



UiO : **Department of Private Law**
University of Oslo

Comparative Private Law, October 9th 2013

Formation of Contracts

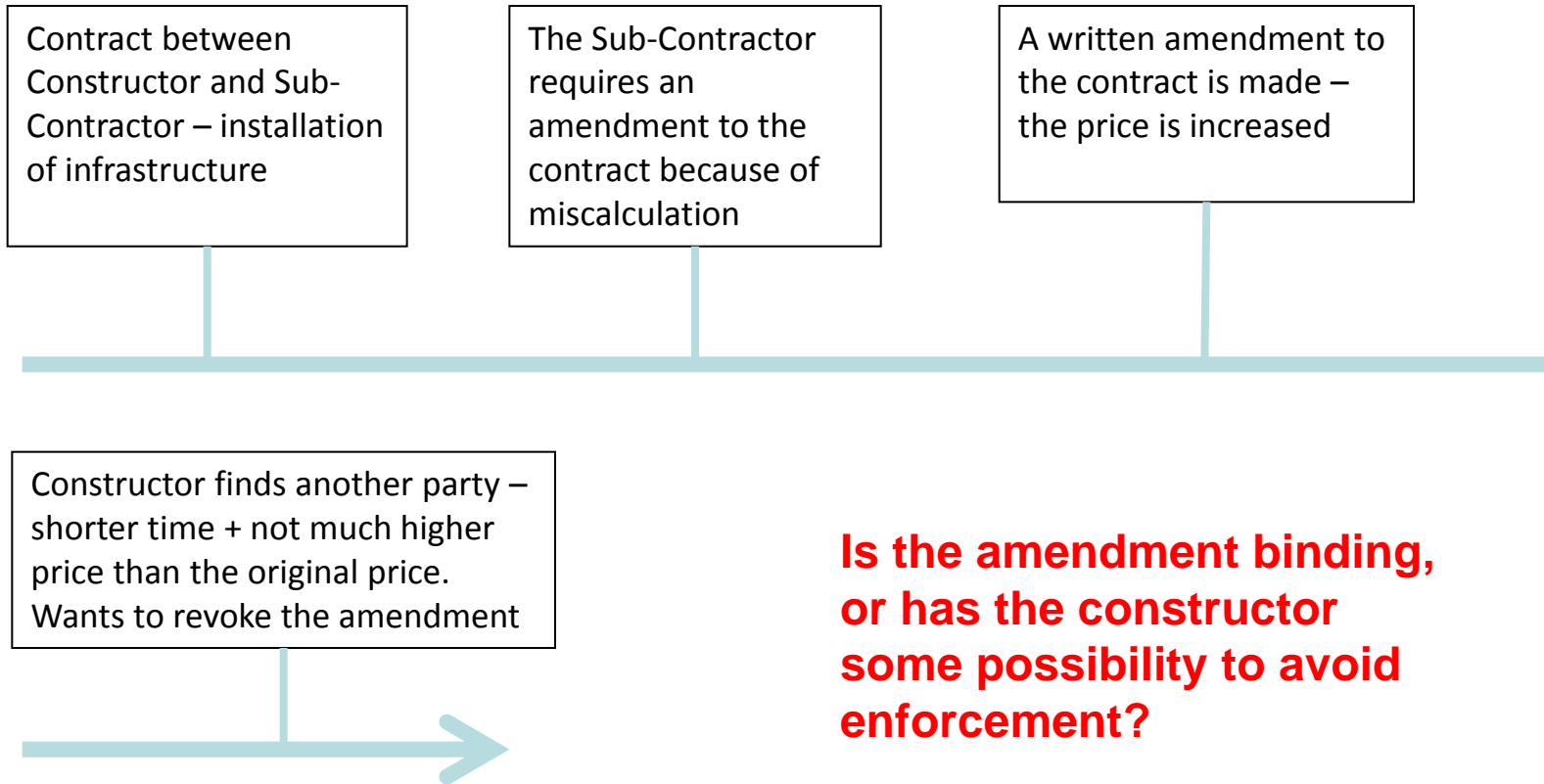


Associate Professor Ph.D. Herman Bruserud

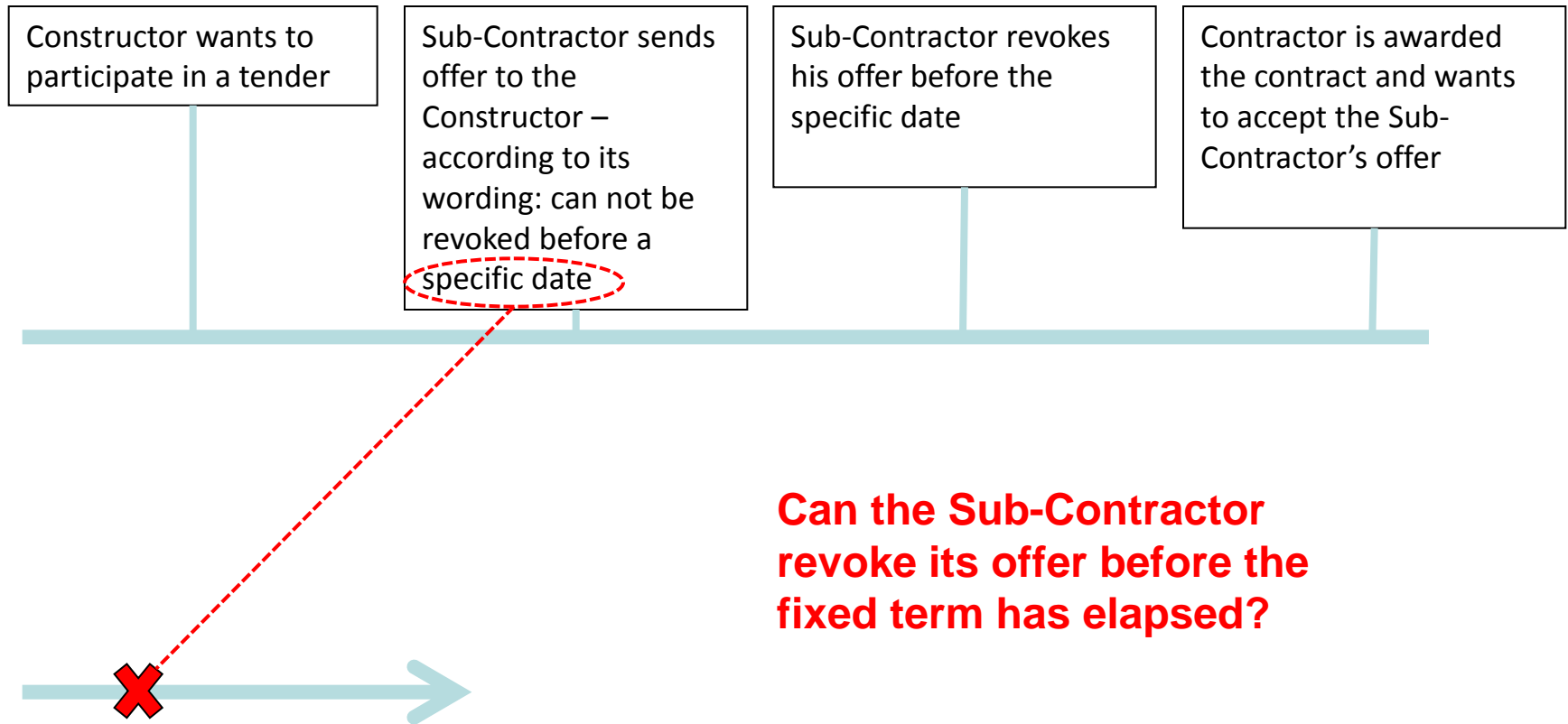
Case Based – Different Legal “Systems”

- Norwegian Law
- German Law
- Italian Law
- English Law
- CISG
- UNIDROIT
- PECL
- CESL

