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110 Differences between Civil Law & Common Law Countries in Drafting & Negotiating International Contracts

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Faculty Biographies

Sara A. Biro

Sara A. Biro is senior counsel in Bechtel Corporation's civil global business unit and is based in Bechtel's London office. In her position, Ms. Biro has led all aspects of the company's legal work on major rail, road, infrastructure, aviation, and telecommunications bids and projects in countries including: Abu Dhabi, Algeria, Azerbaijan, Croatia, Italy, The Netherlands, Portugal, Greece, France, Spain, Germany, the Russian Federation, the United Kingdom, and Turkey.

Prior to joining Bechtel, Ms. Biro was a senior manager with Freshfields in its project finance practice in London and a senior associate with Mayer, Brown & Platt (now Mayer Brown) in its corporate, finance, and international practices in Chicago and London.

Ms. Biro is a member of the ACC and the Association of American Women Lawyers in London.

Ms. Biro received a BA summa cum laude from Georgetown University and is a graduate of the University of Chicago Law School.

Steven M. Kahaner

Steven M. Kahaner is the vice president and general counsel of Marste & Co., Inc. based in New York. He provides general legal guidance and counsel to the company. His responsibilities include counseling on commercial transactions, employment and immigration matters, corporate policy and procedure, intellectual property, software licensing, and technology.

Prior to joining Marste & Co., Inc., Mr. Kahaner practiced law at the New York offices of Sonnenschein, Nath & Rosenthal LLP, and Chadbourne & Parke LLP, with a focus on international corporate, securities and project finance matters.

Mr. Kahaner currently serves as the chair of the inter-American affairs committee of the Association of the Bar of the City of New York.

He received a BA with honors from Tufts University and a JD with honors from the George Washington University's National Law Center.

Patrick Wallace

Patrick Wallace is a partner in the commercial department of Simmons & Simmons, working from the international law firm's London office.

Mr. Wallace has an internationally orientated legal practice with particular interests in the energy and infrastructure area, among others. Assignments in the last two years have involved the UK, Spain, France, Italy, Germany, Austria, Hungary, Romania, the Baltic States, Russia, Turkey, the Middle East, Pakistan, India, and Brazil, working for a range of British, American, and European clients.

Prior to transferring his practice to Simmons & Simmons, Mr. Wallace spent over 20 years at Freshfields Bruckhaus Deringer, including 15 years as a partner and a period as managing partner of its Frankfurt office.

Mr. Wallace is fluent in French and German and holds law degrees from London, Paris, and Harvard Universities. He also spent a period as a visiting scholar at the University of California, Berkeley.

Negotiations

England	France	Germany
If an English contract is ambiguous or says the wrong thing it is extremely hard to get it changed or "rectified" in court Where a formal written contract has been signed, including an entire agreement clause, English courts will not normally admit evidence of what was said in negotiations to interpret it (the *parol evidence* rule) Therefore, the English rules on interpretation mean that there is a very strong incentive to have a particularly clear contract	In France courts can construe and/or complete an agreement but they must respect the common intention of the parties. Even provisions that are clear must be rectified if they do not correspond to the common intention of the parties	Discussions can be used as evidence. Furthermore, the German courts will not hesitate to interpret a contract to mean something very different from what it says if it can be shown that this is what the parties meant (*falsa demonstratio non nocet*)

Pre-Contractual Obligations

- There are remedies in English law, French law and German law for mistake or misrepresentation which leads to a contract being entered into
- English French and German law differ when dealing with the situation where the parties did not actually enter into a contract, but one party seeks to make a claim against the other for wrongful failure to do so

England	France	Germany
In principle in England there is no liability for failing to enter into a contract (unless a "collateral contract" can be found to exist) "Agreements to agree" are unenforceable in England (though if you promise to take reasonable efforts to reach agreement you must at least try)	French law also allows liability claims for breaking off negotiations (*rupture abusive de pourparlers*)	Under German law the commencement of negotiations leads to an obligational relationship (*Schuldverhältnis*) between the parties (and sometimes even vis-à-vis third parties) (E311 BGB)

