arbitration as parasitical and instead sees arbitration as making use of the norms originating in the legal system as norms of the arbitration system.[1409]

There are further operations which will further trigger the legal system as for example the powers of the court in relation to arbitral proceedings as outlined in ss 42 to 45 of the AA 1996. There are conditions for usage of some of the court procedures available to the parties to arbitration, for example securing the attendance of witnesses can be only done via the court procedures if the witness is in the UK and if the arbitral proceedings are being conducted in England and Wales or Northern Ireland.[1410] If the requirements are fulfilled, the legal system is triggered and the operation will enter the system and generate further operations which could be the actual securing of the attendance of the witness. The material content of any witness statement, however, will only be part of the system of arbitration. The usage of

[1408] Ibid Section 9(1) and 9(4).
[1409] Through the said structural coupling with the legal system.
[1410] Arbitration Act 1996 Section 43.

the court procedures for securing witnesses will be again a structural coupling between legal system and system of arbitration.

Once an award is obtained – analogical to generating a judgement by the legal system – this award, provided there is no challenge or ground for refusal of recognition and enforcement, will then be granted enforcement by leave of the court and hence by the legal system in line with section 66 of the AA 1996. This process of enforcement being, therefore, another structural coupling by which the legal system is coupled with arbitration.

7.8 Concluding remarks

From the above, it is clear that the suggestions in sections 5.6 are in line with the further investigation of the legal framework of the system of international arbitration.

The NYC is a part of the legal system but it is also a part of the arbitration system which is in parallel to litigation. The NYC and other conventions can be seen as structural couplings between the legal system in question and the system of international arbitration. There are no such specific regional aspects covering the same ground as the PIL rules provided by the EU, however, there are conventions as for example the ECICA, which would have only regional impact by reason of the geographical clustering of its contracting states even though it is not part of a regional legal order.

Further, the rules of the tribunal have their specific role, however, they are regionally independent per se, which again puts them in a unique position as discussed in section 5.6 of Chapter 5. The rules of the arbitration tribunal would be applicable in case of institutional arbitration and even though rather brief, will have the role of programmes which will be triggered by individual operations of the system.

The national laws of a specific country will play a significant role when applicable as the arbitration will be structurally coupled with the legal system through the national laws. This could be pursuant to substantive or procedural norms, by reference to which each single arbitration will be able to assign the values according to the type of operation which will be running through its structures.

Therefore, pursuant to the above it seems that despite some limitations, there seems to be a robust system which is able to operate in a clear and a comprehensive manner. However, the last point to address is if this process is able to amount to autopoiesis. The suggestion which was outlined in Chapter 5 is that this is unlikely.[1411] This suggestion is based on several factors. One of the strongest points in support of this suggestion is that autopoiesis requires evolution over time which is not supported by the fact that a single arbitration does not reproduce itself over time. The circular spiral of reproduction, is, therefore, not present. As noted above, some system memory of arbitrations is secured through the publication of decision in the Yearbook Commercial Arbitration (the 'YCA'), (the most recent YCA was published in 2022).[1412] A further point is that the system of a single arbitration would not generate enough mass of legal programmes which would be subject to such evolution. The fact that the parties may chose different types of arbitration and different norms, usually subject to exceptions such as mandatory provisions of a country where the arbitration is seated, creates chaos and does not support any identification of boundaries quite simply because there are no holistically identifiable boundaries.[1413]

[1411] For details please see section 5.5 and section 5.6 of Chapter 5.
[1412] 'Available Now: The ICCA Yearbook Commercial Arbitration XLVI | ICCA' (*Arbitration-icca.org*, 2022) <https://www.arbitration-icca.org/available-now-icca-yearbook-commercial-arbitration-xlvi> accessed 17 March 2022. For further details see Section 7.3 of this Chapter 7.
[1413] Even though the mandatory provisions may give a sense of certain boundaries, this is just a limited space and does not provide with any holistic perception of boundaries of the system.

Hence, considering the above, it seems that the system of international arbitration even if it is operatively closed for each arbitration, is (as a system) not able to distinguish itself from its environment. There are simply too many elements which impact the potential of the system to do so and the dynamicity is not organised in a way to enable the system to reach autopoiesis.

In connection with the above, harmonisation of the system of international commercial arbitration in the system sense should be addressed. It can be suggested that harmonisation of a particular system would ideally require an autopoietic system. To harmonise across the global legal order, an autopoietic system would be desirable in order to carry out the said harmonisation. Generally, if the system which is supposed to carry out harmonisation is not autopoietic, the problem of each autopoietic systems which are irritated by the harmonisation provision will deal with it in its own way. This leads to independent evolution as addressed by Chapter 4 Section 4.6 of this Thesis. The independent evolution missing such autopoiesis on a supra level would create divergence over time. This can be due to various reasons, cultural clash of the legal orders and other factors discussed in Chapter 5 Section 5.6.[1414] If applied to the system of international commercial arbitration, it can be suggested that the desired autopoiesis on the global level is missing. This leads to the outcome that it is presumably the legal system on the domestic level (as the regional level does not seem autopoietic either)[1415] which reacts to the irritations by global attempts to harmonise the system. This leads to independent evolution and the outcome is unpredictable.

[1414] Andreas Fischer-Lescan and Gunther Teubner, 'Regime Collisions: The Vain Search For Legal Unity In The Fragmentation Of Global Law' (2004) 28 Mich J Int L.

[1415] In comparison, the EU legal system may be more effective in its harmonisation attempts as it can be suggested that it is an autopoietic system on a regional level. An example could be already outlined ground of refusal of a judgement due to public policy issues as per Art 45(1)(a) of the Recast Regulation. Even though the public policy is left to be interpreted by the Member States, the EU sets out limits for such interpretation (Case C-7/98 Dieter Krombach v André Bamberski [2000] European Court Reports 2000 I-01935).

Even though the harmonisation attempts may be seen as problematic, the arbitration system may still be seen as beneficial for the UK businesses and may be, depending on the nature of the contract and business relationship, an attractive method of dispute resolution. If the UK business and its cross-border trading partner select for arbitration they obtain a way of enforcement overseas. It is necessary to note that even though the courts are approaching the arbitration agreements in a more flexible way, it would be advisable to incorporate a written arbitration agreement in the contract between the UK business and the cross-border partner. There may be some issues that the UK business as a judgement creditor may be facing regarding the jurisdiction of enforcement, for example the public policy as discussed above, however if the businesses choose to select arbitration as the method of dispute resolution, there may be further advantages which correspond to the nature of the robust system of international commercial arbitration.

Arbitration can be seen as a method possessing a high level of neutrality. There are two main areas which for example Professor Lalive considers and these are neutrality of the arbitrator and neutrality of the place of arbitration (seat).[1416] Further, the fact that the arbitration results in a final award, generally not permitting an appeal may be attractive for some businesses.[1417] Another aspect which could be beneficial for the businesses is confidentiality and privacy. Privacy means that third parties may be excluded from the proceedings while confidentiality is related more to the content of the proceedings such as the evidence or the award.[1418] Further, the parties may be attracted to arbitration due to its various aspects of flexibility. There is a flexibility in the choice of governing law (substantive and procedural);[1419]

[1416] Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' (1970) Revue de l'arbitrage 59.
[1417] Jean Thieffry, 'The Finality of Awards in International Arbitration' (1985) 2 Journal of International Arbitration 27.
[1418] Scott D Marrs and Martin D Beirne, 'International Perspectives on Arbitration Confidentiality' (2015) 82 Def Counsel J 76.
[1419] Kimberley Chen Nobles, 'Emerging Issues and Trends in International Arbitration' (2012) 43 Cal W Int'l LJ 77.

choice of institution;[1420] choice of arbitrators;[1421] choice of level of confidentiality;[1422] or choice of different types of procedures (e.g. expedited procedure).[1423] The above are some reasons which may encourage the UK businesses and their cross-border partners to select arbitration as their preferred option for dispute resolution and it can be suggested that the system is able to provide the parties with a great level of certainty regarding enforcement of the arbitral awards.