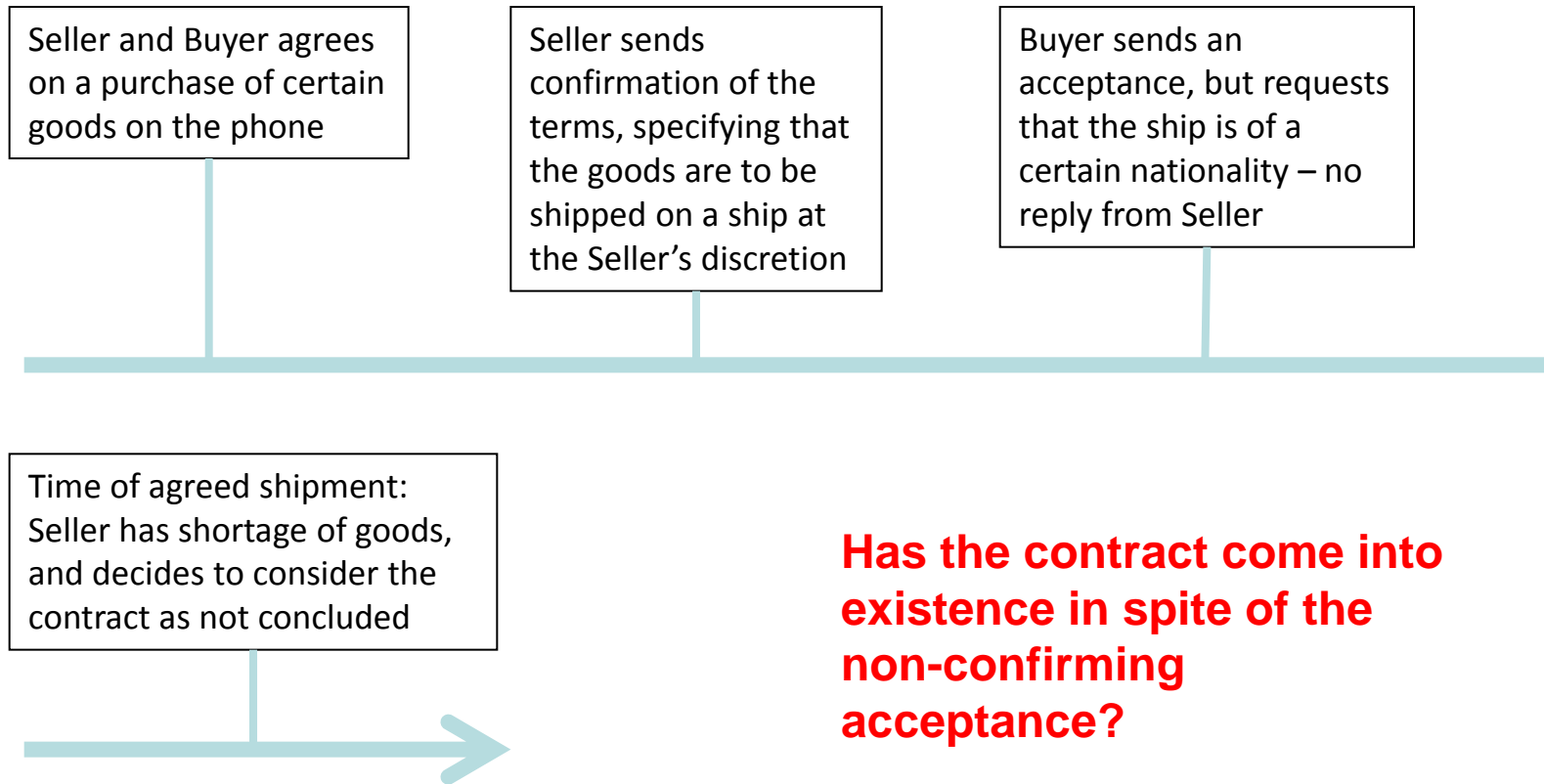
Timeline – Written Amendment



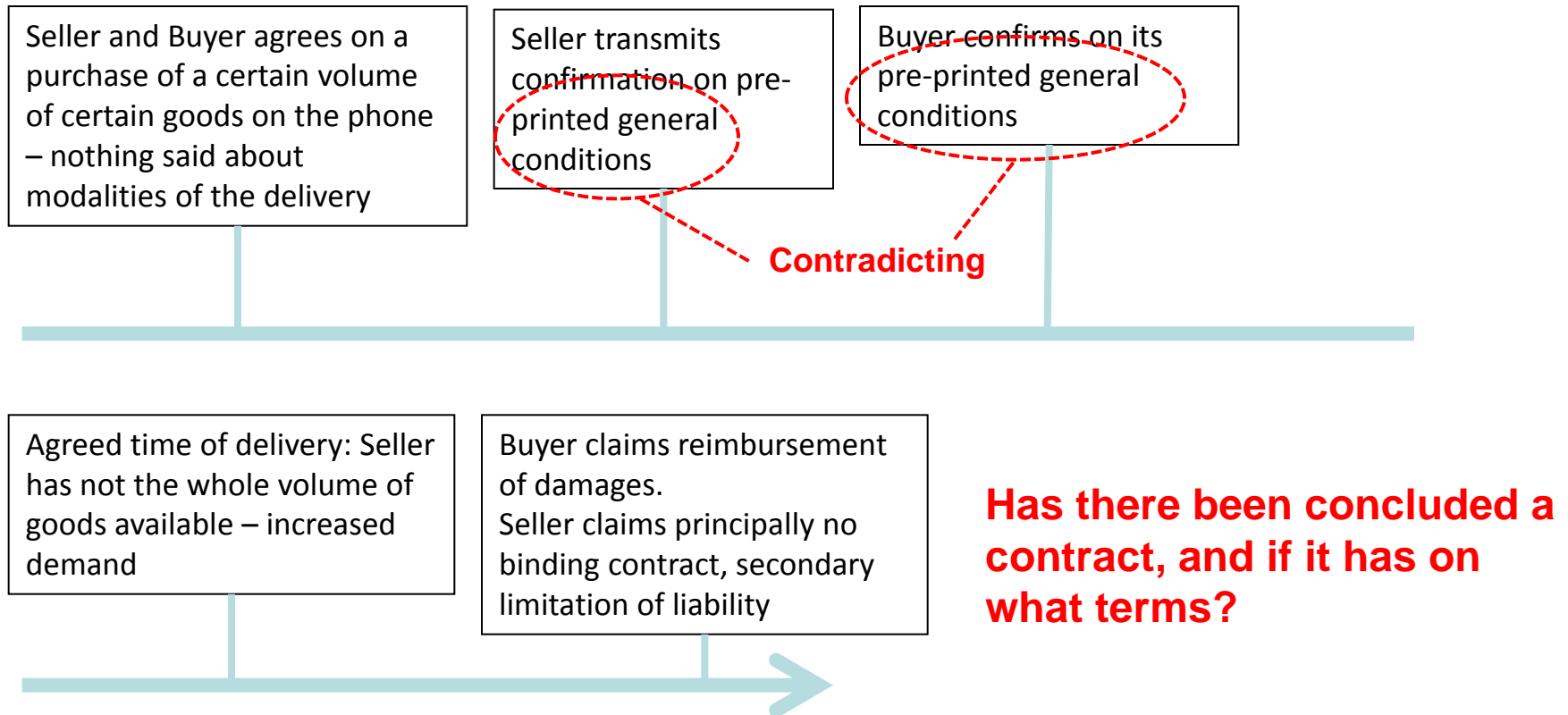
Timeline – Irrevocable Offer



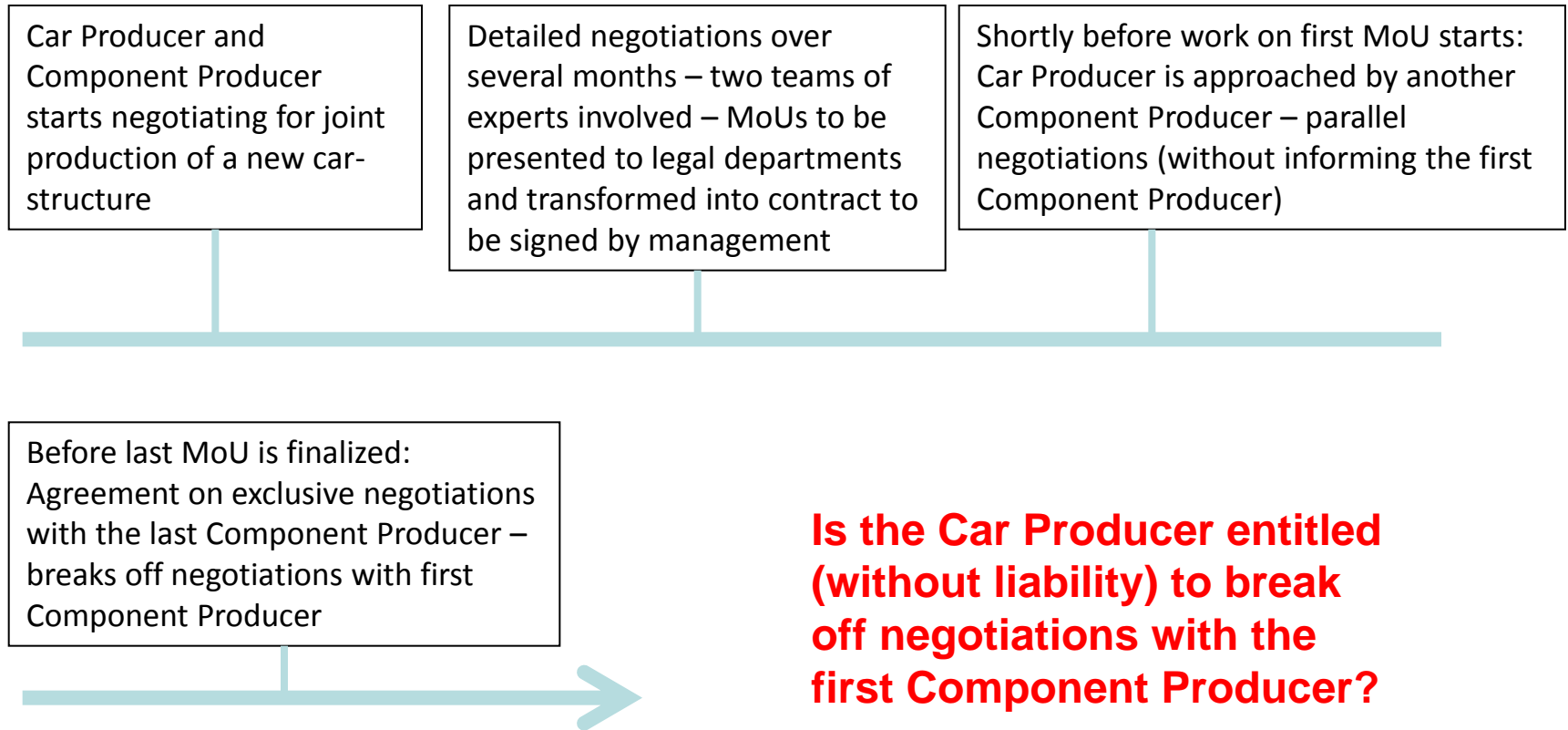
Timeline – Modified Acceptance



Timeline – Battle of the Forms



Timeline – Break-off of Negotiations



Formation of Contracts – Norwegian law

- Basis: Act on Formation of Contracts and judicial practice
- Starting point – corresponding offer and acceptance (“mirror image”), not conforming acceptance amounts to a rejection + a counter-offer
 - Not conforming acceptance might – in exceptional cases – have the same effect as a conforming acceptance
- No form requirements

Formation of Contracts – Norwegian law

- An offer is binding on the offeror from the moment the offeree has obtained knowledge of it
- Time limit to accept offer
- No specific rule on “battle of forms”
- Contract conclusion beyond the strict offer / acceptance-model – “main terms”-test
- Duty of loyalty and duty of good faith during negotiations (and beyond)

Formation of Contracts – German Law

- Bürgerliche Gesetzbuch (BGB) §§ 145 ff.
- Starting point – corresponding offer and acceptance (“mirror image”), not corresponding would amount to a rejection + a counter-offer
 - Exception: “inessential” term
- No formal requirements

Formation of Contracts – German Law

- An offer is binding on the offeror from the moment the offeree has obtained knowledge of it – effect may be excluded in the “offer”
- “Open lack of agreement” (“offener Eingungsmangel”)
 - Doubts on the existence of agreement – no agreement
 - Doubts on the existence of agreement excluded – “knock out theory” – governing law

Formation of Contracts – German Law

- No conclusion of contract if agreement has not been reached on all points that have been the object of negotiations
- Duty of loyalty and duty of good faith during negotiations

Formation of Contracts – Italian Law

- Basis: Codice Civile
- Requirements for a contract to be considered binding:
 - Agreement
 - Exchange of corresponding offer and acceptance – an offer is revocable until it has been accepted
 - The acceptance must confirm the offer ((strict) mirror image), not corresponding would amount to a rejection + a counter-offer

Formation of Contracts – Italian Law

– Causa

- Social-economic function (not violate mandatory rules or public policy)

– Object

- Must be possible, legal, determined or determinable

– Form

- Written form requirements mainly applies to contracts relating to real estate

Formation of Contracts – Italian Law

- No specific rule on “battle of forms”, but performance may be deemed as an acceptance (“last shot”-rule)
- Certain duties of loyalty during negotiations

Formation of Contracts – English Law

- Basis: Case law
- Starting point – corresponding offer and acceptance (“mirror image”) + consideration
- Consideration
 - A contract must oblige both parties – reciprocal benefits and detriments
 - A benefit or detriment may be merely practical

