

# ECRI

**ENGINEERING &  
CONSTRUCTION  
RISK INSTITUTE**

# “Can I get out of my contract? How?”

Seminar for ECRI

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# HOWREY<sub>LLP</sub>

› Antitrust › Global Litigation › Intellectual Property

# **AN OPENING HORROR STORY**

## **Questions about termination are often difficult because:**

‘Termination’ is used to mean different things at different times

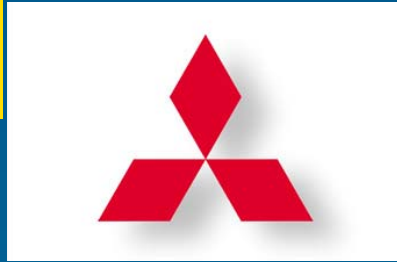
Clauses often mix those things up, don’t provide for the scenario which has arisen or are open to different interpretations

Even when there is a contractual termination clause, the common law on termination can still apply, and it is complex and full of jargon.



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# How not to draft a termination clause

## 13 Termination

- 13.1 In the event of breach of **THE AGREEMENT** by either **PARTY**, the parties shall use reasonable endeavours to agree a just and equitable solution.
- 13.2 Clause 13.1 shall be without prejudice to the right of either **PARTY** to terminate **THE AGREEMENT** for breach in circumstances where it is just and equitable to do so.

# Reasons for wanting out

## Buyer

A fall in market price of good/service being bought

Doubts about Seller's performance / liquidity

Buyer's liquidity problem

A fall in demand for Buyer's product

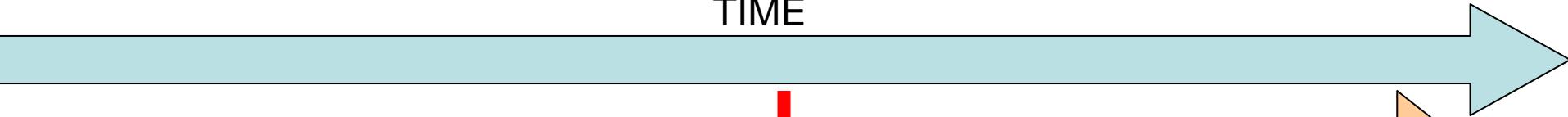
## Seller

An increase in market price of goods being sold

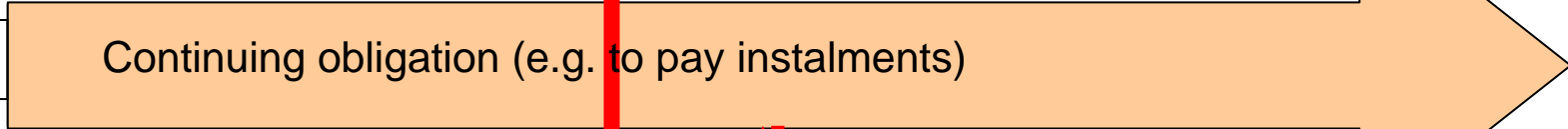
Doubts about buyer's liquidity

Increase in price of materials / labour not recoverable as a variation

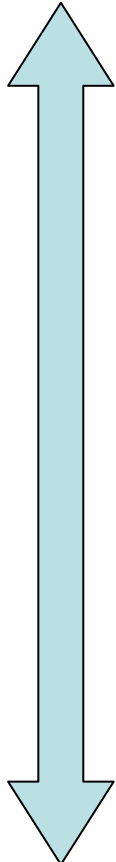
TIME



Buyer



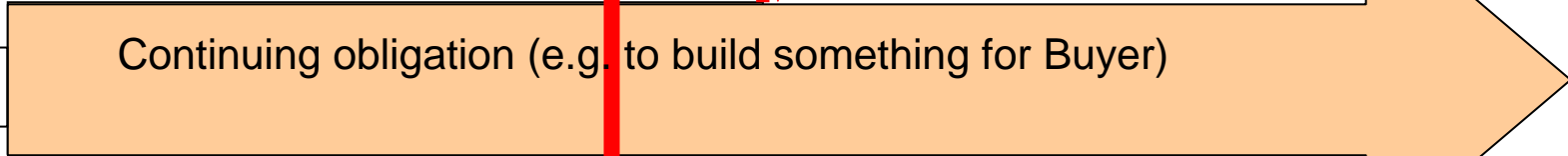
Continuing obligation (e.g. to pay instalments)



