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WELCOME@STUARTSLEGAL.COM
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EPC Project Risks

Legal Alerts: practical observations on contractual risks, title-transfer risks, sanctions, and bank guarantees in EPC-model construction projects and related forms.

EDITION

Prepared by the **“Industrial Construction”** practice of Stuarts Legal for project executives, shareholders, and in-house legal teams of clients and contractors.

Vol. I · 6 essays · 36 pages

Contents

Six notes on the points where legal wording decides the commercial outcome of an EPC project — from the bank guarantee to contract affirmation.

ABOUT THE AUTHOR

Elena Stuart

Managing Partner, Head of the “Industrial Construction” practice

More than **ten years** of advising on construction projects in petrochemicals, oil & gas refining, energy and natural resources under the **EPC** model.

The aggregate value of the projects Elena has worked on exceeds **€100 billion**. She advises contractors, clients, licensors and project lenders, including international export credit agencies.

in linkedin.com/in/elena-stuart

✉ elena.stuart@stuartslegal.com

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Note I

01

p. 06–08

Farewell, Bank Guarantee!

> *Why the bank guarantee is no longer an effective cash-out instrument for the client in an EPC construction project — and not only in Russia.*

#simply_about_complex_EPC

Elena Stuart
Managing Partner
Stuarts Legal

If, a few years ago, someone had told us we would be writing a note on the decline of the bank-guarantee era in EPC projects, we would have laughed for a long time. But life, as usual, has its own plans.

Why is the **bank guarantee no longer an effective cash-out instrument for the client** in an EPC construction project — or, frankly, in any construction project, not only in Russia, but, I dare say, worldwide? There are several reasons.

National protectionism aimed at the guarantor banks

Unscrupulous foreign contractors have mastered a new way of suspending payments under a bank guarantee: they apply to a state court in their home country and seek an order prohibiting the foreign guarantor bank from paying out to the beneficiary (the client under the contract).

For the past several decades the principle hard-wired into the legal nature of the bank guarantee — *"payment on first demand / on demand"* — worked unconditionally. This meant that the guarantor bank pays the beneficiary first and only then sorts out the principal's claims.

Under Article 19 of the Convention, there are several exceptions where payment may not be made, namely:

1. any document is forged;
2. the payment is not owed on the ground stated in the demand for payment;
3. in view of the type of obligation, there are no proper (sufficient) grounds for payment.

Thus, only manifest fraud could previously stand in the way of payment, including under the **URDG** (Uniform Rules for Demand Guarantees).

> *After 2022 the situation has changed: there are now known cases in which a foreign contractor obtains an order from a state court in its home country preventing the guarantor bank from paying out under the guarantee.*

Sanctions restrictions

Besides bad faith on the part of a contractor who decides to obtain a court injunction against payment under the bank guarantee, another situation can arise: the client is added to the **SDN List** or becomes subject to secondary sanctions. In that case the guarantor bank is technically unable to make a payment in favour of a sanctioned person.

Such a situation requires obtaining a licence to make the payment from the US regulator. That process is not always successful and can take a long time.

What is to be done?

To avoid such situations, we strongly recommend that a Russian client in an EPC project **refrain from using bank guarantees** where the contractor is a foreign legal entity — even from a "friendly state".

An EPC contract can effectively incorporate a mechanism of *retention amounts held through escrow accounts*. Corporate guarantees are open to question: it matters in which jurisdiction the contractor is incorporated, to understand how effectively that instrument actually works there.

A similar situation applies to *suretyship*: neither under Russian nor under English law is it an instrument for quickly obtaining cash. If the surety refuses to pay, the client will spend a great deal of time on litigation to obtain recovery.

In short — be attentive in the current global circumstances.

Note II

02

p. 09–11

Stuck Shipment: how to obtain US-ordered equipment under sanctions

> *The US applies strict rules on exports to sanctioned countries. There is, however, still a chance of obtaining an export licence. If an applicant is refused on one ground, nothing prevents them from re-applying on new arguments.*

Specially for Forbes →

Elena Stuart
Managing Partner
Stuarts Legal

Since the spring of 2022, when the United States sharply tightened sanctions against Russia, many Russian companies that had managed to order American equipment have had to defend their position before the US Bureau of Industry and Security (**BIS**).

