COMMON LAW VS. CIVIL LAW

Common law tradition:
1. privilege to the text of the contract, literal interpretation
2. Enforces contracts according to clear terms, they have to be very precise
3. Stability, irrelevant where performance leads to.. Focuses on certainty over fairness

Civil law tradition:
1. If there is an uncertain interpretation, we can rely on other sources of interpretation, such as the civil code
2. supplement terms with ancillary obligations
3. Principle of good faith

-> fundamental differences mean the same contract wording may produce dramatically different interpretations and effect depending on whether it's interpreted under common law or civil law
-> Differences also in the execution and enforcement. In civil law we go for specific performance (we go to the judge and ask for the thing to be done), in common law they focus first on compensation

WHAT MAKES A CONTRACT INTERNATIONAL?

different views, no agreement:
- CISG definition -> parties must have places of business in different states under the Vienna convention on international sale of goods
- UNCITRAL Model Law -> includes disputes where substantial obligations are performed in a state different from parties' state.
- Rome I Regulation -> permits choice of governing law but restricts purely domestic contracts with foreign law choice. You can choose your governing law but you have to be aware of the fact that it's not a domestic contract. if, apart from the choice of a foreign law, all other elements are located in the same state, the chosen law will not have the effect of governing the contract, but will only be incorporated into the contract as if it was a term of the contract. The contract, together with the incorporated chosen law, will still be subject to the local governing law.
- English court approach -> considers contracts international if based on internationally used standards like ISDA Master Agreement. Two Italians had a contract in Italy and decided to go to English court for disputes, used the ISDA rules (international, it's a standard model used worldwide) so the contract was considered international.

THE ANGLO -AMERICANIZATION OF CONTRACT MODELS

English is the undisputed language of international business -> when parties search for contract models in English, they typically find contracts originally written by English lawyers for English law. Often, contracts are governed by a law that does not belong to the common law family.
-> The common law style means that the contract is very long and detailed, it has many clauses and tends to be self sufficient. All the rules are in the contract, parties don't have to rely on the law of any country. impression proven to be illusionary, and not only because governing laws may contain mandatory rules that may not be derogated from by the contract.The governing law, which may vary from contract to contract, will affect the way in which the contract is interpreted, construed and applied.
Interpretation-> the process of clarifying the linguistic meaning of a text
Construction -> the process of inferring legal effects from that text

THE CAVEAT EMPTOR PHILOSOPHY

common law drafting follows the principle of "caveat emptor" (let the buyer beware), they assume that in B to B (business to business) the parties can assert the risk in an adequate way and so assisted by lawyers they can make adequate provisions through careful contract drafting. You protect yourself in the negotiation phase and this is sufficient to ensure the contract is well balanced.
-> Contracts though could be not well balance -> companies are different, who has more economic power tends to take advantage of this(Amazon) -> In international business contracts it is difficult to provide protection to the party also in case the contract is unbalanced because this principle says that businesses can protect themselves

Consumers are protected in the EU because there are provisions of law that protects them, because it assumes that they are weaker than businesses.
Consumers can also conclude contracts everyday -> e-commerce

BOILERPLATE CLAUSES

standard, pre-formulated provision that appears at the end of most contracts, regardless of the subject matter. These clauses are not specific to the business deal itself, but serve to regulate the general legal framework of the agreement (interpretation, enforcement, dispute resolution, governing law).
entire agreement clause -> isolate contract from external sources, excluding terms not appearing in the document. Aims to prevent consideration of side agreements or negotiations. This is also often emphasised by referring to'the four corners of the document' as the borderline for the interpretation or construction of the contract. The parties' aim is thus to exclude terms or obligations that do not appear in the document. interpreter of English law contracts is bound by the language of the contract. As a general rule, the interpreter would not be allowed to take into consideration external circumstances when interpreting and construing the contract, such as the parties' conduct during negotiations or after the signature of the contract

No Waiver Clause -> remedies may be exercised regardless of parties conduct. Prevents passive behaviors from being interpreted as waiving contractual rights, ensures that the remedies described in the contract may be exercised in accordance with their wording at any time and irrespective of the parties' conduct. "The failure of any party at any time to require performance of any provision or to resort to any remedy provided under this Agreement shall in no way affect the right of that party to require performance or to resort to a remedy at any time thereafter"

No Oral Amendments Clause -> ensures that the contract is implemented at any time according to its wording and irrespective of what the parties may later have agreed, unless recorded in writing. useful when the contract is going to be exposed to third parties in connection with the raising of finance or insurance. Third parties who assess the value of the contract must be assured that they can rely on the contract's wording. If oral amendments were possible, an accurate assessment of the contract's value could not be made simply on the basis of the document.