Contract Styles

- The style of negotiating and documenting contracts varies from one legal system to another
- Differences in culture and tradition explain this to some degree
- Other differences in approach flow from specific legal factors
- There is a trend towards increasing convergence as business becomes more international
- While some convergence can be helpful in international transactions it is important to understand the factors which limit this and the dangers which excessive convergence of approach can bring

Contract Styles (continued)

Some Common Law interpretation rules will seem strange to a civil lawyer	Others are more like the Civil Law jurisdictions' approach
English-speaking lawyers have a reputation for lengthy contracts and excessive precision	There are of course other, contradictory, interpretation conventions which take a more sensible approach
It is said that the lack of "fall back" legal rules for specific contracts means that English contracts have to be more specific than many others	For example the "golden rule" says that a contract should be interpreted so as to avoid absurd results
Another important reason for the level of detail in English style contracts is the very mechanical interpretation conventions applied by English courts in deciding what contracts mean	The "mischief" and "purposive" approaches attempt to give effect to the purpose of the document
If you use a different word or expression in two places in the same document, the assumption in English law is that you mean something else	Courts generally adopt these more enlightened approaches to interpreting contracts
The literal rule of construction says that a contract means exactly what it says - literally (even if absurd!)	But you still do not want to take the risk
If you have a list of items which you specifically mention, the "expressio unius est exclusio alterius" rule means that you impliedly exclude all others. This leads to people using "including without limitation," language. This is the opposite to the French approach	So you are left trying to use simple language but still achieve maximum clarity
If you have a list of specific items or reasons and then say "or any others", the ejusdem generis rule says this only means "similarly" ones The "noscitur a sociis" rule says that words are interpreted in the context of the list they appear in (literally the words are "known by their associates"): this can lead to broad expressions being narrowly construed	
If you stipulate a requirement and it is not clear then the "contra proferentem" rule says it will be construed against you. This is different from French law where an obligation is always construed against its obligor.	
All of these rules mean that in English law parties are encouraged to spell out exactly what they mean to the last detail	

Special Form Requirements

- **Most major commercial contracts are of course proper written documents**
- **Generally contracts are valid without a specific form requirement**
- **There are exceptions and they vary from country to country**

England	France	Germany
In England, contracts for the transfer of an interest in land and most guarantees have to be in or evidenced by writing and signed by the parties	In France an element of written proof is, exceptionally, required for civil (as opposed to commercial) contracts above a certain value (€800); (Art 1341 C Civ); and for guarantees by non commercial parties A French notary is required for sales or mortgages of property located in France Guarantees granted by a French *société anonyme* (SA) are subject to the prior approval of its *conseil d'administration* failing which these guarantees may be voided	In Germany, contracts which include a sale of land or a sale of shares in a GmbH (but not an AG) have to be notarised. Suretyship agreements (*Bürgschaften*) must be in writing

Contract Formation

- Offer
- Acceptance
- The process is similar
- Rules may differ in detail: for example a price in a shop window is not a contractual offer in England, but it is in France
- In civil law countries there can be different rules on whether silence implies acceptance, depending on whether commercial parties or private individuals are involved
- The importance of clear correspondence
- "Subject to contract“
- The "Battle of the forms"