The key instrument for them is the *Export Administration Regulations* (**EAR**) — the rules establishing the licensing regime and controlling the export and re-export of most commercial goods, software and technologies, including dual-use items.

The goal is to prove to the US that shipping equipment manufactured by American suppliers to Russia — in most cases under contracts concluded before 24 February 2022 — poses no threat to US national security and certainly will not lead the world into nuclear war. We are, for instance, working right now with clients trying to obtain equipment for a polyethylene plant and for a cheese plant.

How the procedure is set up

The list of equipment whose export requires a licence is contained in the EAR. The US supplier itself fills out the form on the BIS website, listing the equipment to be exported, the manufacturer, the end-recipient of the equipment in Russia, and how it will be used — for example, that two evaporators will be used as part of a liquefied natural gas plant. The form is more than just technical.

Once the form is submitted, BIS reviews the application and sends a so-called *Intent to Deny letter* — a letter expressing the intention to refuse the licence. Note that EAR is built around a presumption of denial, and all export equipment is regarded as potentially dangerous.

BIS writes that, having reviewed the export-licence application, it intends to refuse the licence on the grounds that the equipment could strengthen Russia's military potential and so represents a threat to US national security. Nevertheless, BIS magnanimously grants the applicant another 20 calendar days to put forward additional arguments.

Grounds for exemptions

The US export rules have one merit: if the applicant is refused on one ground, no one prevents them from re-applying for the export of the same equipment on a different ground.

> *This entertaining game with the US regulator is being played by its own charges — the largest manufacturers and suppliers of American equipment, who once did successful business in Russia.*

For example, EAR allows an export licence to be issued where the supply is for humanitarian purposes. The main thing here is to prove that humanitarian purpose, which is not so simple. The cold heart of “Big Brother” is open to the plight of the dying northern sea otters off the coast of California, but hardly to the interests of Russian consumers.

For the polyethylene plant, for instance, we pointed out that the polyethylene products it will produce are important for medicine and pharmaceuticals: packaging for medicines, various disposable medical devices, patient-care items, sterilisation cabinets, test tubes and pipettes. In a similar situation, an appeal to compassion proved fairly effective in the offices of the European regulator. With the US, it didn’t work — but we have not given up.

A few conference calls with US vendors allowed us to formulate new arguments for licence applications. For example, if an American vendor intends to wind down its operations in Russia, BIS may grant an export licence for a “final shipment”.

> *BIS encourages companies to leave the Russian and Belarusian markets and is making changes to make such decisions easier to take.*
>
> *— BIS commentary to the EAR*

Across most US federal laws, “operational activity” is taken to mean the acquisition, development, maintenance, ownership, leasing, renting or use of equipment, facilities, personnel, products, services, personal property and real estate.

US lawyers objected and told us that this ground applies only if a company had had an office in Russia and was now closing it. We, however, reminded our US colleagues of the 14th Amendment to the US Constitution, under which “no State... shall deny to any person within its jurisdiction the equal protection of the laws.”

Indeed, how lawful is BIS’s conduct towards American companies that manufactured unique equipment, want to sell it and put the Russian market behind them, yet cannot obtain an export licence solely because, at the time of application, they had no formal representation in Russia?

Does it really come down to the equipment going to the scrapheap, with nothing but luck deciding otherwise? It is in precisely this spirit that we drafted a new submission to BIS, and we are now eagerly awaiting their response.

Note III

03

p. 12–15

When title to equipment in EPC projects should pass to the client

> *Plainly about a complex topic. A short note for shareholders, project executives, project managers and other participants negotiating EPC contracts on the client side.*

#simply_about_complex_EPC

Elena Stuart
Managing Partner
Stuarts Legal

We are talking about a common misconception of our clients regarding the moment when title (ownership) to equipment passes in EPC projects, and indeed in cross-border supply generally.

Project after project, we explain the following: **the earlier title to the equipment passes to the client, the fewer risks the client and its project lenders face**.

At the same time, it goes without saying that the risk of accidental loss of the equipment being supplied should pass as late as possible. We regularly remind the client's commercial division that the moment of title transfer and the moment of risk transfer can — and should — be separated, both under Russian and under English law.