THE MODELS FOR INTERNATIONAL CONTRACT DRAFTING

the criteria of certainty and consistency seem to be given primacy by the English courts. This ensures a literal application of the contract notwithstanding the result, as long as the clause is written in a sufficiently clear and precise manner.

↳ The clause on Liquidated damages, e.g., is designed to escape the common law prohibition of penalty clauses. The clause is meant to determine, in advance, the amount of damages that may arise if one party fails to perform the contract. By pre-determining the damages, the parties avoid the uncertainty connected with having to prove that there has been a loss, that the loss was due to the other party's default and the amount of the loss. Under the common law,a fine is deemed to be a penal feature that cannot be agreed in a contract. For this reason, contract practice developed the Liquidated damages clause -> same function as a penalty but is structured as a clause regulating reimbursement of damages.

Subject to Contract Clause -> larger commercial contracts with long-lasting and complicated negotiations. various documents signed in the course of the negotiations, usually named 'Letter of Intent' (the parties may not yet have negotiated all of the specific aspects of their cooperation and may therefore not be in a position to be able to write the contract with the degree of detail with which they would feel comfortable. not considered to be particularly binding),'Heads of Agreement' or 'Memorandum of Understanding'.

Termination Clause -> stipulate that the contract may be terminated prior to its planned expiry if certain events occur; for example, one party may be given the power to terminate the contract early upon breach by the other party of certain obligations. They often distinguish between termination as a consequence of an 'Event of default' (one party failed to perform its obligations under the contract) and termination as a consequence of an'Event of termination' (one party is affected by circumstances that render the contract less interesting for the other party. For example, if the affected party's economic situation deteriorates, the innocent party may find it too risky to be bound by the contract)

Arbitration Clauses -> another good example of the importance of English law requirements to the drafting of international contracts. very detailed in the definition of their scope. A detailed Arbitration clause is meant to counteract restrictive interpretations that may be imposed by the applicable arbitration law.

WHY GOVERNING LAW COMES LAST

1. Initial discussions, technical and commercial officers discuss business terms without legal input.
2. Legal drafting, lawyers convert agreed terms into contractual form
3. contract fully drafted reflecting parties commercial understanding and technical specifications
4. Governing law choice

CLAUSE 25, APPLICABLE LAW

Applicable law governs the contract and everything in the contract is ruled by it. Any gap or issue of interpretation depends on the applicable law you have selected. Parties tend to prefer their national law because lawyers are more confident

Options:
- Domestic laws,
- common law of England,
- rules by organization created to regulate trade (international instruments, World Trade Organization.CISG (parties usually are part of the cisg and chose it in order to be as far as possible from national law, it's not automatic), UNIDROIT -> CISG is an international organization among states, while the UNIDROIT principles are the result of working groups of lawyers but soft law
- EU, regulation about applicable law helps the parties to select it
- Lex mercatoria, set of principles shared among the community of traders. Academic concepts but ideally the parties can chose it
- Sector-specific models (eg FIDIC, federation of international developers, building infrastructurea), depends on the sector of the economy
- ICC, models for business globally, not sectorial. International chamber or commerce.

applicable law = which substantial rules govern the contract?
Jurisdiction= who will decide disputes?

Conflicting rules -> different countries apply different conflict of law rules, leading to contradictory results.
Ex. Danish- Thai contract (signed in Bangkok between danish exporter and Thai purchaser, no expressed applicable law clause). Court has to find a law to resolve a dispute, in danish law rule about the characteristic performance, in Thailand another rule (place of conclusion rule) .

The eus successful harmonization covers all member states except Denmark (still using the Rome convention). -> Rome convention (1980) establishes characherisric performance rule, Rome I (2009) added specific rules for different contract types

FREEDOM OF CHOICE

Express choice-> clear contractual clause specifying chosen law
Implied choice-> demonstrated through contractual terms or circumstances
No connection required, parties can choose law of a third country under Rome I

Certain situations restrict freedom to choose applicable law, protecting weaker parties:
1. Purely domestic contracts cannot escape mandatory rules by choosing foreign law
2. Intra-EU contracts. EU mandatory provisions apply despite third-country law choice
3. Consumer contracts. Consumer protection rules of residence country still apply
4. Employment contracts, worker protection rules of work location remain effective