Description of Parties/Recitals

- Description of Parties/Authority to enter into Contract.
  - Typically, contracts in common law systems simply include a brief description of the parties, with the full legal name of the contracting entity, headquarters address, and place of incorporation.
  - Civil law contracts, on the other hand, tend to have a more elaborate description of the legal entities involved, including a description of the details of their incorporation, registration with the relevant company registry, and tax i.d. number, along with a description of the individuals executing the contract on the corporation's behalf, including the individuals' tax number and a description of the power of attorney or other powers giving them the authority to execute the contract on behalf of the corporation.
- Recitals/Preamble/Background/Whereas, i.e., clauses typically included in common law contracts which set out the facts, background information, context (narrative or context recitals) and parties' intentions, purpose (purpose recitals), simultaneous transactions and lead into the main body, the operative part, of the contract.
  - Common law courts will often regard recitals as subordinate to the body of the contract and place lesser weight on them in construing the contract as a whole. Thus, where the recitals and the body of the contract are in conflict, the operative words will prevail.
  - On the other hand, in certain civil law jurisdictions, this information may be regarded as the basis of the entire contract (in Germany, *Geschäftsgrundlage*).

Signatories

- If dealing with an EU company's directors you have a degree of protection as to their ability to bind the company
- There are other entities in the EU where dealing with the directors is not a guarantee of the validity of the commitment
- Government bodies
- Statutory corporations
- France: If dealing with a public authority you have to check the ability of its representative to bind the public authority
- In Germany, it is important to ensure that the constitutional documents of the organisation you are dealing with grant those who are acting on behalf of the organisation to bind it (*Vertretungsmacht*)
- What processes can you apply to check the validity of contract commitments entered into by non EU entities?
- Opinions from local counsel

Consideration

England	France	Germany
English contract law will not enforce voluntary promises Contracts must be "bargains" where each party does something for the other What the party does is called the "consideration" he gives Courts do not assess whether the exact value of the consideration provided is fair in relation to what the other party provided But the consideration must exist The consideration can even be nominal (e.g. one pound) Some things do not count as consideration - e.g. something which had already been done before the contract took place, or something which one party was already legally obliged to the other party to do A promise in a deed is enforceable – even if there is no consideration A deed is a document entered into under seal or stated to be "executed as a deed" In practice, consideration is not a big a problem Most commercial deals will have consideration anyway Even if they do not contain consideration they can be made binding by including nominal consideration of £1 or by entering into a deed The danger areas are routine correspondence, where people assume the other party has to do what he said; or a "side letter" on a deal where people sometimes forget there must be consideration for the side letter (even if it is only entering into the overall package of contracts)	French law has a concept of "cause", which consists of what a party receives from its counterparty under an agreement (the objective cause) and the reasons why this party has entered into this agreement (the subjective cause) Every French law agreement must have an objective cause otherwise the agreement is void The subjective cause of a French law agreement must be lawful otherwise the agreement is void Unlike under UK law, it is not possible to get around the requirement for an objective cause by providing for a very small consideration. The courts are likely to declare the sale of a business for €1 void because there is no cause (unless the purchaser e.g. undertakes to pay the debts of the seller)	Under German law, consideration (*Gegenleistung*) is not necessary for the conclusion of a binding contract However, lack of consideration may change the nature of a contract (e.g. from a sale to a gift), thus potentially triggering different form requirements

Price and Other Terms

England	France	Germany
Generally the principle of freedom of contract means that what the parties agree will be enforced even if the price or other terms might look "unfair" There can be exceptions, depending on the subject matter and on the sorts of parties involved	Under French law, the rule of freedom of contract applies subject however to some exceptions, e.g., in limited areas a price which is far too low will be invalidated (e.g. in a sale of land or of artist's rights at less than 7/12ths of their real value)	In Germany, the agreement of a price which is far too low could constitute usury (*Wucher*) or could otherwise offend public morals (*sittenwidrig*) (§ 138 BGB)

Gap-Filling

- Most legal systems have a requirement that contracts should be sufficiently certain otherwise they will be void
- However, most will also "fill in gaps" in some cases
- In many countries there is a set of legal principles that will apply to specific types of contracts unless the parties agree otherwise
- This is typical of Civil law countries where there will be codified contract terms for sale, exchange, gift, etc. In practice people often rely on these terms and do not repeat them in the contracts
- These rules also exist for some types of contract in common law countries (for example the Sale of Goods Act in England), though they do not cover as many different types of contract
- Often trade associations will create such terms (e.g. in power trading and banking documents)
- In an unfamiliar legal system, or where the subject matter does not correspond to established contract local forms, it always makes sense to agree the terms specifically
- This is why complex commercial contracts in emerging economies with untested legal systems tend to be extremely detailed