Formation of Contracts – English Law

- Consideration (cont.)
 - Remedy of promissory estoppel – clear and unequivocal promise, inequitable to go back on the promise, the promisee must have relied in the promise
 - Does also apply to irrevocability of an offer

Formation of Contracts – English Law

- An offer may be revoked until it has been accepted
- Starting point – corresponding offer and acceptance (“mirror image”) – not corresponding would amount to a rejection + a counter-offer

Formation of Contracts – English Law

- Rather strict application of the “mirror image”-rule to situations of “battle of the forms”
- No general duty of loyalty during negotiations – but fraudulent misrepresentations

Formation of Contracts – CISG

- Formation of contracts – CISG part II
 - The Scandinavian Countries opted out of CISG part II, but are now in the process of opting in
- Between a civil law tradition and a common law tradition
- Starting point – corresponding offer and acceptance (“mirror image”) – not corresponding would amount to a rejection + a counter-offer

Formation of Contracts – CISG

- Starting point – corresponding offer and acceptance (“mirror image”) – not corresponding would amount to a rejection + a counter-offer (cont.)
 - Immaterial modifications – the offeror must object
 - Non-exhaustive list of terms which are considered material
 - Also applies to amendments to existing contracts

Formation of Contracts – CISG

- An offer may be revoked until accepted
 - Exceptions
 - Indicates that it is irrevocable, or
 - The offeror has reasonably acted on reliance that the offer was irrevocable

Formation of Contracts – CISG

- No specific regulation for “battle of the forms”
- No rules on pre-contractual liability – governing law?
 - What about lex mercatoria?
 - The question was on the table during the negotiation of CISG

Formation of Contracts – UNIDROIT

- Very similar to CISG on formation of contracts
- Differences
 - No list of “material terms”
 - Specific rule on “battle of the forms” – “knock out theory”
 - Agreed terms and any general conditions that might be common in substance
 - Rule on good faith during negotiations

Formation of Contracts – PECL

- Very similar to UNIDROIT on formation of contracts

Formation of Contracts – CESL

- Starting point – corresponding offer and acceptance (“mirror image”) – not corresponding would amount to a rejection + a counter-offer
 - Immaterial modifications – the offeror must object
 - Non-exhaustive list of terms which are considered material

Formation of Contracts – CESL

- An offer may be revoked until accepted
 - Exceptions
 - Indicates that it is irrevocable
 - The offer states a fixed time period for its acceptance
 - The offeror has reasonably acted on reliance that the offer was irrevocable