IMPACT OF GOVERNING LAW

The only situation in which a court may change the term of a contract is when it is clear that the written term did not reflect the parties' intention. This, however, requires not only that it is clear that there was a mistake in the contract, but also that it is clear what the parties intended to say.
The English interpreter, furthermore, has little possibility of filling in the gaps in the contract by assuming implied terms. an English court does not have access to pre-contractual negotiation or surrounding documentation in order to ascertain the common intention of the parties; and courts do not hear evidence of the parties as to what their intention was at the time of writing the contract.
caveat emptor, let the buyer beware. It is not the legal system's role to ensure that the parties' interests are balanced. It is each party's own responsibility to consider all risks and make appropriate provisions for them in the contract.

one of the main features distinguishing the common law and civil law in respect of contracts is the relationship between the agreed contract terms and the applicable law: civil law courts have more power to evaluate the fairness of the contract and intervene to reinstate the balance of interests between the parties; they are more concerned with creating justice in the specific case than with implementing the deal in the most predictable manner. In doing so, the civil law court is guided by general clauses and principles of good faith, reasonableness or fair dealing.

It is likely that a civilian court would not attach too much importance to the Entire agreement clause: if it is satisfied that the parties had agreed on the modified specifications, it would consider this agreement even against the wording of a standard clause that was probably not negotiated. It is likely that a common law court would take the Entire agreement clause more seriously: had the producer intended to insist on the new specifications, it would not have included in the contract an Entire agreement clause expressly depriving of any affect any previous agreements.

The Liquidated damages clause has its origin in the common law, where contractual penalties are not permitted. The main remedy available for breach of contract in common law is compensation by way of damages; however, the quantification of damages may be difficult and uncertain. In order to achieve certainty in this respect, English contracts contain clauses that quantify the damages in advance. As long as the amount of the liquidated damages is somehow related to the amount of possible damages, and the clause is not used as a punitive mechanism, the clause will be enforceable. The agreed amount will thus be paid irrespective of the size of the actual damage. In this way, English contracts also obtain the result that in civil law systems is obtained by agreeing on a contractual penalty. -> The Liquidated damages clause is one more example of the different approach to drafting and interpretation in the common law and in the civil law traditions. Whereas the former permits circumventing the law's rules by appropriate drafting, the latter integrates the language of the contract with the law's rules and principles.

WHICH STATE LAW GOVERNS AN INTERNATIONAL CONTRACT?

conflict rules or choice-of-law rules -> rules that have the function of identifying the laws governing inter national relationships -> parties the power to choose which law their contract shall be subject to. This power enhances the impression of self-sufficiency

In the EU, large parts of the private international law relating to commercial relationships were harmonised by two regulations: the Rome I Regulation on the Law Applicable to Contractual Obligations and the Rome II Regulation on the Law Applicable to Non-contractual Obligations. Where there are no harmonised choice-of-law rules, even within the EU each court will apply the private international law of its own state.
party autonomy may be restricted through two mechanisms of private international law:
1. overriding mandatory rules (also known as lois de police) -> mandatory rules protecting interests that are particularly important for the society to which the court belongs
2. Ordre public is a basis for avoiding application of a foreign law, or for refusing recognition and enforcement of foreign judgments or of arbitral awards-> safeguard fundamental principles of the court

NO EXPRESSION OF CHOICE

If the parties have not expressed a choice of law, the governing law will be chosen by applying the connecting factor contained in the subsidiary conflict rule. In the Rome I Regulation, Article 4 provides a series of connecting factors, one for each contract type, mainly based on the general connecting factor of the habitual residence of the party making the characteristic performance. -> the legal style in which the contract is written does not seem to be a relevant criterion in the assessment of which country the contract has its closest connection with.

THE ROLE OF TRANSNATIONAL LAW

a third system, detached from national law and yet not international law (not formally based on treaties or conventions) -> the lex mercatoria, transnational law or delocalisation.

↳ purpose is to provide a uniform, transnational regulation for international contracts, which can be applied equally all over the world and irrespective of the national legal systems with which the dispute is connected. This regulation would stem from a body of rules spontaneously emerging from the international business community, and its most prominent principle would be the primacy of the parties' will. The literature supporting a delocalised, transnational system presents various arguments aimed at showing that national laws are not adequate sources for governing international contracts, from the observation that it is costly and time consuming to analyse, for every contract, all potentially applicable laws, to the statement that conflict rules are a confusing and complicated mechanism and thus should be avoided, or that national laws' content is adequate to regulate domestic, but not international contracts.