[1420] Ibid 82.
[1421] Ibid 82.
[1422] Ibid 83.
[1423] Ibid 84.

8. Conclusion

The title of the Thesis was selected as the Effective Enforcement of International Commercial Transactions by UK Businesses in a Fragmenting Transnational Institutional Environment. The Thesis aimed to map an effective enforcement of international commercial transactions by the UK businesses in a fragmenting transnational institutional environment. Further, the research aimed to analyse the establishment of the EU legal framework affecting the trading environment of the UK businesses. Apart from the regional rules, the research focused on alternatives regarding dispute resolution and alternative legal framework affecting EU and non-EU states. Further, the research aimed to investigate challenges and benefits to the UK businesses regarding the transfer to a jurisdictionally limited legal system (excluded from the EU regime). The research was conducted using doctrinal legal research with elements of comparative law method and interdisciplinary methodology.[1424]

Throughout the research, there were a few robust themes identified and discussed and further outlined in the Thesis. It was fundamental to establish the context of the research and in order to be able to do so, the notion of international trade had to be addressed at the beginning of the research. Regarding the subject matter of the research, it was the business enforcement which was the underlying theme of the individual parts of the Thesis. With regards to international trade and enforcement of international commercial transactions, the fragmenting environment was highlighted in connection with individual aspects of the research. Fragmentation as a notion addressed in this Thesis has two aspects, one of them includes fragmenting events and processes, as for example Brexit or the Covid-19 Pandemic.

[1424] For details regarding methodology, please see Chapter 3 of this Thesis.

The second aspect is fragmentation from the perspective of the UK businesses. When the UK businesses are trading cross-border, there is not a single legal system which the businesses are facing, there are multiple legal systems which may be involved. These systems are connected, however, they are independent. Regional units such as the EU could be seen as attempting harmonisation and the EU private international law ('PIL') can be seen as facilitating the coordination and harmonisation across the legal systems of its Member States. The fact that the EU PIL rules ceased to apply in the UK means that there is an impact on the position of the UK businesses and their prospective enforcement. In order to illustrate the dynamicity of the fragmentation and its aspects, it was convenient to adopt a theory which would facilitate the discussion of the impact of fragmentation on systems of interest and also on the UK businesses themselves. For these reasons, the systems theory as developed by Niklas Luhmann was adopted.[1425] The systems theory further provided a fruitful environment to develop the whole perspective and with its help, it was possible to create an extended perspective on current affairs.

8. 1 International trade

The aims of the research were fulfilled by addressing firstly international trade and setting up the context in Chapter 2 of this Thesis. In order to progress with the discussion regarding enforcement of the commercial transactions, an outline of commercial context of the research was needed. When setting the context for trade, it was convenient to identify a useful perspective in which trade can be understood. For these purposes, perspective of

[1425] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004).

Professor Rodrik was adopted.[1426] Rodrik points out that markets and government should not be viewed as substitutes but should be viewed as complements.[1427] This is an interesting point when globalisation is addressed as this is a significant aspect for any cross-border trade. On the global scale, even though there are global markets in existence, there is a lack of international governmental framework that would assist the markets on the global scale, and so the markets generate tension between local institutions.[1428] Similar understanding on the global level regarding political system is further presented by Luhmann and, therefore, the above outlines the interconnection of the selected scholarship in this Thesis.[1429]

The historical development of international trade contributed to the development of a robust economic system on the global level which seems to be the case both for Rodrik and Luhmann. There is an interconnection between cross-border trade and institutions of state, i.e. the political system, as well as the legal system. Rodrik does not specify individual systems per se, however, sees the dynamicity of the trade environment which is close to Luhmann's dynamic perspective.[1430]

The context of international trade as presented in Chapter 2 provided a framework for the research and conveniently highlighted the area of interest. Once the context was established, further analysis regarding the systems themselves was put in a larger perspective rather than pinpointing the systems first and discussing them in isolation.

[1426] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012).
[1427] Ibid xvii.
[1428] Ibid 20.
[1429] For more details see Chapter 5 section 5.3 of this Thesis.
[1430] Dani Rodrik, *The Globalization Paradox: Why Global Markets, States, And Democracy Can't Coexist* (Oxford University Press 2012).

8.2 Business enforcement

Once the context for the commercial transactions has been established, the position of the UK businesses which were seen as the participants for the purposes of the Thesis needed to be outlined. The position of the UK businesses needed to be established as it was the enforcement of the international commercial transactions by them which was one of the centre points of this Thesis. In order to reach an effective enforcement, the ultimate focus must be on the legal system. Thus, connecting the context of trade with the legal system was necessary. From this perspective, it is worth outlining that enhanced consumer protection is acknowledged, possibly most significantly on the domestic (e.g. Consumer Rights Act 2015) or regional level (e.g. the Omnibus Directive),[1431] however, since the UK businesses are seen as the participants, it is not the consumer protection but rather business relationships which were of focus of this research.

One of the last resorts of action, provided that a dispute cannot be settled amicably, is to subject the said dispute to a particular dispute resolution mechanism. For these reasons, it was outlined what are the options regarding different methods of dispute resolution and in line with one of the research aims, what are alternatives which may be convenient for the UK businesses no longer benefiting from the regional rules of the EU.

Chapter 6 established the legal framework of the PIL system, not only outlined from the desired EU perspective but also from a global and domestic point of view. The above was further contrasted with the legal framework of international commercial arbitration in

[1431] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance) [2019] OJ L 328/7.

Chapter 7 which was outlined as perhaps one of the most convenient alternatives to litigation for the UK businesses. As the international commercial arbitration has its own separate legal framework, it was outlined that the umbrella for this framework could be seen, amongst other conventions, in the New York Convention 1958.[1432] The international element in case of arbitration could be seen as generally outweighing regional elements as it is excluded from the EU PIL regime.[1433] Therefore, when a fragmenting event occurs in a form of jurisdictional limitation of regional EU PIL rules for the UK, this may mean that the excluded system may not be as affected and thus more stable as a method of dispute resolution. This was further explored once the systems theory was applied on a model scenario at the end of Chapter 7 as well as when the system was discussed in Chapter 5.

8.3 Fragmentation

After establishing the position and perspective of the UK businesses, it was convenient to emphasise the different levels or tiers on which legal instruments, relevant to the research, can be identified. The approach used was to identify such instruments on the global level focusing on international treaties and soft law, the regional level focusing on the EU rules and the domestic level for which selected legal instruments of the legal system of England and Wales were identified. This structure was adopted in individual chapters of this Thesis where legal instruments were discussed as well as where the position of the systems is discussed (e.g. legal, political and economic systems in Chapter 5).

[1432] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[1433] 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 L351/1 Art. 1(2)(d).

The transfer to a jurisdictionally limited legal system was addressed and it was important to set the context of the political change outlining Brexit and individual phases of the negotiations. However, since 23rd of June 2016 when the majority of UK voters expressed interest, in a nationwide referendum, in departing the UK from the EU, there were further fragmenting events occurring on the global level. Until recently, it was the Covid-19 pandemic which impacted businesses worldwide and was the centre point of focus. This relatively long-term occurring pandemic, which as of March 2022, is still relevant and its impact will be visible for years to come, seemed to be recently shadowed by the political development in Europe when Russia invaded Ukraine. This is another example of fragmenting event which is having and will have a significant impact on the international trading environment.