England	France	Germany
Sometimes English courts will refuse to complete bargains for the parties At other times they will be willing to determine "a reasonable price" when the contract does not do so Other terms will be implied - if they are so obvious that the parties would have said "of course" if asked about the clause by an "officious bystander"	In France, a binding contract can arise if the essential elements are agreed even if minor details are not, or if the parties have agreed terms but not recorded them in a formal contract	In Germany, offer and acceptance must specify the essential elements of the contract (e.g. parties, subject-matter, price) or must at least state how they are to be determined German statutory law provides some "fall-back" rules which enable gaps to be filled - e.g. if a contract for consideration fails to specify the consideration payable, it will be assumed (in the absence of evidence to the contrary) that the consideration is to be determined by the party who is to receive it (§ 316 BGB) and that such person should determine the considerable by exercising "reasonable discretion" (*nach billigem Ermessen*) (§ 317 BGB) Where fall-back rules do not exist, gaps in the contract will, where possible, be filled by the court in accordance with the hypothetical will of the parties (so-called "supplementary interpretation" (*ergänzende Vertragsauslegung*)

Penalty Clauses

England	France	Germany
If negotiating an English law document, bear in mind that penalty clauses are not enforceable. These are distinct from liquidated damages clauses - the parties may only recover their reasonable pre-estimate of expected actual loss	In France penalty clauses are enforceable - Courts however have a general power to reduce or ignore a penalty clause if the penalty is out of proportion with the prejudice suffered (CC Arts. 1152, 1231)	In Germany, penalty clauses are generally permissible (§§ 339 ff. BGB), but not, e.g. in standard terms of business. If the penalty is unreasonably high, it may be reduced by the court. This does not apply to contracts between merchants (*Kaufleute*), although even here the contractual penalty provision will be void if it offends public morals

Exclusion of Liability

England	France	Germany
Normally in England you can sue a party which breaches a contract for the "loss of the bargain" and for all reasonably foreseeable loss caused by the breach of contract Very often in England parties exclude liability for types of losses which are seen as potentially too great, even if they can be predicted: for example exclude loss of profit, loss of revenue, loss of use, consequential loss and economic loss This is very important in contracts where the value of lost industrial production or sales caused by a breach of contract is far greater than the price of services which they depend on These exclusions are permitted (subject to reasonableness, if the other party is a consumer)	French law: Rules similar to English law rules apply However, you cannot sue a party for the indirect damage caused by its breach of a contract (only the direct foreseeable damage) Liability exclusion/limitation clauses will not be enforceable in case of gross negligence or wilful misconduct	The position in Germany is similar to that in England However liability for intentional harm can never be excluded in advance (§ 276 para. 3 BGB), whether by way of a total exclusion, a cap on liability, a shortening of limitation periods or any other means In standard terms of business, the extent to which liability may be excluded differs depending on whether or not the contract is a consumer contract

Force Majeure

England	France	Germany
English law does not have a specific doctrine, though in extreme cases doctrines of frustration and/or impossibility might apply The lack of a specific English contract law doctrine of *force majeure* does not mean the concept is unknown in business contracts Issues commonly dealt with include the following: The definition of *force majeure*; general or specific Relief from the obligation to perform or for liability for breach of contract, in case of *force majeure* Lack of funds gives no relief from the obligation to make payment for services received Whether the party affected can claim payment or not, during a period of *force majeure* Obligations to take reasonable efforts to overcome *force majeure* Termination rights and any associated termination payment in case of prolonged *force majeure* In many ways the sophistication of modern *force majeure* clauses, and their relationship with the subject matter of the contract, is too complex for a general contract law rule of *force majeure* to provide for	French law has a general rule on *force majeure* - a party is excused from performance if it is made impossible by a unforeseeable irresistible event which could not be provided against However, there is extensive case law on the interpretation of contracts which included express *force majeure* clauses	German law does not have a generally applicable doctrine of *force majeure*. However, in practice, the doctrines of disappearance of the basis of the transaction (*Wegfall der Geschäftsgrundlage*) and impossibility (*Unmöglichkeit*) may serve to relieve a party of its obligations