Sometimes, the parties do not reach an agreement on which governing law to choose, do not attach significant importance to the choice of the governing law or do not even think of the question of the governing law

(i) Detached Contracts -> These contracts prompt the necessity of restricting the state's role as a sovereign that may introduce new legislation, the tribunal is to apply (in the absence of a choice of law made by the parties)'the law of the host countries. . . and such rules of international law as may be applicable' -> the national law of the host country is to be applied inasmuch as it does not violate international law.

(ii) Standard Contracts -> The European Commission seemed to encourage standard contracts as a tool towards harmonisation of the various state contract laws. It was soon realised, however, that contracts, even if they are standardized, are subject to a governing law and cannot derogate from this law's mandatory rules. Therefore, a standard contract, to be effective across the entire territory of the EU, would necessarily have to comply with the strictest of the criteria set by the various member states

-> would have prevented the standard contracts from adopting any more flexible criteria offered in other member states, hence preventing progress in contract practice.. As a tool for harmonising international contract law it has been proposed that standard contracts should be negotiated by organisations representing the involved parties.

Transnational sources have proven to be particularly successful in harmonising specific areas of international commercial law– as opposed to the general contract law -> Harmonisation of specific areas can be achieved in various ways: (i) through binding instruments such as the 1980 Vienna Convention (CISG), which creates a uniform law for certain aspects of sale contracts; (ii) through instruments issued by international bodies but without binding effect, such as the UNCITRAL, (iii) through instruments issued byprivate organisations and without binding effect unless the parties to the contract adopt them– such as the International Commercial Terms (INCOTERMS), (iv) through model contracts issues by branch associations such as the ISDA Model Swap Agreement; (v) through principles and guidelines issued by international bodies

-> Common to these instruments is the fact that they have a specific scope of application: These instruments do not have the goal of regulating all aspects of the relationship between the parties, such as the validity of the contract, its interpretation or all remedies for breach of contract.

Transnational rules regulating specific aspects of a legal relationship are a useful complement to the governing law and are enforceable if they are incorporated into the contract by the parties and do not violate the mandatory rules of the governing law. If these rules represent trade usages, they will be applicable even without incorporation by the parties since most of the legal systems refer to trade usages. Even if they are incorporated by the parties into the contract, however, these sources do not replace the governing law. They cannot replace the governing law because they only regulate specific aspects of the legal relationship. Any issues that fall outside of their narrow scope will be regulated by the governing law. Furthermore, both the contract and the incorporated sources will be subject to the applicable law

Transnational sources, thus, may be incorporated into the contract by the parties, but traditionally may not be selected to govern the contract to the exclusion of any national law, not even in mere contractual matters. In commercial arbitration, in contrast, arbitration laws and arbitration rules often give the parties the possibility of choosing'rules of law' to govern the dispute; In many situations, transnational sources will be applied as a supplement to the governing law. Generally, within the field of contract law, the law permits the parties to regulate their interests in a way that differs from the regulation contained in the law itself. The law, in other words, is generally not mandatory, but applied as default rules, in case the parties have not agreed on a specific regulation. In some situations, however, transnational sources might conflict with the mandatory rules of the applicable law.

AUTONOMOUS INTERPRETATION

The principle of autonomous interpretation applies not only when soft law sources have gaps, but also when the meaning of the provisions is to be ascertained. An autonomous interpretation aims at construing and applying a rule in a uniform way that is common to all countries that have adopted or ratified the instrument. It assumes that a court avoids special interpretations due to peculiarities of its specific national system

THE CISG FRAMEWORK

In force since 1998. One of the main effort to harmonize international trade law. It was an effort of one of the agencies of the United Nations.

Automatic application -> CISG automatically applies when both parties have their places of business in different contracting states (over 95 countries including EU,US,China and Japan). If only one party is from a contracting state, CISG may still apply through private international law
Explicit opt-out f parties want to exclude CISG under art 6.
CISG can apply even if one or both parties are from non-member states

The CISG covers the formation of contracts and the substantive rights and obligations of the buyer and the seller arising out of a contract of sale, such as delivery, conformity of the goods, payment and remedies for breach of the related obligations

Because of the common law tradition' s reluctant approach to good faith, the final text of the CISG is silent on the question of good faith as a duty between the parties or as a correction to the terms of the contract.

the generic proposals on good faith were incorporated into Article 7. Article 7, however, does not formulate a rule directed to regulate the parties' conduct in the contract; it states a rule instructing the interpreter of the Convention. The Convention shall be interpreted having regard to the need to promote the observance of good faith in international trade.