In order to reflect on the above, a suitable theory adopted for the analysis was needed. If a rigid concept was adopted hereby to reflect on the societal changes, the dynamicity of these changes might not be reflected fully. A convenient way how to reflect on changing international economic, legal and political environment which further impacted regional and domestic systems, was to identify a theory which was able to react to unforeseen events and was flexible to illustrate the impact of these events on the said systems. This was the moment when the systems theory was introduced as the convenient method or the tool which could facilitate the discussion and reflection of the said fragmentation.

The above outlines the fragmentation from the perspective of the fragmenting events themselves. An event is happening in the environment of the global society and the systems and sub-systems present in the society are reacting in a certain way. However, when addressing fragmentation, with regards to the aims of the research, the perspective of the UK businesses had to be taken into consideration as well. This is the perspective which illustrated

the impact of fragmenting events in practice. Once certain norms cease to apply in the UK, the participants, i.e. the UK businesses, face the impact on their trade. Since the focus of the analysis was on foreign element, it was those businesses involved in the cross-border trade which were addressed with regards to the impact of fragmentation. It was clear that the types of fragmenting events as outlined above would not impact the UK businesses in a positive way as the loss of certainty, amongst other factors, is evident.

8.4 Research Development

In line with the progression of the research, the systems theory facilitated understanding of the challenges which the transfer to a jurisdictionally limited legal system may bring. In order to be able to provide a sound analysis, it was necessary to conceptualise the approach of the research to the research area which helped to avoid chaos in the analysis. The selected systems theory itself was an effective tool to outline the characteristics of the environment in which the UK businesses trade. The dynamicity of the theory was convenient as the fragmenting events could be set in a context and it was outlined what is the impact on the trading environment for the UK businesses and what challenges are being brought by the recent development in the global society. Luhmann's theory facilitated the expansion of the understanding beyond the originally set aims of the Thesis and enabled the research to produce a valuable new perspective on dispute resolution mechanisms.

While conducting the research, the aims were reflected in the body of work which has been developed throughout the duration of the research period. As the Thesis was developing, there were points which were more relevant than others and, therefore, the shape of the Thesis did change since the initial stages of the research. As is mentioned below in Section 8.6, there were certain limitations which had to be addressed and the aims of the research

amended. One of those points was the aforementioned aim to identify the requirements of the UK businesses for securing flawless cross-border trade from their perspective.

Since the response rate to participation on the empirical part of the research was not satisfactory, the empirical part per se could not progress as planned according to the initial plan. However, this was a situation which was addressed by the researcher when planning the research project. In case of any problems with the response rate, it was agreed by the researcher and her supervisors that the focus will be on the UK businesses from the perspective of the system itself. In order to progress with this aim, and in line with the overall aim to identify the effective enforcement of the international commercial transactions, a development of a robust approach towards the identification of the systems and their connections was needed. Such need was given by the nature of the relationship which has been investigated, the cross-border trade and the influence of fragmenting events on enforcement of rights of the UK businesses.

As it was mentioned many times in this Thesis, the systems theory was selected for its convenience and it is not claimed that it is the only correct way how to approach the changes and the fragmentation which is part of a discussion below in Section 8.7 However, it was not the aim of this research to analyse the systems theory in isolation and, therefore, a contrast with H.L.A. Hart was presented in Chapter 4 in order to contrast elements of different perspective amongst different scholars. After all, it was the legal system and its perception which was the core for the discussion. From an external perspective, it is the same legal system which is being discussed while using different tools to analyse individual aspects. This part of the Thesis did present the similarities and differences and was useful to illustrate that different theories do not have to be discussed in isolation.

8.5 Luhmann

As it was suggested above, one of the most important aspects when the international commercial transactions and the environment in which they are performed are discussed is the interconnection between the systems, here, taking Luhmann's view into consideration, the interconnection between the legal, political and economic system. Linking the interconnecting aspect to the aims of the Thesis, it was also convenient to discuss the system of international commercial arbitration and placing it in perspective of its location within the connections of the systems. The above, which was discussed mostly in Chapter 5, resulted in discussion regarding the fragmentation itself and illustration how fragmentation for the purposes of this Thesis is perceived.

The dynamicity of the systems theory was one of the reasons why the theory was selected and subsequently applied to the systems of interest. There are two aspects of dynamicity, the first inevitably is a change, the second is an uncoordinated change. Each of the systems listed above evolves independently and not as a part of the other systems. This is the core for autopoiesis, the system is reproducing itself and is able to identify itself and its own boundaries, however, is not able to identify other systems per se. An autopoietic system can distinguish between itself and its environment. The connectivity of the systems (as observed externally as internally it is the connection of a system and its environment) is possible through to their structural coupling. Due to the structural coupling, the systems can achieve a level of coordination, and this was further explored by the Thesis. This is one point of contribution to human knowledge which this Thesis achieves.

8.6 Limitation to research

There are a few points which need to be addressed when limitations of the research are outlined. Regarding the scope of the research, it was clear from the outset that such a wide topic of international dispute resolution would not be convenient for research of this extent and that there will be areas which ultimately will need to be prioritised. These prioritised areas may be seen as the concept of the systems in the international trading environment applying the systems theory which is a fundamental base of this Thesis. Accordingly, there were matters which needed to be discussed in order to be able to provide full illustration of the dynamic interconnection of the systems. Due to this focus, it was the dynamic element which was the priority throughout the Thesis.

However, another matter which needed to be addressed was the legal framework itself when it comes to litigation with a foreign element as well as international commercial arbitration. For these reasons, Chapter 6, outlining the PIL framework, and Chapter 7, outlining the international commercial arbitration framework, were designed and focused on to support the findings and to extend the systems theory beyond Luhmann's focus.

The extension of the Luhmann's focus was conveniently illustrated in the findings of the aforementioned two chapters and is addressed below in Section 8.7. Altogether with the fragmentation discussion and the systems theory itself, this is the robust scope of this Thesis leaving out some of the elements which would be interesting to address in the future connecting to the research evidenced hereby. The future propositions are addressed below in this section, however, it is worth noting that one of these areas is a detailed discussion of public policy and its perception within the systems theory as well as from the perspective of the global, regional and domestic levels.

With regards to public policy, one aspect of the EU attempt at harmonisation was the harmonisation of public policy in the sphere of judgment recognition and enforcement so that EU public policy supplanted that of local jurisdictions.[1434] With the loss of this regional integration UK businesses face a more complex public policy environment, as each jurisdiction will assert its own public policy without EU limitations.[1435] This ability of each jurisdiction to impose its own public policy upon judgment recognition and enforcement is a feature of both PIL and international commercial arbitration.[1436]

Regarding the points addressed above, potentially the two most significant constraints of this Thesis itself are the time limitations and the word limit. The time restriction influenced the research from a few different perspectives, firstly, there was only limited time to design the methods of contacting selected UK business. Even though that the first attempt in a letter form was not successful, the researcher designed a questionnaire with the idea of getting more responses in shorter time, however, even this attempt was not successful. There were other means which the researcher thought of, for example further involvement with the East Midlands Chamber of Commerce and similar, however, this would require more time as it would involve the building of relationships and more ethical approvals would be time consuming. Due to these factors, the alternative plan of the perspective shift had to be adopted, otherwise, the research would not be completed in the required time.

[1434] The researcher has presented her poster regarding the EU public policy at the Midlands3Cities Research Festival 2018 Birmingham, the presented poster titled: 'Challenges - by BREXIT' and referred to the 'safety net' which was provided by certain EU rules by then applicable in the UK. The poster has outlined some of the points in which the EU public policy protects the traders of the Member States from public policy on domestic level which may be vagarious.

[1435] Even though Article 45(1)(a) of the Recast Regulation outlines that the refusal of recognition is possible if such recognition is contrary public policy in the Member State addressed, the EU limits the interpretation of public policy within its boundaries as seen for example in Case C-7/98 Dieter *Krombach v André Bamberski* [2000] European Court Reports 2000 I-01935.

[1436] For details please see Chapter 6 Section 6.2 and Chapter 7 Section 7.3.