Unilateral Changes to the Contract

Is a contract valid if it entitles one party to change its terms unilaterally?		
England	**France**	**Germany**
In England this sort of contract is common – e.g. when it refer to the standard terms as amended from time to time. There are no clear rules restricting what those changes could be. Typically they occur in contracts which the other party is free to terminate if it does not like the change.	In France contracts which would give one party discretion over whether it performed would be invalid (as a condition *purement potestative*)	German law permits a contract to give one party discretion about whether or not it will perform (Potestativbedingung) - e.g. § 454 BGB expressly states that in the case of a sample purchase (Kauf auf Probe) the purchaser is free to decide whether or not to approve the goods purchased and that in the absence of evidence to the contrary the contract will be taken to have been concluded subject to the condition precedent of approval by the purchaser Generally, however, the German courts will - in the absence of very clear wording - be slow to interpret a contract in this way

Unilateral Changes to the Contract (continued)

Some surprises for the common lawyer:		
England	**France**	**Germany**
	Termination for breach in French law: You need to specify an express right to terminate fixed term contracts for breach. Otherwise you have to go to court to terminate them (*résolution judiciaire*)	In German contracts it is important to state when obligations have to be performed, since if not specified by the parties (or by statute) and not otherwise discernible from the circumstances, performance will be due immediately (§ 271 BGB)

Third-Party Rights

England	France	Germany
Under English law third parties could not acquire rights under a contract unless they were a party to it. They had given no consideration Under a recent reform, it became possible to confer rights on third parties under contracts in England However, parties normally exclude this right and enter into a separate contract if they want to confer rights on third parties English law contract: Ensure that you contract out of 1999 Act, if third parties are not intended to benefit	French law: Bear in mind that despite the provisions of the Code Civil Art. 1121, which was intended to restrict third party rights, courts may still allow third parties to benefit- consider drafting in an express exclusion	German law: The matter needs to be considered and drafted in explicitly. If there is no provision in the contract, courts may imply/infer third party rights from the circumstances Where third-party rights are conferred, it is a question of interpretation whether the parties to the contract are to be able to amend/abolish the third party's rights without his consent

(Unfair) Standard Business Terms and Consumer Contracts

- Most legal systems have rules or agencies which control unfair clauses in consumer contracts
- Sometimes these also benefit commercial parties who contract on someone else's standard business terms. This is so with some provisions of England's Unfair Contract Terms Act (but not the Unfair Terms in Consumer Contracts Regulations 1999)

England	France	Germany
Generally these rules started with judicial developments but were enlarged on by legislation Sometimes these also benefit commercial parties who contract on someone else's standard business terms. This is so with some provisions of England's Unfair Contract Terms Act (but not the Unfair Terms in Consumer Contracts Regulations 1999)	In France, these rules do not benefit commercial parties who enter into a contract in the course of their business on someone else's standard business terms (article L. 132-1 of the French Code de la Consommation; French Supreme Court, 5 March 2002)	In Germany "standard terms of business" (*allgemeine Geschäftsbedingungen*) will, as such, be subject to very strict control when used in consumer contracts and certain (less stringent) control when used in commercial contracts These are contractual provisions drafted (by the party using them or by a third party) for use in multiple (i.e. more than 3 to 5) contracts and which were "presented" by the party using them to the other without being individually negotiated