SCOPE LIMITATIONS

Art 2 excludes certain types of sales from CISG application:
1. Consumer contracts -> goods bought for personal, family or household use
2. Auctions
3. Specific goods (ships, aircraft or electricity)

CONTRACT FORMATION

art 14, offer -> a proposal must be sufficiently definite and indicate intention to be bound
Art 18, acceptance -> must be communicated to the offeror. It becomes effective in the moment the indication reaches the offeror. It cannot contain major modifications to the offer, only minor.
Art 16, revocation -> offer can be revoked before acceptance, unless irrevocable by agreement

SELLER'S OBLIGATIONS

Delivering conforming goods (on time, marching quantity, quality, description and packaging requirements)
Provide documentation (transport and customs documents for buyers possession)
Remedy defects (if goods are non-conforming, seller must repair, replace, reduce price or allow avoidance)

BUYERS OBLIGATION

pay contract price, at agreed time and place
Take delivery (accept goods as specified in the contract)
Examine and notify of defects

REMEDIES FOR BREACH

breach (art 25): substantial failure that deprives the other party of what they were entitled to expect.
Buyers remedies: avoid contract, claim damages, require specific performance
Sellers remedies: claim, payment or damages, avoidance of contract, reclaim goods.

Art 74, damages calculation: cover foreseeable loss, including lost proft

GOOD FAITH AND INTERACTION WITH DOMESTIC LAW

Art 7, good faith -> cisg requires parties and courts to act in good faith, promoting predictability,
Domestic law integration-> CISG covers obligations, not validity, contract validity is governed by domestic law
CISG vs incoterms-> cisg does not prescribe delivery terms, incoterms complement CISG obligation.

OFFER AND ACCEPTANCE ACROSS LEGAL TRADITION

three approaches:

Common law -> Carlill v Carbolic Smoke Ball co (1893), case establishing unilaterali contracts and acceptance by performance in english law. Rules for how to design the offer. Unilateral contracts and acceptance can be valid -> The Carlill case -> company promised £100 to anyone who used its products as directed and still caught flu. Mrs Carlill used the producr, caught flu, and claimed the reward. Advertising was a unilateral offer to the public, acceptance occurred by performance. -> an offer can be accepted by conduct if it invites performance

Civil law-> German BGB, codified rules creating binding offers with strict protections for offeree reliance. offeror is bound by the offer unless expressly reserved otherwise. Expiration rules-> offer expires if rejected or not accepted within the specified time period

International -> CISG art 14-17, uniform rules balancing flexibility and certainty in international sales contracts. Art 14, definiteness: offer must be sufficiently definite and indicate intention to be bound

Consideration is a rule of English law according to which a unilateral promise is not enforceable: to create binding obligations, both parties need to commit to obligations that will create, for each of the parties, both a detriment and a benefit. A simple unilateral offer is a detriment for the offeror and confers no benefit; it confers a benefit on the offeree, without requiring any detriment from it. In contrast, under the civil law, a unilateral offer is binding without the need to enquire whether there was a mutual exchange of benefit and detriment.

CISG: THE INTERNATIONAL MIDDLE

Art 14, definiteness: offer must be sufficiently definite and indicate intention to be bound
Art 15, effectiveness: offer becomes effective when received by the offeree
Art 16, revocation: offer revocable until acceptance is stated irrevocable or offeree reasonably SLIDE
Art 18 acceptance: acceptance effective when it reaches the offeror

NATURE OF THE OFFER

Common law-> Invitation to contract, revocable until acceptance (unless option contract). prioritizes freedom and objective intention. objective theory, focus on manifested intent and reasonable interpretation of conduct
Civil law-> Binding once made unless right to revoke expressly reserved. prioritizes reliability and trust in declared will. Will theory, emphasis on binding declarations and protection of reliance
CISG-> functional compromise. International balance blending both traditions for commercial predictability. Revocable unless stated irrevocable or relied upon by offeree

THE INTERNATIONAL SALE OF GOODS CONTRACT

PRICE AND PAYMENT CLAUSES

Define currency, timing and method of payment.
-> common law: precise and exhaustive drafting
-> civil law: moderated by good faith and cooperation

COMPARATIVE INSIGHT: PAYMENT

Common law-> payment is a condition precedent, late payment triggers automatic effects
Civil law-> flexibility in case of hardship or temporary difficulties