As it was addressed above, there was a limitation of the scope of the Thesis and this was further shaped by the word limit itself. Since there is an outlined world limit, it is not reasonable to extend the research in a way that the outcomes would not be able to be presented due to the space restriction. Even with this in mind while drafting the Thesis, there were areas which had to be left out even though they were discussed. An example of this is a detailed discussion regarding characteristics of arbitration. This is an interesting topic, especially when it is addressed from a critical perspective and when the theory presented by many scholars may be rather different when empirical data is analysed, however, since the word limit and the limit of the scope was in place, it was not reasonable to keep this discussion in. This is, however, an idea for a future exploration of the area and by itself may amount into a research article.

Further limitation, which was discussed in Chapter 3 of this Thesis in detail was the problem with accessing data which were desired by the initial plan of the Thesis. This limitation was reflected mainly in the fact that the researcher did not get responses in order to proceed with the elite interviews which were initially planned. This was despite the effort of the researcher trying to connect to the businesses in different ways and exploring further channels, for example co-operation with the East Midlands Chamber of Commerce. There are a few possible reasons for this outcome. Firstly, the data were being collected in 2018 which was the time when the businesses were engaged in their own ways how to deal with Brexit. There were some responses outlining the fact that the businesses felt the research is important, however, they did not currently have time to spend responding the enquiries. Further, there was no remuneration for their efforts and, therefore, some of the potential participants may have felt that for them there is nothing to gain from this co-operation. This may be changed in the future, if the researcher is able to apply for further funding.

Possible future research development

There is a significant potential in extending the research in future, provided there are resources available. There needs to be funding to be able to support time spent on the research including funding for the research activities which may need additional research assistants to help gather further data and to help disseminate the research further. Apart from the relevant funding, for this type of research it would be convenient to build relationships with the potential participants in order to extend the possibilities of the data gathering. It would also be convenient to establish research connection for possible research collaboration further. This may include interdisciplinary cooperation with business schools, economists or international relations scholars. The researcher already established a number of valuable connections amongst early career researchers and more senior colleagues due to participation at conferences where she presented her research.[1437] It would be valuable to explore these connections further and see what the potential is.

Regarding the content itself, there are many areas in which the research could be extended and the area explored further. One of such areas would be, as suggested above, gathering data from the UK businesses themselves and contrast their views with the conclusions reached hereby. If there was additional funding for progressing with the elite interviews, the businesses may be more interested in cooperation. Additional funding would also mean that there may be ways how to focus on marketing of the research and emphasis on the

[1437] These conferences were for example: University of Edinburgh - Edinburgh Postgraduate Law Conference 2018, paper title: 'Enforcing global trading networks in a fragmenting regionalised world'; University of Durham - Postgraduate Conference - Commercial Law in Times of Change, paper title: 'Challenges in a fragmenting institutional environment – the BREXIT and Private international law perspective'; International Institute of Social and Economic Sciences - 2nd Law & Political Science Conference, Prague, paper title: 'International legal relations in troubled times and their impact on substantive elements of international trade' which included panel chairing; Midlands3Cities Research Festival 2018 Birmingham, presented poster titled: 'Challenges - by BREXIT'; Midlands3Cities Research Festival 2019 Birmingham, presented poster titled: 'DEAL or NO DEAL'; or The Society of Legal Scholars Graduate Conference 2019, presented paper titled: 'The end of the EU Private international law rules in the UK?'.

importance of such research. The convenient aspect is that the legal perspective may be connected with the economic perspective and thus could further bring interesting possible cooperation with economic researchers as outlined above.

Apart from the exploration of the empirical side, there are further aspects which would be ideally discussed in detail if there was more time and capacity, one of them being the aforementioned area of public policy which is a very complex topic and would require a significant space. However, it would be interesting to further connect the outcomes of this Thesis with application of the systems theory on public policy issues as public policy will probably be an area where the autopoietic evolution of legal systems and other social systems is likely to generate divergence over time.

In a longer term, it would also be convenient to further investigate the impact of the Covid-19 pandemic as well as the Ukraine-Russia war conflict. It can be expected that the changes and the implications of these fragmenting events will be significant and any further research into these issues will be topical and in demand.

8.7 Contributions to Human Knowledge

Business Perspective and political impact

There are various aspects how the research contributed to human knowledge and in order to illustrate how the themes link together with the contribution, it is worth connecting the areas presented in this section to the themes of the research identified in the first five sections above. As it is clear from the title of the Thesis, it was the business perspective which was one of the interests of the research. The contribution of development of the business perspective was based on the international trade context including the business

enforcement aspect which was outlined above in Section 8.1 and 8.2. Even though it was not possible to conduct the empirical part of the research, the perspective of the UK business remained one of the focal points. However, the direction was shifted towards the changes in society and their impact on the UK businesses.

When the systems in society were outlined and their connections discussed, the focus needed to be directed at programmes, the structures which the legal system possess and which are concerned with enforcement of the international commercial transactions. The logical starting point were the norms of PIL. These norms needed to be discussed in order to make the link to the systems theory and outline the importance of the structural couplings. One of the most important matters from the business perspective was that the structural coupling via the EU PIL was lost for the UK businesses. This means that the system of international commercial arbitration may be a convenient means to pursue when drafting dispute resolution clauses in the cross-border contracts in future.[1438] However, the parties should incorporate a valid written arbitration agreement in their contracts to ensure their dispute is able to be submitted to arbitration.

However, one of the aspects which needs to be born in mind is that the arbitration as a method of dispute resolution is voluntary. If a contract between UK business and their cross-border partner is being drafted with a dispute resolution method in mind, the aspect of autonomy is present. However, as it was illustrated in Chapter 6 of this Thesis, arbitration is not the only method which the parties can agree on and have a healthy level of certainty in possible future recognition and enforcement of a binding decision in their case. This is because the UK made an effective step and unilaterally accessed the Hague Convention

[1438] For details please see Chapter 7 Section 7.8.

2005.[1439] The impact of this is that if a UK business and a business from the EU would like to subject their dispute to litigation, they are able to do so, provided it is an exclusive choice and the judgement rendered will be enforced in the territory of the ratifying parties.[1440] The fact that Recast Regulation ceased to apply in the UK effectively means that if parties do not agree to use it, they cannot use it and further, they cannot use it for the courts of England and Wales as the condition is that regardless of domicile, the parties can choose jurisdiction of courts of a Member State.[1441] However, if the choice preference was to be the courts of England and Wales, they are able to do so under the Hague Convention 2005 as noted above.[1442]

Therefore, the above indicates that having a dispute resolution clause in a contract using Recast Regulation will not benefit the parties if they want English courts as English courts cannot be chosen. However, if the parties want to choose English courts, they can use Hague Convention 2005 and so the decision in their case may be enforced in the EU as the EU is a party to the convention as well.[1443] If, therefore, the parties are willing to choose and willing to put a dispute resolution clause or arbitration agreement in their contract, there should not be a problem with either litigation or arbitration.

The core issue arises if there is no choice or if the choice is not exclusive (in order for Hague Convention 2005, the choice must be exclusive).[1444] Then, the parties cannot rely on Recast

[1439] 'HCCH | Declaration/Reservation/Notification' (*Hcch.net*, 2020) <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1255&disp=eif> accessed 17 February 2022.
[1440] 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements, Outline Of The Convention' (*Assets.hcch.net*, 2013) <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 25 February 2022.
[1441] 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 L351/1 Art. 25.
[1442] 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements, Outline Of The Convention' (*Assets.hcch.net*, 2013) <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 25 February 2022 Art. 5.
[1443] 'HCCH | #37 - Status Table' (*Hcch.net*, 2022) <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 6 March 2022
[1444] 'The Hague Convention Of 30 June 2005 On Choice Of Court Agreements, Outline Of The Convention' (*Assets.hcch.net*, 2013) <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf> accessed 25 February 2022 Art. 3.