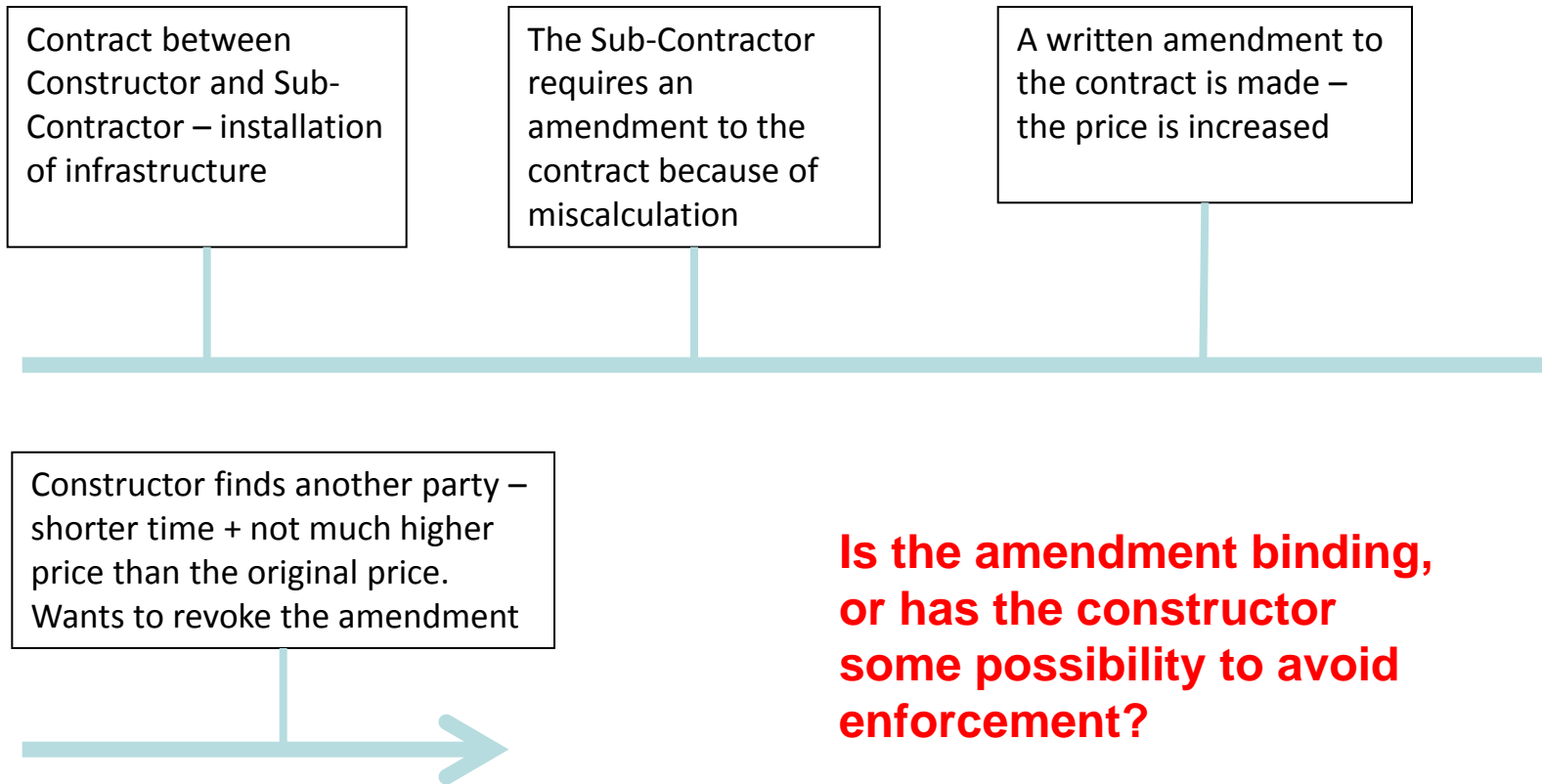
Formation of Contracts – CESL

- Conflicting standard contract terms
 - Does not exclude the conclusion of a contract
 - Unless a party in advance has indicated an intention not to be bound by a contract to that extent, or informs the other party of such an intent without undue delay
 - Terms as far as they are common in content