INCOTERMS

international commercial terms (The actor responsible for establishing the terms is international chamber of commerce, ICC), define allocation of costs, risks and responsibilities.
acronyms (EXW,FCA,CPT...)-> each term has a clear meaning.
E.g. exw (ex works, seller makes goods available at their premises, buyer bears all costs and risks from there onward. Risk transfer point when goods are placed at buyers disposal at seller's premises)

incoterms do not have automatic legal force, they apply only if expressly incorporated into a contract
Interpretative function: they supplement, rather than replace, national law or international instruments like the UN Convention on Contracts for the international sales of goods (CISG). Courts use them to interpret parties'obligations regarding delivery, transport and risk allocation.
-> A central legal issue concerns when the risk of loss or damage to the goods transfers from the seller to the buyer: under FOB (Free on Board), risk passes when goods are loaded on board to the vessel
Under CIF (Cost, insurance and Freight) risk passes at shipment, even though the seller pays for transport and insurance.

OVERLAPS

national variations: domestic rules on delivery, transfer of title, or insurance may conflict with the incoterms allocation.
CISG overlap: the CISG also regulates delivery and risk. When both apply, parties must ensure the contract clarifies which regime prevails
Mandatory law limitations: customs, sanctions, or consumer protection rules may override incoterms allocations

UCP 600

The UCP 600, a publication by the ICC regulating the payment mechanism of letters of credit, are another example of soft law that supplements the governing law. Like the INCOTERMS they regulate a specific mechanism and do not have the goal of covering general matters of contract law. However, they have a larger scope of application and in some situations, they may conflict with mandatory rules of the governing law Letters of credit are a widely used method of payment, applied when the creditor does not intend to take the commercial risk connected with the creditworthiness of the debtor.

CONFORMITY OF GOODS AND INSPECTION

Ensures goods meet contractual specifications.
Buyer's duty to examine and notify defects

Common law-> strict notice requirement, failure bars remedies
Civil law/CISG-> reasonable time standard based on circumstances

FORCE MAJEURE CLAUSES

Common in international sales contracts. Situation in which performance becomes impossible due to events such as natural disasters, war, governmental actions, pandemics, or other serious disruptions not attributable to the parties.

According to Article 79 of the CISG, a party is not liable for failure to perform its obligations if it proves that the failure was due to an impediment beyond its control, which was unforeseeable and that could not reasonably have been overcome.

The clause serves to excuse non-performance or delay in performance without liability, provided the affected party can demonstrate that:
- the event was external
- it was unforeseeable
- it was unavoidable

Force majeure provisions are usually not mandatory, therefore the parties are free to regulate the matter as they deem fit; however, interpretation of the parties' regulation may be coloured by the governing law

Civil law-> force majeure typically codified. a contracting party that fails to perform its obligations is excused if the failure to perform is due to an impediment that was unforeseen. Article 1218 of the Italian Codice Civile states that a party that does not fulfil its obligations correctly is liable, unless it proves that the non-performance is due to impossibility caused by events that that party is not responsible for.
Common law systems-> depends on the contractual clause itself, no general doctrine. contractual obligations are deemed to be absolute, and a party would normally not be excused for non-performance-> English law has the doctrine of frustration, which could be compared with the civilian principle of force majeure.

HARDSHIP CLAUSES

under which circumstances and with which consequences the parties may be entitled to renegotiate their contract because of a supervening and unexpected imbalance in the respective obligations.
Excessive difficulty, not impossibility
Common law-> must be expressly included
Civil law-> recognized via imprévision or rebus sic stantibus

ICC hardship clause -> aligns with UNIDROIT principles. Encourages renegotiation before termination

A comparable clause is the so-called Material Adverse Change clause (also known as MAC clause). Generally, MAC clauses are to be found as conditions for the closing of a deal: after the contract is signed, it may be necessary to carry out various formalities before the deal becomes effective. If, in the time between the signing and the closing, an event occurs that materially negatively affects the interest of one party in the deal, that party has the option to withdraw.

DISTRIBUTION CONTRACTS

When organizing foreign distribution, an exporter faces an initial choice:
- sell directly abroad
- sell domestically to intermediaries who will then export. Simplify export-related challenges for the manufacturer but limits their control over the resale phase

DIRECT FOREIGN SALES

3 main organizational models:
1. Distribution without dedicated foreign organization
2. Distribution through a third-party organization.
3. More advanced forms requiring a direct presence abroad, such as a franchising.

4. Internet., a company's own website or third-party platform. -> bypasses traditional intermediaries and allows producers to reach foreign markets efficiently

Selling directly to foreign customers is the least complex option, but rarely practical for ongoing businesses .