Regulation or Hague Convention 2005 and they may need to rely on the national rules, i.e. as modelled in the scenarios in Chapter 6 in this Thesis.[1445] The above emphasises the need for an effective incorporation of an effective [1446] dispute resolution clause in the contract between the businesses.

The lack of a sufficiently robust and predictable default option given a failure to exercise an effective choice by a business is the problem created by Brexit for the UK businesses. Since the structural coupling is lost, the 'safety net' of the Recast Regulation is also lost for the UK businesses trading with their EU cross-border partners. The most disadvantaged parties will be those parties either without a dispute resolution clause or arbitration agreement or with null and void dispute resolution clause or arbitration agreement. There are many reasons behind the lack of the above arrangements, it could be that the businesses are not aware of the problems which may arise when there is a dispute. Or, they may not have resources in order to protect themselves.

In order to address these issues, there should be mechanisms adopted to mitigate any negative impact on the UK businesses. They need to be informed. They need to know that in case of a dispute, they should include a dispute resolution clause or arbitration agreement in their contract to be protected. However, as suggested above, often these parties do not have resources to obtain a legal advice or simply are not interested in obtaining legal advice as they have never experienced a dispute and so they do not see the importance of this protection. This environment requires a change, there needs to be more information available to the parties.

[1445] See Chapter 6 Section 6.4 for details.
[1446] I.e. written, exclusive and practical. For more details please refer to Chapter 6.

In the future, on the level of the countries, there needs to be precise cooperation between the EU and the UK. So far, such cooperation has proven difficult. The EU seems stubborn, as illustrated in denying the UK access to Lugano Convention 2007.[1447] However, maybe if enough countries proceed to conclude bilateral treaties with the UK, the EU will see that its stubbornness does not have any effect. On the other hand, the question is if all the EU countries have bilateral treaties with the UK in place, is Lugano Convention 2007 still needed.

To conclude from a business perspective, if parties have a valid dispute resolution clause or arbitration agreement in their contract, they should not have to face complex domestic PIL rules. However, the commercial chambers and industry relevant bodies should be informing their members about the need of such clauses in their contracts and persuade their members to incorporate the clauses. From the perspective of the political system, the government should make sure that the bilateral treaties are in place and make sure that the cooperation with the EU is moving on in an effective way.

Concepts

Another area when the research contributed to human knowledge is the conceptualising the current changes as well as the systems operating in society. This conceptualisation can be linked to the notion of fragmentation which formed an important part of the analysis and could be seen as underlying notion regarding majority of the aims of the research as outlined in Section 8.3 above. Further, the conceptualisation can be linked to the research

[1447] 'Communication - Assessment On The Application Of The United Kingdom Of Great Britain And Northern Ireland To Accede To The 2007 Lugano Convention' (*European Commission - European Commission*, 2021) <https://ec.europa.eu/info/files/communication-assessment-application-united-kingdom-great-britain-and-northern-ireland-accede-2007-lugano-convention_en> accessed 10 May 2021

development as per section 8.4 and 8.5 regarding the conceptualisation of the systems in society.

In line with the research aims, the thesis required the development, explication, and application of working concepts to enable the analysis. Although obviously based on earlier work, some of this conceptual work generated novel insights. Chapter 4 provided with a base for the perception of an autopoietic system and presented important points which were further developed in following chapters. The discussion of fragmentation brought novel perspective as it addressed current societal development. Since the Thesis umbrella aim was investigation of enforcement of the international commercial transactions in the fragmenting transnational institutional environment, fragmentation itself was set in the environment as well as to be conceptualised from the perspective of the systems theory.

In order to arrive to a sound discussion regarding the norms which were necessary to discuss in this Thesis as for example in Chapters 6 and 7, the nature of the systems of interest functioning in the society was presented. The different levels were adopted throughout the Thesis and, therefore, even the discussion regarding the economic, legal and political systems was performed on global, regional and domestic levels. There were certain interesting points gathered throughout the discussion and it was interesting to see Luhmann's perception in contrast with H.L.A. Hart and other scholars regarding potentially the most important system for the purposes of this Thesis, the legal system.

The discussion of Hart and Luhmann reveals several novel points. The difference between Hart and Kelsen (internal/external point regarding the ultimate rule of recognition); the compatibility of Hart and Luhmann emphasis on the realisation of a legal system in and

through its operations; or the analysis of the global legal order amongst other findings.[1448] These findings can be shared with the UK businesses. Possible routes for dissemination include: publication of the results in academic journals and journals concerned with international trade; use of the existing links with the East Midlands Chamber of Commerce; or the development of future research and its dissemination.

From the synthesis in Chapters 4 and 5 of this Thesis, it is clear that the 'strongest' level with regards to autopoiesis can be seen on the domestic level.[1449] This may be influenced by the fact that this level is the most normatively detailed and it is structurally coupled with a domestic political system. The normative complexity of a domestic legal system means that there is a significant mass of programmes in the system and, therefore, the system is structurally robust.

In comparison, the robustness is not as profound when it comes to the regional level. Even though it was suggested that the EU legal system can be perceived as operatively closed, certain structures are not present and, therefore, the mass of programmes can be seen as thinner in comparison to the domestic level. Further, this point may be supported by the fact that the regional level lacks an autopoietic political system which may make the regional legal system seem 'weaker' in comparison to the domestic level.

From the global perspective, it was suggested that possibly the only autopoietic system in place in a global society is the economic system.[1450] This means neither legal nor political

[1448] For further details please refer to Chapter 4 and Section 8.7 below related to the findings.
[1449] This point of view is taken from a well-developed country rather than for example an authoritarian or developing nation or a failed state.
[1450] This assertion is limited to the systems analysed in this Thesis (legal, economic, political) and is not intended to reflect on other systems such as mass media (see Niklas Luhmann, *The Reality of the Mass Media* (Kathleen Cross tr, Polity Press 2000).

systems are autopoietic on the global level. This is influenced by many factors, for example the lack of sufficient mass of programmes with respect to the global legal system.

Chapter 5 Section 5.7 of this Thesis did provide a conceptualisation of specific systems in society which were of interest. It is clear from the discussion throughout the whole Thesis that the systems theory is dynamic model and does not correspond well to rigid concepts. Fragmentation, for the purposes of this research, was identified as a deviation from a status quo, the status quo of the systems existing in the global society.[1451]

There are many different ways how the deviation from the status quo could be perceived within the systems theory. It could be for example a particular system reaching autopoiesis for the first time. It could also be the opposite, the system losing coherence and facing inevitable collapse. Further, the fragmentation may manifest itself in destruction of a specific structural coupling between systems, i.e. losing a valuable connection.

Chapter 5 Section 5.7 outlined an example of the Covid-19 pandemic and its impact on the economic, political and legal system as well as the system of international arbitration. This example was convenient and did compliment the discussion in Chapter 5 regarding the connections between the systems in question. Further, an important point which was addressed was how the jurisdictional limitation in the form of EU PIL rules ceasing to apply in the UK could be read in the conceptualised concept of fragmentation.[1452] It was interesting to see how the shift in the PIL area impacts the legal system of England and Wales and it was interesting to see the contrast of the EU PIL rules with the domestic PIL rules having in mind the global perspective and international instruments at the same time.

[1451] Jacob Katz Cogan, 'The Idea Of Fragmentation' (2011) 105 Proceedings of the ASIL Annual Meeting 2.
[1452] It needs to be noted that the discussion is related to the rules which require mutual recognition and not the rules which the UK was able to unilaterally retain as for example the rules related to applicable law.