Formation of Contracts – CESL

- General duty to act in accordance with good faith and fair dealing

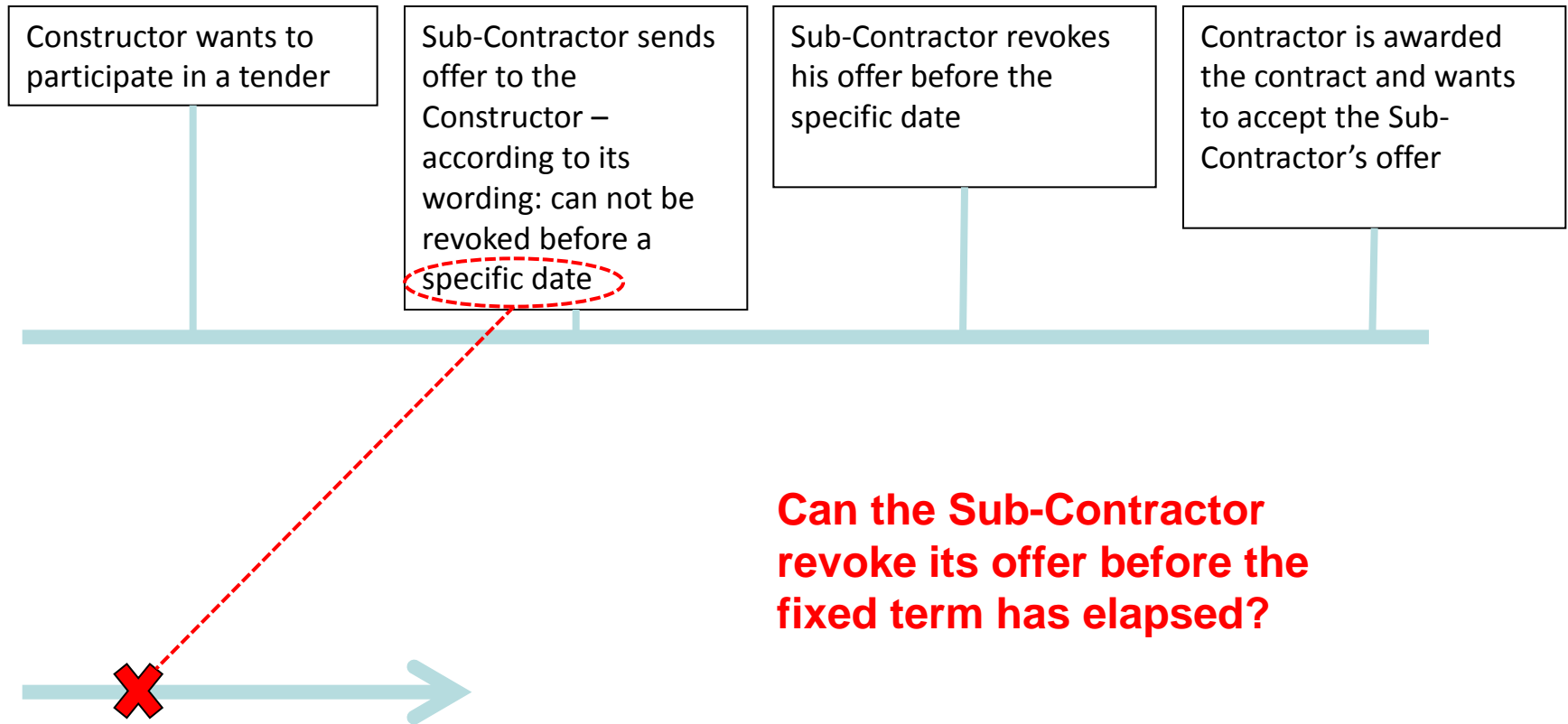
Timeline – Written Amendment



Written Amendment

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