The exporter may send their own sales personnel. It is also common to rely on business finders or other types of occasional intermediaries

DISTRIBUTION VIA AGENTS OR DEALERS

Most common model, third-party abroad (agents, dealers), organize the distribution or promote sales acting as an intermediaries. They buy and resell the products earning a margin

Commercial risk-> the risk of insolvency on the part of the final consumer remains entirely with the exporter. The dealer assumes in full both the risk of failing to sell the purchased products and the risk of nonpayment by the customers

Non-circumvention & non-disclosure agreements, primarily aimed at protecting the intermediary from the risk that the counterparty might establish director relationship with the party introduced, thereby avoiding payment of any intermediate fees that may be due

Agents enable the exporter to exercise more effective control over client. Dealer tends to exclude the exporter from the relationship with final purchasers

THE DISTRIBUTOR

Responsible for distributing the exporter's products as a buyer-reseller

In most countries the sales concession contractor is not standardized by legislation, but has been developed through practice and case law. Case law however, agrees that the international distribution contract cannot be included in the category of international sales contracts governed by the 1980 Vienna convention

Unlike an agent who is in a position of substantial economic dependence, the distributor is considered to have greater economic independence

2 cathegories of selling:
Active sale -> distributor selling, you do advertising. All the sales you make after having made advertising.
Passive sale -> sale made after someone comes to you without being informed or without being solicited, e.g. advertising in one country but receive an order from another. So here it's not active because there's no advertising in that second country.
In order to achieve protection of the distributor from active sales, you can put into the contract that the distributor agrees not to actively promote sales into the suppliers territories or those allocated by the supplier to other exclusive distributors or buyers. You can make restrictions in terms of exclusivity but only limited to active sales, not passive.
Normally internet sales are comsidered passive so they can't be restricted, unless when the website is in a specific language targeted to the territory.

Distributor shall make use of the suppliers trademakes, trade names or amt order symbols, for the only purpose of identifying and advertising the products, within the scope of his activity as distributor of the supplier and in the suppliers sole interest.
The distributor shall not register, whether directly or indirectly or though third parties, any ™, trade names or symbols of the supplier they may be considers with the suppliers one's.

Common is also a clause about confidentiality. Exchange of informations that are sensitive, so you ask the distributor not to reveal, even after, because they are part of your knowledge and of the values of the company. The clause is there to shift the burden of proof in case of breach of contract.

CHOICE OF FORUM

WHY FORUM SELECTION COMES FIRST

Before determining which state's law governs an international contract, practitioners must identify where disputes will be adjudicated. This foundational choice drives all subsequent legal outcomes. The forum is the court of a state that accepts jurisdiction on the case. In the EU, jurisdiction in civil and commercial matters is determined by the so-called Brussels I Regulation.

Every country applies its own conflict-of-laws rules (the lex fori) to determine applicable substantive law. Consequently, different forums may point to different governing laws for the identical contractual relationship
-> not merely procedural, it fundamentally shapes substantive outcomes,se

Hague convention on choice of courts agreements-> the parties may choose which court has jurisdiction on disputes between them. If the parties have chosen the court of a country in which the Convention is in force, that courtnshall accept jurisdiction irrespective of whether or not there is a connection between the dispute and the forum, and courts of other Convention countries must decline jurisdiction or suspend the proceedings until the chosen court has dismissed the case.
The chosen court may dismiss the case upon a very narrow basis: if the choice of courtbagreement was void under the court's law, or if its performance would conflict with public policy.
If there are no conventions or supranational regulations on jurisdiction, the jurisdiction is regulated by the civil procedure law of each state. The rules on jurisdiction, therefore, may vary from state to state

THE MEANING OF JURISDICTION

Jurisdiction defines which court possesses the legal authority to hear a particular dispute

EU-> primarily regulated by the Brussels I regulation. Establishes harmonists rules based on factors such as the defendant's domicile, place of contractual performance, or location where damage occurred. Ensure predictability and mutual recognition of judgement amongst MS
Post Brexit-> UK now relies on domestic common law principles, The Hague Conventions where applicable and bilateral agreements with specific jurisdictions
Complexity for contracts involving UK parties
Global diversity-> each state's civil procedure law determines jurisdiction independently, often leading to inconsistency.