The classic “non-bankable” wording

Below is a typical formulation taken from an EPC contract for DAP delivery:

> *“Title to the equipment (the relevant part thereof) shall pass to the Client at the moment the equipment (or the relevant part) is delivered to the Site, as evidenced by the Parties signing… [type of document specified].”*

What is wrong with this wording? In most cases, project lenders will tell you that this provision is **non-bankable**. Put simply: a lender will not grant the client financing for an EPC project with such a title-transfer clause. Why? Let us think this through.

What percentage of the total contract price will the client have paid by the time the equipment is delivered to the agreed delivery point — for example, the site? Everything depends, of course, on the particular project and its commercial terms, but it is clear that by the time the equipment arrives on site the client will, as a rule, have paid the supplier more than 70% of the equipment price.

The cycle of supplying equipment — from placing the order with the vendors, through manufacture, factory acceptance tests, dispatch, intermediate transshipments, to delivery at the final destination — takes a very long time (from six months upwards), especially when it comes to *long lead-time equipment* in petrochemicals or mining.

Three negative scenarios

What can happen while the equipment is travelling to the client? Let us consider the most likely negative scenarios.

1. **Attachment of the supplier’s property.** The supplier has breached its obligations under other contracts with another counterparty, and that counterparty has decided to seek interim relief by way of attachment of the supplier’s assets — into which, by sheer coincidence, the equipment being shipped to you at the delivery point may also fall. You can never predict how conflict-of-law rules will operate in different jurisdictions. The probability is fairly high and lies outside the client’s control.

2. **Insolvency of the supplier.** Insolvency or compulsory liquidation proceedings have been opened against the supplier. The equipment may fall into the insolvency estate or its equivalent in the supplier’s jurisdiction. Handover of the equipment to the client will, putting it mildly, be impeded.

3. **Sanctions risk.** A friendly foreign supplier has already manufactured the equipment and is shipping it to the client, but somewhere along the way OFAC clerks have sent it a frightening letter about secondary sanctions, blocking of payments, arrest of the chief executive in any country of the world (other than Russia, of course) and his extradition to the United States for assisting a Russian company in circumventing sanctions.

What matters to project lenders?

That the project be delivered on time. A plant built on schedule means the lenders' money is returned on schedule. Equipment that has been manufactured — at the cost of six months to a year — but never delivered for any of the reasons described above means a slippage of the project schedule "to the right". Substantially. No one needs that. And this risk can and must be managed in the EPC contract or supply contract.

Solution

Title to the equipment should pass to the client on the earliest possible date.

If the EPC contractor places orders for the manufacture of equipment with the manufacturing plants, then title to the equipment can pass to the client on the date the equipment is dispatched from the manufacturer's plant to the EPC contractor — i.e. *in transit*.

Where we are working with CIP delivery terms, title should pass on the date the equipment is handed over to the first carrier.

> *If title to that equipment were already with the client, the conversation with the frightened foreign supplier would go quite differently. Even if the supplier abandons the equipment in the middle of a field, the client can always come and collect it.*

Naturally, the earliest possible date of title transfer must be determined for each individual contract, taking into account the delivery basis and the insurance requirements.

Refusing to take title as a client until the equipment reaches the delivery point — while having paid almost the full equipment price — is dangerous.

Living in the hope that a bank guarantee will close the risks set out above is, of course, possible. To be precise, it was possible up to February 2022. In the current climate, a bank guarantee from a foreign bank is no longer an effective instrument for ensuring proper performance by a counterparty, and still less an effective instrument for a quick cash-out.

And remember that even a “cashed-in” bank guarantee cannot stop the clock — and time matters to every participant in an EPC project. Time which can be lost simply through the wrong wording in the contract.

Note IV

04

p. 16–20

Risks and technical aspects of meeting *guaranteed performance figures* in EPC contracts

> *Meeting the guaranteed performance figures is always the result of both parties performing their obligations. Quality of feedstock, working utilities, the responsibility matrix: where the contractor's obligations end and the client's counter-obligations begin.*

#simply_about_complex_EPC

Elena Stuart
Managing Partner
Stuarts Legal

Kirill Astafiev
Of Counsel
Stuarts Legal

In the course of EPC contract implementation, clients pay particular attention to including in the contractor's scope responsibility for successful testing and for meeting the guaranteed performance figures of the equipment supplied or of the production line as a whole.