Special Contract Counterparties - Government

England	France	Germany
In England, as in most common law countries, contracts with government entities come under normal contract law There are some differences of treatment for government in that, while the English courts will make declaratory judgments, they will not make orders of specific performance or grant injunctions against the government However, damages will be awarded for breach of contract Great care needs to be taken in checking the powers of public bodies. Banks which entered into swap transactions with local authorities found they were invalid because the authority was acting outside its powers	In France, a separate system of administrative law exists with its own courts and its own contract law An "administrative contract" will be governed only by administrative law and contains provisions which are beyond the normal scope of private law. For example, the public authority has the power to modify or terminate the contract unilaterally, (subject to an indemnification obligation) This gives the public authority the right to direct how the contract is performed and to vary the contract obligations if public service requirements change It also entitles the contractor to economic protection against the consequences of these changes French administrative contract law often applies to the provision of goods and services to public bodies Under limited circumstances, it is possible for public authorities to agree to use private law contracts too. This has been done, for example, on recent French toll road projects, to meet investors' and lenders' needs for legal certainty	In Germany there is a separate system of administrative law, but commercial contracts with government entities are governed by German private law For public-law bodies (as opposed to private-law entities) the German courts recognise a doctrine similar to that of the common law ultra vires doctrine
In practice, UK and German government contracts often specify express rights to vary the contract obligations or to terminate the contract early, similar to the general rights under French administrative contract law		

Terminology – how to avoid some of the traps

- There are some “false friends” where words look the same but have very different meanings: *execution* of a contract – does it mean signature or performance: *prejudice moral* (non material damage). *Mortgage* cannot be considered identical with the German *Hypothek.*
- Even similar legal concepts differ a lot in the detail – quote the exact legal term in the foreign language, accompanied by a good English translation of the legal concept embodied in the term, if you want the local law concept to apply. You should be aware, however, that quoting the foreign legal term has been known to have the effect of importing into your contract the local law to which the foreign legal concept belongs for purposes of interpreting that concept. Check that you are happy for this to happen - for example, does the local law concept have a clear and generally accepted meaning under the relevant local law and jurisprudence?
- Be careful with the rise of “Euro English”, which is neither U.K. English nor U.S. English.
- Keep things very short and simple – that still works very well under common law.
- In negotiations – be sure to explain what you mean: you are working in your native language and they are not. Never try to win a point through complex language. the point of negotiations is to reach a real agreement.

Conclusion

- As we deal with an increasingly international transaction base we are more likely to operate in unfamiliar jurisdictions
- It is important to be alert to the issues where there maybe significant differences between the law and practice we are accustomed to at home
- We have looked at a few key areas today but there are many more, so constant vigilance is needed
- It is also necessary to inform our commercial colleagues of areas where their normal expectations may not apply and to alert them to areas where extra care is needed to avoid unwanted commitments and to capture important commitments in legally valid forms
- It is also helpful to understand how the factors inherent to different legal systems influence the way contracts get negotiated and drafted so as to make the contracting process as effective as possible for us

Case Study

- You are the in-house Counsel on a business trip to the country of Civilia. Civilia is a country in the South East of Europe and its legal system is based on a combination of French and German Civil Law. You are with commercial colleagues to negotiate a complicated long-term contract to supply raw materials and provide services to a large industrial enterprise - the Civilia National Manufacturing Corporation. You are having dinner with your business colleagues after the meeting and they want your views on the following issues. Discussions have been friendly but it has been difficult to get agreement on what actually needs documentation in the contract.

Question 1

- As you have gone through the draft contract, CNMC has quite often explained that: “What we mean by this word is X” but has not wanted to change the draft. Your business people say that they don’t need to pay much attention to all that because if something is not written into the final contract it isn’t binding.

- Do you agree?

Question 2

- There is one part of the contract, which CNMC prepared, which contains a mistake in the price formula. The words in the contract differ from what was previously agreed in correspondence. Your business colleagues want to keep quiet about this and want to revise the internal board paper to include the extra revenue.