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Buyer's future obligations become a secondary obligation to pay damages immediately

Yard



Continuing obligation (e.g. to build something for Buyer)

Serious breach by Buyer  
Yard gives Buyer notice of termination

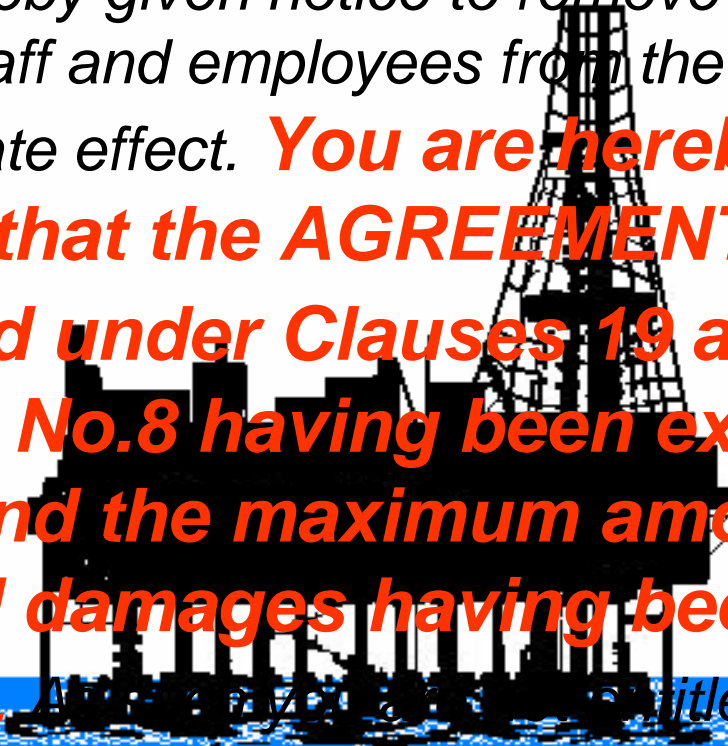


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Yard comes under an immediate obligation to mitigate, and cannot recover damages for loss it could reasonably have acted to avoid.