PARTY AUTONOMY

Broad autonomy to designate the forum through a forum selection clause in their contract -> exclusive clauses (only the chosen court may hear disputes, others must decline jurisdiction) or non-exclusive clauses (the chosen court has jurisdiction, but parallel proceedings in other competent forums remain permissible)

2005 Hague Convention on Choice of Court Agreements, framework ensuring that forum selection clauses are respected internationally. The chosen court must accept jurisdiction, other courts must decline to hear the case, resulting judgments are enforceable in all Convention states.
-> no geographical nexus requires, parties need not select a court with substantive connection to their dispute. They frequently choose forums renowned for commercial expertise and efficiency (London, Singapore, NY, Amsterdam)

Consider the reliability, independence and reputation of the judiciary, language and procedure, standards for disclosure and discovery, accessibility of enforcement, political stability.
-> an ill-considerate forum choice can expose parties to unpredictable outcomes, protracted delays, biased adjudication or unenforceable judgements.

FORUM SHOPPING, EXORBITANT JURISDICTION AND FORUM NON CONVENIENS

Forum shopping-> claimants deliberately file suit in jurisdictions offering the most favourable substantive law, procedural rules or damages regimes. Forum shopping cannot be avoided since conventions and domestic laws often
permit a choice from various available fora

Exorbitant jurisdiction-> certain jurisdictions assert authority over disputes with only tenuous connections, for example based solely on presence of assets or service of process. This creates unpredictability and potential abuse, a party may run the risk of being sued in various different states, perhaps even without a real connection with the subject matter.

two approaches to choice of jurisdiction:
1. discretionary , mainly found in common law systems, Even though they have jurisdiction, courts have the discretion to dismiss a case if they deem it unsuitable for proceedings (forum non conveniens)
2. objective approach, the jurisdiction rule is precise and based on specific connecting factors such as the place of business of the defendant, the place of performance of the contract or the place of damage in case of torts. If the requirements of the jurisdiction rule are met, the claim must be allowed. If the requirements are not met, the claim may not be allowed. There is no discretion for the court,

ENFORCEABILITY OF COURT DECISIONS ACROSS BORDERS

Whilst a court's judgement is automatically enforceable within its own territory, cross-border enforcement requires legal cooperation between states.
This liability may be restricted by carrying out activity through various separate companies. In principle, each company is a separate legal entity and the assets of one company may not be attached for enforcing a court decision rendered against another company, for example, a subsidiary, the parent company or an affiliate belonging to the same group of companies

2005 Hague Convention on Choice of Court Agreements, guarantees that judgements from a contractually chosen court will be recognized and enforced in all Convention states
Brussels I Regulation, ensure near-automatic mutual recognition of judgements within the EU
-> when no treaty applies, enforcement depends entirely on the domestic law of the country where the assets are located. Some require a complete re-examination of the merits (ex equator proceedings), whilst others apply principles of comity a reciprocity. Unpredictability is high, and enforcement may be impossible in certain jurisdictional

ARBITRATION

Mechanism for resolving international commercial disputes, preferred by multinational corporations, financial institutions and sophisticated parties worldwide.
Neutrality -> parties avoid national courts and select neutral venues
Expertise -> arbitrators with deep industry knowledge and commercial experience
Confidentiality -> proceedings remain private
Flexibility-> parties design procedural rules, timelines and evidentiary standards to suit their needs
Global enforceability->recognized in over 170 jurisdictions under the 1958 New York Convention, more extensive than any court judgement regime

the practice of drafting contracts without regard to the governing law does not mean that the parties have opted out of the governing law for the benefit of some transnational set of rules. Just because the parties decided to take the risk of legal uncertainty for some clauses does not mean that the interpreter has to refrain from applying the governing law or that the legal evaluation of these clauses should be made in a less stringent way than for any other clauses. In addition, the fact that some clauses, such as boilerplate clauses, are not negotiated, indicates that giving them excessive importance in the interpretation of the contract would not necessarily result in the interpretation being faithful to the parties' intentions -> arbitral tribunal is, therefore, expected to understand the dynamics of negoti- ations in order to properly give effect to the intention of the parties. Blindly applying the wording of the contract without any regard to the principles of the governing law or, to the extent that they are determinable and applicable, of transnational law, would not necessarily reflect the true intention of the parties if the clause that is being applied literally is one of the boilerplate clauses that the parties did not consider carefully.

international arbitration does not have a uniform approach to contract interpretation: it may range from a formalistic application of the contract's wording to an interpretation of the wording in light of the governing law, to an interpretation of the wording in light of transnational principles of soft law or even of a more equitable character. Even the same arbitral tribunal may adopt more than one approach to the same contract, depending on the tribunal's understanding of the dynamics of negotiations that led to that particular contract's text. Parties have the possibility of influencing the approach to interpretation by selecting arbitrators who represent a certain attitude towards contract interpretation.