- Can they rely on enforcing the price clause in the contract?

Question 3

- During dinner your business colleague gets a call from Head Office saying that he must not continue discussions as the company has changed its mind about pricing and would like to sign up a similar deal with a competitor of CNMC. Your CEO signed a letter before your visit saying that his team was going to take every step it could to reach agreement in negotiations.
- Would you have any liability from breaking off discussions at this point?

Question 4

- CNMC told you today that there are too many lists and there is too much detail in your contract. They say that if there is a problem the Judge will decide what is reasonable.
- Is that right?
- Is it safe?

Question 5

- Part of the deal involves your company taking a lease of land on the industrial site. It also requires you to buy shares in the existing operating subsidiary. Your business colleagues ask you what CNMC meant about involving the Notary in this.

Question 6

- Your company has already provided some preliminary supplies of goods and services to CNMC. Your company set out the key terms in a letter it sent CNMC before starting the work. CNMC did not formally acknowledge or accept this.

- Are the terms binding on CNMC?

Question 7

- Your business colleague does not want you to offend the lead negotiator for CNMC who is going to sign the contract by asking for him to prove his authorisation.
- Is that safe?

Question 8

- In the course of discussions today the lead negotiator told your colleagues that: “It does not matter exactly what services are specified in the contract, because as a Government owned body, CNMC can change the contract, under Civilia Law.”
- Is that likely to be right?

Question 9

- Your colleague says that he wants all the goods supplied under the contract to be sold on your standard terms as varied from time to time by your company.
- Would that be valid in Civilia or are there any risks?

Question 10

- For the preliminary work that you have already been carrying out, CNMC has agreed to increase the price paid. They have sent you a letter saying: “We agree to increase the price for the work by 10% (including for work already done)”. Your colleagues are worried that if they back out of negotiations on the main deal, CNMC will try and get out of this price rise.
- Would it be binding?
- Is it worth amending the letter by adding the words “in consideration of $10, receipt of which is acknowledged”?

Question 11

- If the current draft contract is signed the mistake in the formula means the price will be ten times higher than what was previously agreed. Your business colleague is worried because he has heard that Civil Law Courts sometimes invalidate contracts if the price is very unfair.

- Do you think this is a risk here?

Question 12

- If the goods supplied under the contract are sold on your standard terms, can you count on them being enforceable in Civilia?

Question 13

- One small part of the work which you will have to do for CNMC has not been priced, and nothing has been written down about the time by which the work has to be performed. Your business colleague does not want to hold up negotiations by debating all this.
- Will the contract be valid if you sign it without addressing these issues and, if so, how would price and timetable be determined?

Question 14

- CNMC wants to put very tough penalty payments in the contract if you fail to deliver. Your business colleague says he is not worried about these, the penalties are so extreme that the whole clause will be completely unenforceable.
- Is that likely to be right?

Question 15

- Your business colleague wants to limit liability for breach of contract. He wants this to apply even in case of gross negligence or wilful misconduct (because you will have to take on a lot of local staff who may not do the work properly).
- Will this be valid?

Question 16

- He wants to be sure that if you fail to deliver you are not liable for CNMC's loss of profit when the CNMC manufacturing facility ceases work.
- Would you normally expect to be liable for this and is it possible to exclude that liability under local law?

Question 17

- Your colleague does not want the company to be liable for breaching the contract if force majeure stops it from performing. CNMC has said that it does not want to go through the detailed force majeure clause that you have proposed because it is all covered under local law anyway.

- Is that right and is it safe to rely on local law?

Question 18

- The contract has a fixed term of 7 years. Your business colleague wants to know that if the customer does not pay he can simply terminate the contract by sending a letter to that effect.

- Can he do that?

Question 19

- Your business colleague wants to be sure that CNMC's customers cannot sue you for damages if you breach the contract. The contract is silent on this at the moment.

- What can and should be done about this?