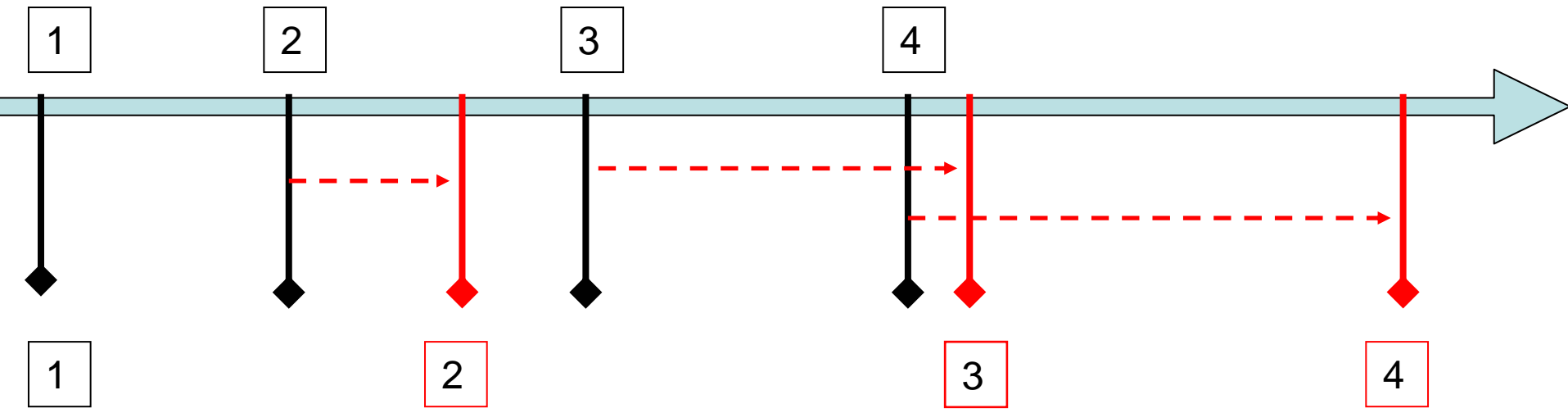




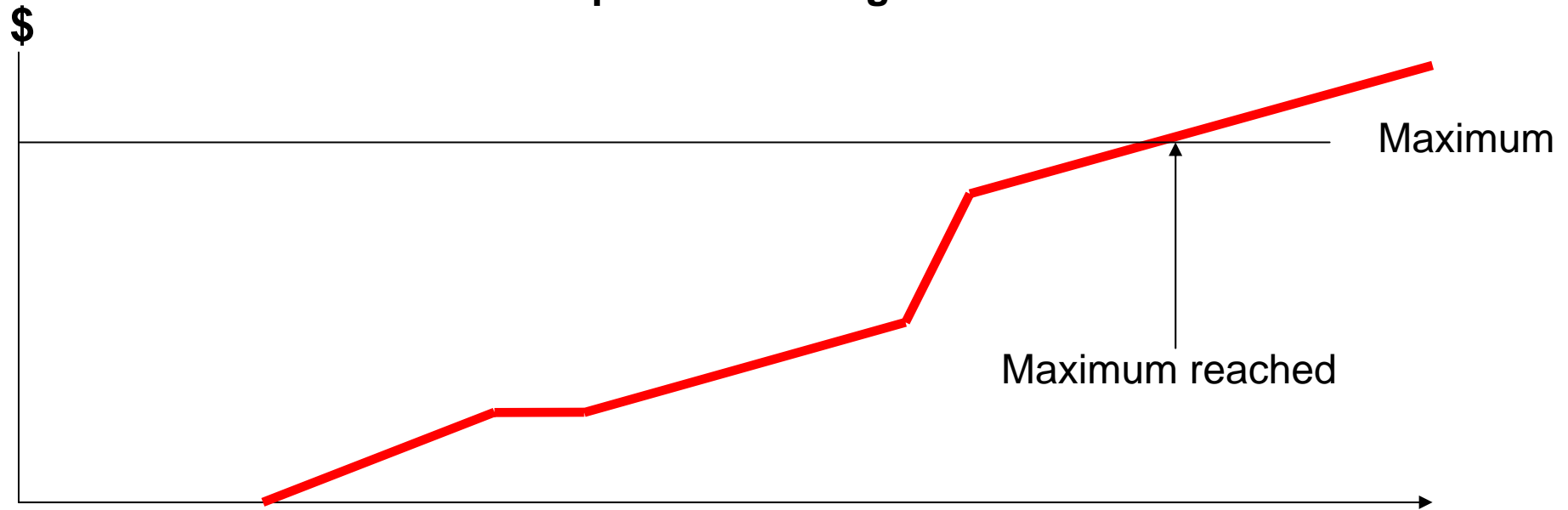
*“You are hereby given notice to remove your remaining staff and employees from the [Platform] with immediate effect. **You are hereby informed that the AGREEMENT is terminated under Clauses 19 and 34.2, Milestone No.8 having been exceeded by 51 days and the maximum amount of liquidated damages having been exceeded.** [Buyer] is not entitled to claim any payment in respect of the WORK carried out thus far until expiry of the one year DEFECTS LIABILITY PERIOD, which is now set to expire on [date]. [Buyer] reserves the right to offset against this amount (or, if it exceeds this amount, to recover from [Yard]) the cost of completing the Platform and making it ready for operation and/or of rectifying defects and/or in respect of other breaches of the AGREEMENT”*