Application of the systems theory

One of the most significant contribution to human knowledge is how the conceptualised systems theory was applied to the legal system of England and Wales and other systems of interest including the political system, economic system and the system of international arbitration. This was the core of the Thesis and brought a novel perspective on the understanding how recent changes in society can be perceived on a dynamic systems theory. This aspect of contribution to human knowledge can be linked to the research development theme as outlined in Section 8.4 above as well as the Luhmann theme itself as outlined in Section 8.5.

Once the autopoietic nature and its element of a system was outlined, the conceptualisation was possible as addressed above in this Section 8.7. The points outlined in Chapter 5 when the fragmentation and the systems in society were conceptualised were further brought in when discussing the PIL rules in Chapter 6. In Chapter 6 the function of the PIL rules in connection to the legal systems on different levels was outlined Section 6.4 specifically focusing on PIL rules and the systems theory. From this discussion it did appear that the PIL rules cannot be perceived as an autopoietic system, rather, as illustrated on the model scenarios in Section 6.4, the norms of the PIL system provided on the global or regional level can be seen as the structural coupling between the domestic legal systems as they each include the PIL norms within their structures.

Prior Brexit, the EU PIL rules, specifically the Recast Regulation, was a part of the legal system of England and Wales.[1453] Since the UK was a Member State of the EU, it had the benefit of

[1453] 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 L351/1.

the structural coupling with other legal systems via the norms of Recast Regulation. Even though there are ongoing debates about the effectiveness of the EU PIL system, it is fair to state that the system is developing, is in function for a significant period of time and provides certainty for the users of the system.[1454] The norms provided in the Recast Regulation, however, require reciprocity. This is rather clear from the nature of these norms, specifically when it comes to the rules regarding jurisdiction or recognition and enforcement of foreign judgements. If one country wants the other to recognise the competence of its courts and their judgements, it must provide the same recognition in reciprocity.[1455]

These norms, prior Brexit, were recognised by the domestic legal system as being a part of it. Whenever there was an operation which activated these norms, the structural coupling between the domestic legal system and the foreign legal system played an important role in filtering one operation through the two systems. However, the Recast Regulation is no longer a part of the legal system of England and Wales. In terms of fragmentation, this does not mean that the legal system of England and Wales is not able to perform autopoiesis. It is the structural coupling which ceased to exist under the impact of Brexit. In other words, Brexit caused the loss of a valuable connection of the UK to the Member States via the structural coupling of the Recast Regulation. The long-term impact of this loss is not yet fully clear, however, the possible implications are outlined from the business perspective at the beginning of this Section 8.7.

[1454] For further discussion please see Section 6.2 of Chapter 6 of this Thesis.
[1455] In case of applicable law this is not the case, there is no reciprocity needed, and that is why the UK was able to retain EU PIL rules regarding applicable law.

Summary of Findings

The last subsection of this Thesis is dedicated to a summary of the most important findings which are outlined together for more comprehensive illustration of the significance of this research to contribution to human knowledge.

A convenient point to begin with is the fact that the researcher did not obtain any participants in her designed empirical part of the study. It can be suggested that businesses prioritise their own interests and do not wish to contribute in surveys which are conducted by independent research, especially with ongoing Brexit concerns. This finding is valuable in its own right as it opens opportunities for potential post-doctoral research where the resources for attracting the participants may be greater. Furthermore, this opens a new opportunity to research into the reasons behind the participants' views regarding independent research and could potentially generate a collection of useful tips and know-how as to how to attract research participants from within the business sector.

Due to the impossibility of self-generation of the data, the researcher had to amend the main direction of the Thesis. As outlined above and in Chapter 3, the researcher decided to extend the socio-legal perspective provided by the system theory based on the findings of Luhmann.[1456] As Luhmann's theory of law as a social system is missing some points in application of the system theory to specific legal systems, for example international commercial arbitration and private international law issues of applicable law, jurisdictional competence and recognition and enforcement of foreign judgments there was a convenient gap identified. The application of the system theory in these areas where it has not been

[1456] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004).

previously applied facilitates the understanding of connections of individual elements when it comes to a dispute resolution between the UK businesses and their cross-border trading partners.

Once Luhmann's systems theory was adopted, it was necessary to position the theory within the legal scholarship and for these purposes the comparison with Hart was presented in Chapter 4 Section 4.2. There are similarities between Hart's theory and Luhmann's theory which brings Luhmann close to the context of legal positivism. However, as there are also notions which Luhmann rejects, such as the static notion of structural rules of recognition, it needs to be borne in mind that Luhmann cannot be categorised as a legal positivist per se.

There are, however, certain aspects which can be found similar for Luhmann and Hart, as for example certain elements of the global legal order. If Hart's perception of international law is taken in comparison to his theory of a fully mature legal system, it is apparent that due to the lack of unity of primary and secondary rules, international law is not a fully formed legal system. This can be contrasted with Luhmann's views as his perception on international law is not clear. However, it is some points which as guidance as for example the lack of enough structures on the global level which seems similar for both scholars. Altogether, taken with Hart's view, this helped to determine the extension of the systems theory to international law and, therefore, helped to determine the possible structure of the environment.

Further, when regional perspective of the EU legal system was discussed, it was concluded that the EU legal system may be seen as operatively closed. It could be suggested that even though there are certain operations missing which do exist on a national level of a legal system, there still appear to be enough mass of communication generated for the EU legal system to be operatively closed. Since operative closure means that the system operates

within its own boundaries, it appears that this is the case with the EU legal system. If compared with Hart and the view that international legal order is missing secondary rules of adjudication and recognition, the EU legal system does include such secondary rules, and, therefore, may be seen as certainly more complete than the legal order on a global level.[1457]

In comparison, it was concluded that the system of international commercial arbitration may be seen as operatively open. There are undoubtedly structures in existence which lead the system of international commercial arbitration towards an operative closure in the context of a particular dispute, such as the New York Convention 1958, which provides a solid legal framework for the enforcement of arbitration awards internationally.[1458] Further, the system of international commercial arbitration has been able to gather a great mass of legal communication which again could lead the system towards a capability for operative closure in the context of particular disputes. That capability is insufficient, however, to evidence autopoiesis of international commercial arbitration as a system; since the operative closure of a particular arbitration would not by itself have any bearing on future arbitrations and thus in itself would not contribute to the evolution of the system.[1459]

In Chapter 7 of this Thesis, where international commercial arbitration is discussed in detail, it was outlined that there are many arbitration centres worldwide which the parties are able to choose from when deciding to subject their future disputes to arbitration. These arbitration centres are themselves decision-making systems which operate within a set of binding rules generating a binding decision using their binary code of legal/illegal in order to resolve a

[1457] H. L. A Hart and others, *The Concept of Law* (Oxford University Press USA - OSO 2012) 214.
[1458] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention) (NYC); for details about the NYC please see Chapter 7 of this Thesis.
[1459] Further, it is possible that the system of international commercial arbitration lacks the aspect of stabilisation of expectation in a same way as an autopoietic legal system. For further details regarding expectations see Chapter 4, Section 4.4.

dispute. From this perspective, using the assumption that on a global level international commercial arbitration is an operatively open system, it could be seen that on the specific level of the individual arbitration centres, they could be seen as operatively closed systems of decision making. If this assumption is correct, it lends a unique position for the individual arbitration centres. They are not on a national level, neither are they on global or regional level. They seem to be systems which are not anchored at any specific level discussed herein.