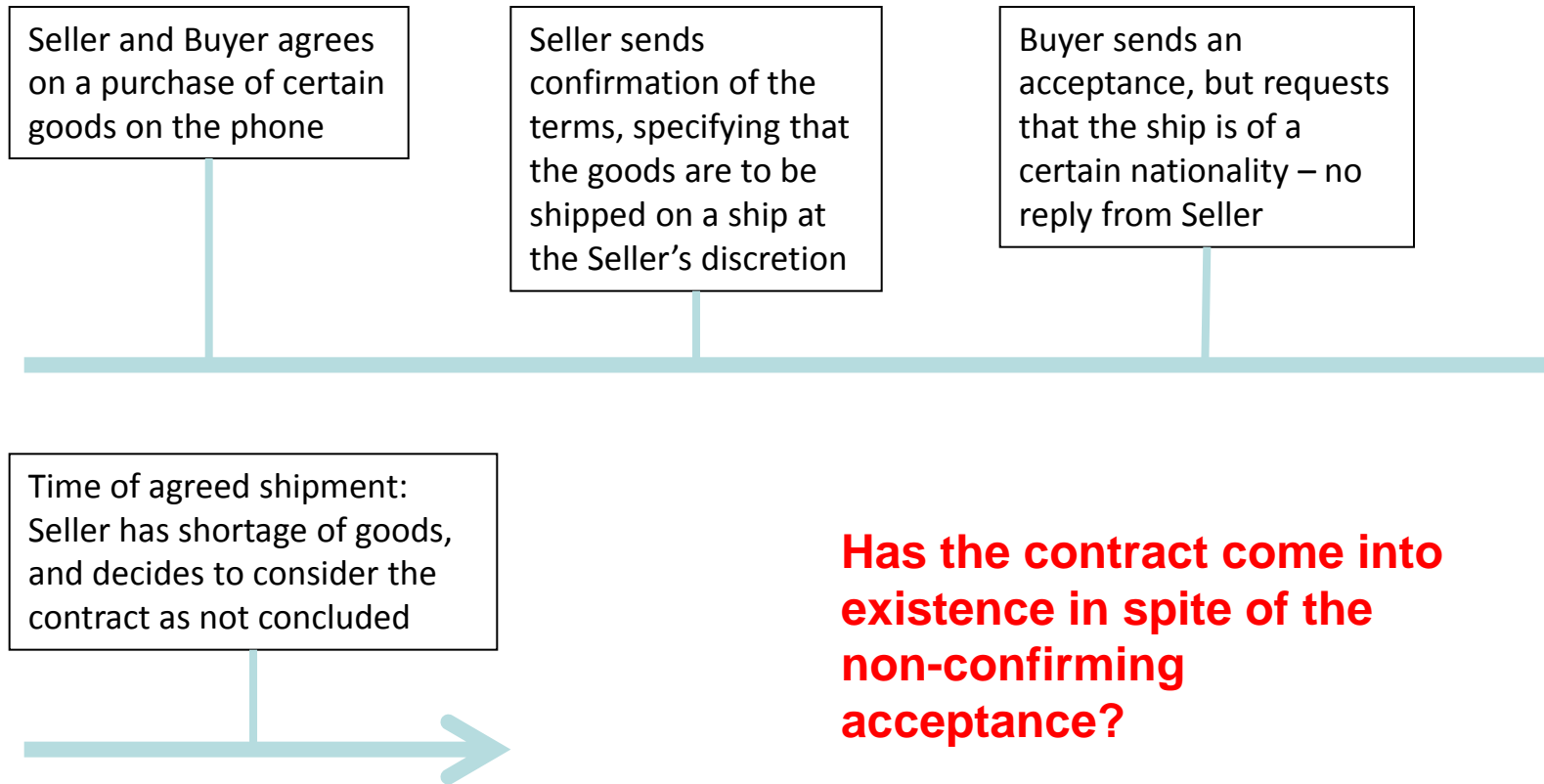
Timeline – Irrevocable Offer



Irrevocable Offer

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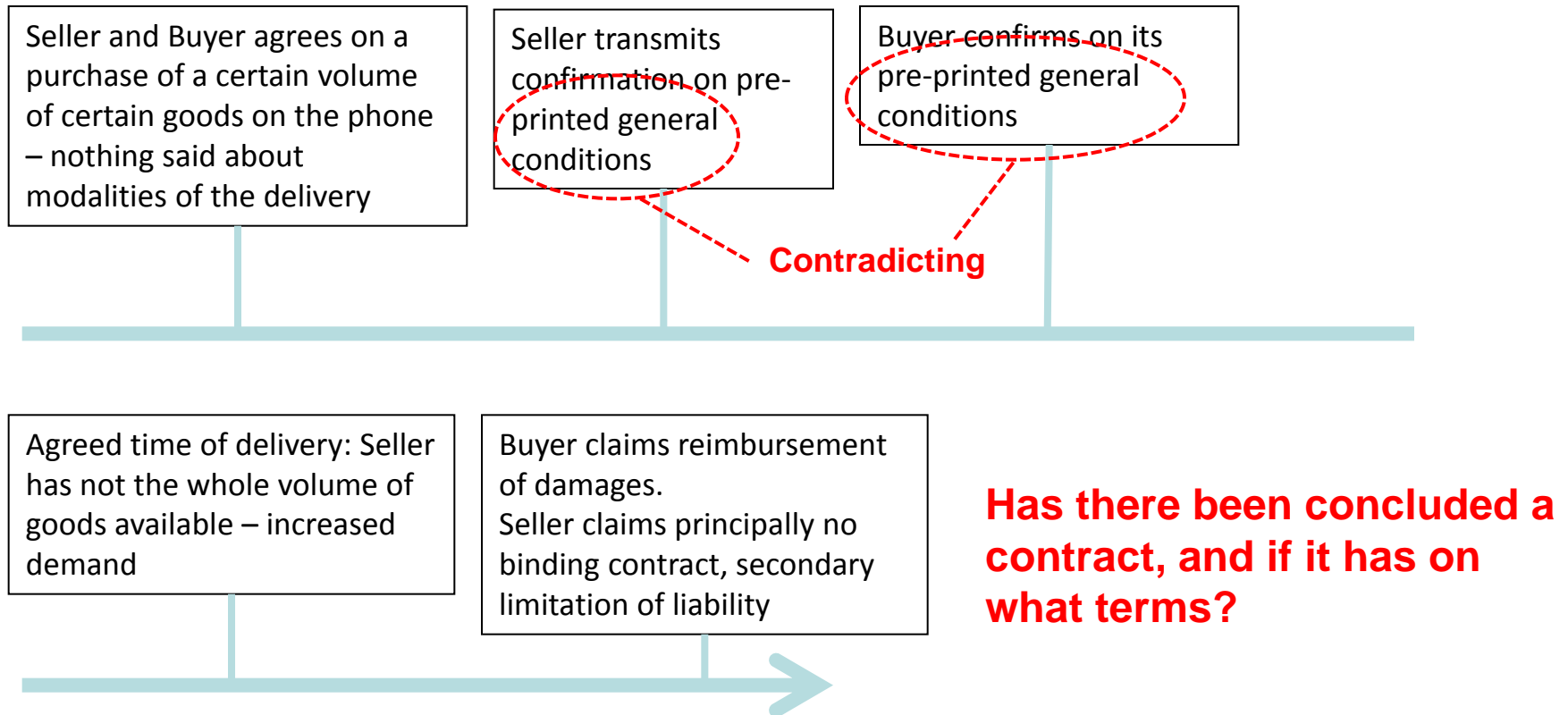
Timeline – Modified Acceptance