<b>Clause</b>	<b>Effect</b>
19.1(a) terminate for convenience	Yard paid for all work done up to date of termination
19.1(b) terminate for ‘any default whatever’ if not remedied promptly after notice	Any outstanding right to payment is deferred for a year. Buyer is entitled to its costs of completion.
38.2 terminate if maximum liquidated damages reached	Contract just says Buyer “may <u>terminate</u> the CONTRACT once the maximum amount of liquidated damages have been incurred”

## Original contract milestones



## Liquidated damages



**38.2 ... the COMPANY may terminate the CONTRACT once the maximum amount of liquidated damages have been incurred.**

- The contract would be “terminated” – both parties’ future obligations would disappear
- **BUT** unlike with a termination at common law – there would have been no repudiation. Therefore future obligations do not crystallise into an obligation to pay damages now.

***You are hereby informed that the AGREEMENT is terminated under Clauses 19 and 34.2, Milestone No. 8 having been exceeded by 51 days and the maximum amount of liquidated damages having been exceeded.***

*“A shall have the right to terminate this contract in the event of any breach whatever by B (including de minimis breaches and breaches which would not otherwise amount to repudiations or give rise to a right of termination at common law), all B’s obligations hereunder being of the essence”*

*Lombard North Central PLC v Butterworth*  
[1987] QB 527

5. Timely payment is of the essence

6. In the event of any breach by the purchaser, all future payments become payable immediately

“Material  
default”

“Substantial  
default”

“Irremediable  
breach”

*Global v. Lim* (1998) 17 F.T.R. 235  
*Edwards v. Waspac Marine*  
*Inc.* (1998) 17 F.T.R. 235

*“[a disease] could be said to be remedied if ... cured although no cure could remove the past effect ... [T]o*

*whether a breach ... is material must depend upon all the facts of the particular case including the terms and duration of the agreement, the nature of the breach and the consequences.”* *restraining ... disclosure of confidential information could not be said to be remedied by a promise not to do it again”*

# *Stocznia Gdynia SA v Gearbulk Holdings Ltd*

## **10.6 Seller's Default**

The Purchaser shall be entitled, but not bound, to declare the Seller in default and terminate the Contract:-

(a) if there is a major breach by the Seller of its obligation ... to proceed with construction of the vessel such that ... the Vessel cannot be completed on or before the [completion date]

## **10.7 Effect of termination**

Upon termination ... in accordance with the provisions of Article 10 ... the Seller shall ... repay ... all sums previously paid to the Seller.

## Tactics adopted by employers

(a) Looking to cut their losses by seizing upon any contractor breach as a grounds to terminate  
Is the breach relied on really a repudiation, or one which entitles employer to exercise a contractual right?  
Is the notice given effective?

(b) Using a variation clause to order reducing variations  
If employer has no right to terminate, can you rely on the purported termination and exercise a termination right yourself?

(c) Trying to use risk of non payment as leverage in negotiating reduced price  
Is this a real attempt to terminate or the opening of a negotiation?  
Even if you're in the wrong, is it worth offering to recontract?

(b) Using a variation clause to order reducing variations.

**JCE 2005**

**3/14 Variations “desirable for the completion and/or improved functioning of the Works”**

.5 No Variation required by the Architect / Contract Administrator or subsequently sanctioned by him shall vitiate this contract

Variation = “alteration or modification of the design, quality or quantity of the Works including: ...the ... omission ... of any work”

## (c) Trying to use risk of non-payment as leverage in negotiating reduced price

No duty to renegotiate – rights are as in contract

Only situation in which you might consider is where:

(1) If you agree the lower price, you'll get paid that lower price; and

(2) If you hold out for the price previously agreed, you'll never see the money

### **Other points to consider:**

Reserve position?

Economic Duress?

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