After the discussion regarding the characteristics of the systems of interest, i.e. the legal, economic and political system, was completed, application of the analysis provided in Chapter 4 was further conducted, focusing on the connections between the above systems in a form of structural coupling. Chapter 5 Section 5 outlined these connections in detail between the systems of interest and explained how these operate in society. In case of economic and legal systems one of the most prominent connections is the notion of property. The notion of property is one of the most significant mechanisms of structural coupling between the legal system and the economic system. As Luhmann suggests, a legal system when identifying the status of a property is interested in the attachment, transfer and reattachment of ownership of a property, which is an object of a contract, between direct or indirect contracting parties that may contrastingly be identified as an exchange from the perspective of an economic system.[1460]

Apart from property, the two systems can be seen as coupled via the notion of agreement, which precede a contract formation (as seen in legal system) or exchange (as seen in economic system) and contract. Further, the two systems are structurally coupled via the notion of money. This structural coupling, which by the economic system is perceived from

[1460] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 393.

the operations of the system as units to measure value, is by the legal system tied to the concept of legal tender and connected to its statutory requirements, which in the English legal system is illustrated in the Coinage Act 1971.

One of the last illustrations of the structural coupling between the legal and economic system was the notion of credit and debit which corresponds to the legal system's remedies of debt and damages. It is worth noting that the economic system perceives this notion in terms of value while the legal system comprehends this as a specified quality of obligation. The above view applies to the notion of damages as a separate concept. The examples of the structural couplings above outlined the difference in the perception of the same events within different systems. What is a single occurrence for an observer, has a different meaning within economic and legal systems. Each system is irritated by a different part of the occurrence.

As with the structural couplings between the economic and the legal system, the connections between the political and legal system can be viewed as structural couplings addressing what can be seen as a single event from an external observer's point of view resulting in different perceptions within the individual systems.[1461]

One of the most important structural couplings between the two systems is constitution. The constitution within the legal system is referenced as a '[…] *supreme statute, a basic law*'.[1462] The political system on the other hand references the constitution as an '[…] *instrument of politics, in the double sense of both instrumental politics (which changes states of affairs) and symbolic politics (which does not).*'[1463]

[1461] See for example John Beattie Paterson, 'Reflecting on Reflexive Law' in Michael King, and Chris Thornhill (eds), *Luhmann On Law And Politics: Critical Appraisals And Applications (Oñati International Series In Law And Society)* (Hart Publishing Limited 2006) 20.
[1462] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 410.
[1463] Ibid 410.

Further, the two systems may be seen as connected via legislative process. The connection through the law-making process can be derived from the constitutional link. However, at the same time the nature of this specific connection can be perceived separately due to the existence of the legislative process itself. When the process of passing law is in place, there are operations within the political system being reproduced and this process is reflected within the legal system's operations at times when the legal system is triggered by the result of the operational flow within the political system.

Another example of the structural coupling between the two systems is enforcement. It can be suggested that from the perspective of the legal system, the need for enforcement comes in a few forms. There is a need for enforcement of political decisions or for example enforcement of law. An example of this is when the public administration outlines patterns for behaviour which are generally followed.[1464] When these patterns are being followed, it is the moral criteria of right or wrong what is being used by the public administration.[1465] If these criteria are no longer followed, the political system resorts to the legal system which is irritated by this behaviour and will generate the basis for enforcement by outlining permitted and forbidden patterns of behaviour.[1466] When the enforcement of law within the political system is sought, the political system investigates '[…] *whether or not a prescribed action or failure to act can be enforced by the use of power*.'[1467]

Additionally, the connection between the legal system and the system of international commercial arbitration was explored. Even though the system of international commercial arbitration is not likely to be autopoietic, there are strong connections with the legal system.

[1464] Ibid 373.
[1465] Ibid 373.
[1466] Ibid 373.
[1467] Ibid 164.

These connections could be potentially seen as structural couplings as well even though from the external observer's perspective, one of the systems is not autopoietic.

One of the strongest links between the system of international commercial arbitration and the legal system is the New York Convention 1958 ('NYC').[1468] It can be suggested that the NYC forms a part of the legal system, yet it does not recognise international commercial arbitration as part of its own operations. The explanation may be that that the legal system when irritated by the arbitration agreement of the parties reflects on its own structures and subsequently produces an instruction not to use the legal system.

Enforcement as a notion can be also seen as connecting the two systems together. Even though the arbitration proceedings result in a binding decision, the arbitration system must irritate the legal system in order to complete the recognition of the decision within the national legal systems. This is in accordance with the process of enforcement of law within the legal system as discussed above as all systems must ultimately bring their disputes to the legal system in order to ensure enforcement. And subsequently, if this does not achieve enforcement, the legal system's last resort is the enforcement by force via structural coupling with the relevant political system.[1469] Enforcement also serves as a coupling between the legal system and the individual arbitration centres.

After the discussion of the connections between the above systems was presented, it was vital to further elaborate on the notion of fragmentation. It seems that according to the information subtracted from Luhmann's scholarship, there are a few possible scenarios how

[1468] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10th June 1958, entered into force 7th June 1959) 330 UNTS 3 (New York Convention).
[1469] Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2004) 374.

fragmentation may manifest itself within society.[1470] Either a non-autopoietic system may evolve enough mass of communication to be able to reach autopoiesis and breaks itself from its non-autopoietic environment. Or a new subsystem of a system is formed, which although being from its own nature a subsystem staying within the boundaries of its original system, also has its own defined boundaries. The two above examples may be seen as positive and even though a fragmentation may be happening, this will not necessarily mean a loss of order. Another option, which may mean a loss of order would be an autopoietic system losing coherence and collapsing back to its environment.

Further, once the focus is directed to structural couplings, there may be other fragmenting events identified. If an autopoietic system loses contact with another autopoietic system but continues to function, this loss of contact may be perceived as of a fragmenting nature, yet may not necessarily mean loss of order, very much depending on concrete systems and structural couplings. Another possible scenario is that an autopoietic system loses couplings with a non-autopoietic environment but continues to function. The fact that is continues to function may indicate that a loss of order did not occur. When loss of order may occur is when a loss of structural coupling causes inability to function for an autopoietic system and it collapses back to its environment.

One of the fragmenting events which was illustrated was the Covid-19 Pandemic. The potential impact of the pandemic was illustrated on the systems of interest and also included the impact on the structural couplings.

It can be suggested that the economic system may have suffered significantly. This is by the way of decrease in wealth as less operations are generated due to less transactions being

[1470] It needs to be noted that this is not an exhaustive list of scenarios.

processed (for example decrease in tourism). The political system can be also seen as impacted by the pandemic. As opposed to the economic system, the political system experienced higher volume of operations generated as new measures were required in order to eliminate the impact of the crisis and, therefore, using its authority it was increasing the mass of operations.[1471] Even though the legal system can be seen as operating slower due to the nature of its structures, the impact of pandemic is and will be visible as well. An illustrative example may be the House of Lords Constitution Committee's March 2021 report as to the impact of the pandemic on the Courts.[1472] The report indicated that the court system was left vulnerable with fewer staff and increased number of litigants; the courts were not prepared for disruption on the scale caused by the pandemic; or for the fact that planned improvements required in the IT area could not take place, which therefore, left the courts reliant on sub-optimal technology. [1473] On the other hand, the system of international commercial arbitration may benefit from potentially higher volume of disputes caused by the pandemic as arbitration may possess more flexible tools offered to businesses such as online arbitration and, therefore, may be more prepared for impactful events such as the pandemic than the courts.

It can be suggested that the pandemic cause disruption to structural couplings of all the above systems with their environment. For an illustration, the links of the economic system with its environment were outlined. The border closures in the world set new limits to the operations of the global economic system and this form of dislocation had an impact on the links between

[1471] Frauke Austermann, Wei Shen and Assen Slim, 'Governmental Responses To COVID-19 And Its Economic Impact: A Brief Euro-Asian Comparison' (2020) Asia Europe Journal 211.
[1472] (*Select Committee on the Constitution COVID-19 and the Courts*, 2022) <https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/257/25702.htm> accessed 9 January 2022.
[1473] Ibid Summary of Conclusions and recommendations.

the global economic system and other systems.[1474] Many planned contracts (exchanges as perceived by the economic system) were cancelled and this had an impact in the thinning of the structural couplings between the economic system and the legal system. The frequency of irritations to the respective systems decreased as the contracts (exchanges) were unable to be performed. Therefore, not only did the pandemic cause a decrease in operation of the economic system (which could be seen as fragmentation in a sense of thinning the mass of operations), it also caused a decrease in the impulses from the environment and thinned the structural couplings between the economic system and its environment.