To secure performance of these obligations, clients often tie part of the contract payments to the successful completion of such events. In some cases they include in the contract provisions on the right to terminate the contract unilaterally, demanding a full refund of all sums paid and compensation of losses.

It is important to note, however, that meeting the guaranteed performance figures is the result of performance both of the contractor's obligations and of the client's counter-obligations. One of the key such counter-obligations is the supply of good-quality feedstock.

Feedstock supply as the client's counter-obligation

Achieving the declared performance characteristics of the equipment and the production line is impossible without the client providing feedstock and working utilities of the proper quality. Even minor deviations in the feedstock properties (composition, moisture, structure, presence of impurities) may lead to the following consequences:

- damage to or contamination of the process equipment (pumps, filters, pipelines, etc.);

- reduced equipment productivity or equipment failure;
- inability to achieve the planned product quality.

To address these risks, it is advisable to include a clear provision in the EPC contract that the supply of quality feedstock and working utilities is the client's counter-obligation. Breach of this obligation should release the contractor from liability for failure to meet the guaranteed figures, and should also confer the right to reschedule the tests.

The responsibility-allocation matrix

To manage risks effectively during commissioning and testing, the parties should agree on a responsibility-allocation matrix. Such a matrix should become an integral schedule to the contract.

Client's responsibility

- supply of quality feedstock in the required volume;
- timely and sufficient provision of working utilities (power, water, compressed air, etc.);
- feedstock sampling and proper storage of the samples for later analysis in case of dispute.

Contractor's responsibility

- setting the equipment operating parameters in line with the declared feedstock characteristics;
- organising and carrying out the production-line testing;
- maintaining documentation of the test results.

Technical aspects

Effect of feedstock quality on test results. Proper feedstock quality is one of the most significant factors for successful testing. To ensure the reliability of the testing, the contractor needs to be able to check the feedstock both before and during the tests. The following provisions are recommended for the contract:

- a mandatory laboratory analysis of the feedstock before testing;
- recording the feedstock parameters (chemical composition and physical properties, moisture, size) and providing the corresponding test reports;
- agreement on the format for storage of feedstock samples for possible future checks.

Stability of energy supply. The production line's operation depends on a stable supply of utilities (electricity, gas, water, steam, compressed air). It is recommended to set out:

- the parameters for the utilities;
- installation of back-up power sources;
- the client's responsibility for monitoring supply stability based on the project demand.

Tuning the equipment to feedstock properties. If the feedstock supplied by the client does not match the design parameters, the contractor must be entitled to revise the equipment settings and/or the characteristics of the product. This includes:

- adjusting the operating parameters of equipment items (pumps, compressors, heat exchangers and other elements of the system);
- running additional tests to minimise the risk of damage to the equipment.

> *The responsibility-allocation matrix will help eliminate potential disputes and allocate risks between the parties in advance.*

Checking the automated control systems. Before starting up the production line, it is advisable to fully test all elements of the control system (SCADA or equivalent), including a preliminary alternative verification of all systems, instruments and sensors, to rule out failures during the “hot” tests.

Financial aspects and compensation

Attempting to perform tests with unsuitable feedstock or under conditions not matching the design parameters can result in significant expenses for the parties. Accordingly, it is recommended to fix in the contract:

- the amount of compensation owed to the contractor. The client shall compensate the contractor for confirmed and pre-agreed costs if the unsuccessful tests occurred through the client’s fault;
- engagement of specialists, accommodation, meals and business-trip expenses;
- additional commissioning costs and re-diagnostics of the equipment, where necessary;
- the procedure and conditions for compensation of the contractor’s expenses;
- the setting of liquidated damages for breach of obligations.

It is recommended to provide for penalties in case of late supply of feedstock or failure of the feedstock to meet the design parameters.