Modified Acceptance

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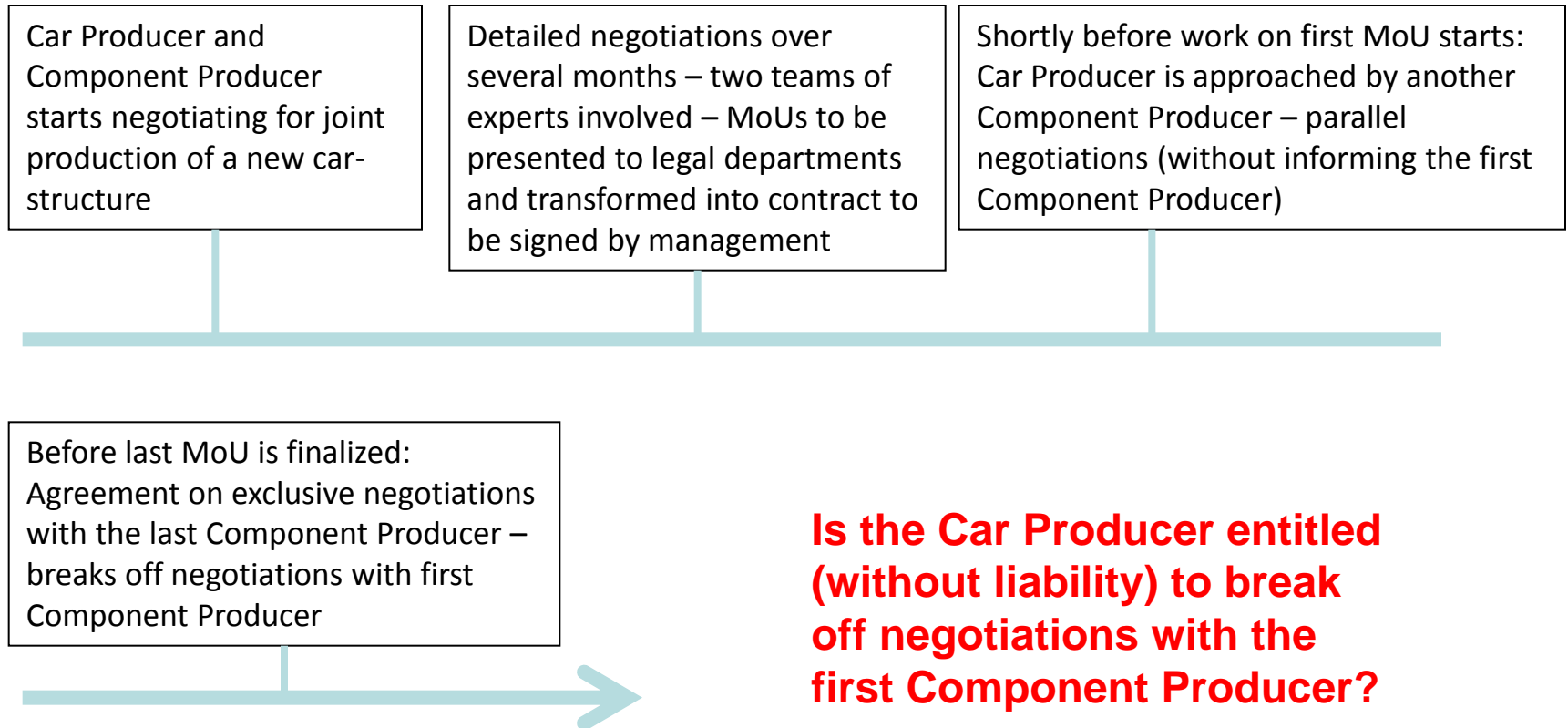
Timeline – Battle of the Forms



Battle of the Forms

- Norwegian law
- German law
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- UNIDROIT
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Timeline – Break-off of Negotiations



Break-off of Negotiations

- Norwegian law
- German law
- Italian law
- English law
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- UNIDROIT
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