Additional point which is necessary to outline is the impact of Brexit (another fragmenting event) on the rules of private international law. With respect to the rules of PIL, due to the existence of the international and the regional rules, the national rules may be avoided and thus associated barriers of language and additional costs connected with an investigation of the respective national rules may be avoided as well. However, where there are no applicable rules on the international level or the regional level, this may cause extensive issues especially with respect to the party which is trying to enforce their claims. An example which was used in the Thesis refers to the English law as, even though the UK business may not be directly dealing with these rules, it is a familiar system. However, if the UK business is facing a foreign jurisdiction and provided that national PIL rules of the said jurisdiction apply, the rules will not be familiar and the UK business may struggle significantly. This may be due to the language barrier and additional costs but also due to the fact that the legal culture may be very different and unfamiliar for the UK business.

[1474] Addy Pross, 'COVID-19, Globalization, De-Globalization And The Slime Mold's Lessons For Us All' (2020) Israel Journal of Chemistry.

Further to the business perspective of the above issues with the possible lack of international or regional PIL system in place, the impact on the structural coupling between individual legal systems can be seen. It was suggested, that if there is an international or regional legal instrument in place, this does not mean that the respective PIL system is autopoietic, however, it does illustrate that there is a firm structural coupling between the individual legal systems. This is the case pre-Brexit when the UK enjoyed the regional PIL rules provided by the EU. Since these rules ceased to apply, the UK businesses may use the option to incorporate a dispute resolution clause in their contract with their cross-border partners choosing exclusive jurisdiction (or enter into a submission agreement after the dispute arises) and this may protect them via the structural coupling with for example the Hague Convention 2005. However, if this is not possible, since the structural coupling of the UK legal system with the EU Member States via EU PIL is missing, the UK businesses may face uncertainty as there may be PIL rules activated which the UK businesses are not familiar with.

An option, which may be more beneficial for the UK businesses is the international commercial arbitration as a method for their dispute resolution. With regards to international commercial arbitration, despite some limitations, there seems to be a robust system which is able to operate in a clear and a comprehensive manner. This is the case even though the system may not be seen as autopoietic. This suggestion was outlined in Chapter 5 and is based on several factors. [1475] One of the strongest points in support of this suggestion is that autopoiesis requires evolution over time which is not supported by the fact that a single arbitration does not reproduce itself over time. The circular spiral of reproduction, is, therefore, not present. As noted above, some system memory of arbitrations is secured

[1475] For details please see Section 5.5 and Section 5.6 of Chapter 5.

through the publication of decision in the Yearbook Commercial Arbitration (the 'YCA'), (the most recent YCA was published in 2022).[1476] A further point is that the system of a single arbitration would not generate enough mass of legal programmes which would be subject to such evolution. The fact that the parties may chose different types of arbitration and different norms, usually subject to exceptions such as mandatory provisions of a country where the arbitration is seated, creates chaos and does not support any identification of boundaries quite simply because there are no holistically identifiable boundaries.[1477]

One of the last points which was addressed was the notion of harmonisation generally and with regards to the international commercial arbitration. It can be suggested that harmonisation of a particular system would ideally require an autopoietic system. To harmonise across the global legal order, an autopoietic system would be desirable in order to carry out the said harmonisation. Generally, if the system which is supposed to carry out harmonisation is not autopoietic, the problem of each autopoietic systems which are irritated by the harmonisation provision will deal with it in its own way. This leads to independent evolution as addressed by Chapter 4 Section 4.6 of this Thesis. The independent evolution missing such autopoiesis on a supra level would create divergence over time. This can be due to various reasons, cultural clash of the legal orders and other factors discussed in Chapter 5 Section 5.6.[1478]

If applied to the system of international commercial arbitration, it can be suggested that the desired autopoiesis on the global level is missing. This leads to the outcome that it is

[1476] 'Available Now: The ICCA Yearbook Commercial Arbitration XLVI | ICCA' (*Arbitration-icca.org*, 2022) <https://www.arbitration-icca.org/available-now-icca-yearbook-commercial-arbitration-xlvi> accessed 17 March 2022. For further details see Section 7.3 of this Chapter 7.

[1477] Even though the mandatory provisions may give a sense of certain boundaries, this is just a limited space and does not provide with any holistic perception of boundaries of the system.

[1478] Andreas Fischer-Lescan and Gunther Teubner, 'Regime Collisions: The Vain Search For Legal Unity In The Fragmentation Of Global Law' (2004) 28 Mich J Int L.

presumably the legal system on the domestic level (as the regional level does not seem autopoietic either)[1479] which reacts to the irritations by global attempts to harmonise the system. This leads to independent evolution and the outcome is unpredictable.

Even though the harmonisation attempts may be seen as problematic, the arbitration system may still be seen as beneficial for the UK businesses and may be, depending on the nature of the contract and business relationship, an attractive method of dispute resolution. If the UK business and its cross-border trading partner select for arbitration they obtain a way of enforcement overseas. It is necessary to note that even though the courts are approaching the arbitration agreements in a more flexible way, it would be advisable to incorporate a written arbitration agreement in the contract between the UK business and the cross-border partner. There may be some issues that the UK business as a judgement creditor may be facing regarding the jurisdiction of enforcement, for example the public policy as discussed above, however if the businesses choose to select arbitration as the method of dispute resolution, there may be further advantages which correspond to the nature of the robust system of international commercial arbitration.

Arbitration can be seen as a method possessing a high level of neutrality. There are two main areas which for example Professor Lalive considers and these are neutrality of the arbitrator and neutrality of the place of arbitration (seat).[1480] Further, the fact that the arbitration results in a final award, generally not permitting an appeal may be attractive for some businesses.[1481] Another aspect which could be beneficial for the businesses is confidentiality

[1479] In comparison, the EU legal system may be more effective in its harmonisation attempts as it can be suggested that it is an autopoietic system on a regional level. An example could be already outlined ground of refusal of a judgement due to public policy issues as per Art 45(1)(a) of the Recast Regulation. Even though the public policy is left to be interpreted by the Member States, the EU sets out limits for such interpretation (Case C-7/98 Dieter Krombach v André Bamberski [2000] European Court Reports 2000 I-01935).

[1480] Pierre Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration' (1970) Revue de l'arbitrage 59.

[1481] Jean Thieffry, 'The Finality of Awards in International Arbitration' (1985) 2 Journal of International Arbitration 27.

and privacy. Privacy means that third parties may be excluded from the proceedings while confidentiality is related more to the content of the proceedings such as the evidence or the award.[1482] Further, the parties may be attracted to arbitration due to its various aspects of flexibility. There is a flexibility in the choice of governing law (substantive and procedural);[1483] choice of institution;[1484] choice of arbitrators;[1485] choice of level of confidentiality;[1486] or choice of different types of procedures (e.g. expedited procedure).[1487] The above are some reasons which may encourage the UK businesses and their cross-border partners to select arbitration as their preferred option for dispute resolution and it can be suggested that the system is able to provide the parties with a great level of certainty regarding enforcement of the arbitral awards.

[1482] Scott D Marrs and Martin D Beirne, 'International Perspectives on Arbitration Confidentiality' (2015) 82 Def Counsel J 76.
[1483] Kimberley Chen Nobles, 'Emerging Issues and Trends in International Arbitration' (2012) 43 Cal W Int'l LJ 77.
[1484] Ibid 82.
[1485] Ibid 82.
[1486] Ibid 83.
[1487] Ibid 84.

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Thomas v Thomas [1842] 2 QB 851

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