Fixing in the contract the client’s counter-obligation to supply good-quality feedstock, the method of its verification and an agreed responsibility-allocation matrix will:

- reduce the likelihood of disputes and disagreements;
- ensure transparency of processes during commissioning and testing;
- improve the overall efficiency of project delivery.

> *Successful testing under an EPC contract is only possible where the scope of each party’s duties is properly captured and the responsibility allocation is clearly drawn between client and contractor.*

Note V

05

p. 21–25

Rely upon or *non rely upon* information

> *Who answers for errors in the FEED documentation and design documentation in EPC projects, and how this links to project financing.*

#simply_about_complex_EPC

Elena Stuart
Managing Partner
Stuarts Legal LLC

The client is building a factory — say, a chocolate factory; why not. The client engages an EPC contractor in order to have *turnkey liability* on the project, i.e. single-point responsibility in the EPC contractor.

First, because it is convenient; second, because project lenders are not always willing to provide financing where the plant is being built on a *multi-lot* basis, i.e. with several contractors. Why? Because for project lenders — that is, the banks — that means risk: the more contractors are on the project, the higher the probability that one of them will breach the work schedule or fail to perform other contractual obligations, which in turn raises the risk that commissioning of the chocolate factory will be delayed, and with it the risk of borrower default.

Designing the chocolate factory

On the design side, several configurations are possible. Let us consider each, both from the perspective of Russian law and of English law as applied to the EPC contract.

Configuration 1 · Designer in-house

The EPC contractor designs in-house, which is rare but does happen. That is, the EPC contractor does not subcontract a design institute — it has designers on staff. This is the ideal scenario for all parties to the EPC contract, because if the EPC contractor makes an error in the calculations when preparing the FEED or the design documentation, as a result of which the plant fails to meet the guaranteed performance figures either during the 72-hour tests or within another deadline set by the EPC contract, the responsibility rests entirely with the EPC contractor.

Configuration 2 · EPC contractor engages designers

In practice the most common situation is one where the EPC contractor enters into a subcontract with one or several designers.

Depending on the technological complexity of the EPC project, the designer (usually a foreign one) may develop only the FEED package (*front-end engineering design*), i.e. basic or preliminary design, in which the production technology is embedded; the EPC contractor then adapts the basic package to Russian design standards in accordance with Government Decree No. 87 “On the Composition of Sections of Design Documentation and Requirements for their Content” of 16 February 2008.

Alternatively, the EPC contractor subcontracts the basic design to a Russian designer for the purpose of adaptation to Russian design standards and receives back from it a package of design documentation that complies with the Russian standards.

Configuration 3 · The client hands over the FEED as initial data

It also happens that the client enters into a contract for basic design directly with the licensor (the technology owner) and then passes the FEED package as initial data to the EPC contractor for inclusion in the Russian design documentation in adapted form.

What *rely upon* and *non rely upon* information mean on a project

Sometimes the EPC contractor does not wish to bear liability for the technological solutions “embedded” in the design. Let’s look at the example of our chocolate factory. The EPC contractor is most often not the licensor: it knows how to build the factory, but does not know

what technological solutions must be embedded in the design so that the factory produces chocolate with given characteristics.

For this reason the EPC contractor engages a licensor — i.e. a party that owns the technology for producing chocolate with the required characteristics. The licensor delivers pre-FEED or FEED design, and the EPC contractor then refines the basic design to Russian standards.

What to do about this?

Whether any given piece of initial data is *rely upon* or *non rely upon* information is, in most cases, a matter of commercial negotiation — although there are a number of technical aspects that are hard to influence.

The topic is especially sensitive and important for EPC contractors at the stage of accepting initial data from the client before the project starts. The EPC contractor must clearly understand — and fix in writing in the EPC contract — which initial data passed by the client can be checked by the EPC contractor, and which cannot.

- **Non rely upon information** — information that may not be relied upon and must be verified.
- **Rely upon information** — information that should be relied upon and need not be verified.

Why is this important? Any error in the client's initial data discovered during project delivery may significantly extend the construction period of that same chocolate factory. And if the EPC contract does not fix what initial data the contractor vouches for, then de jure he will be answerable for everything — especially if the EPC contract is governed by English law.

> *"I am prepared to be liable for the chocolate factory's failure to meet the guaranteed performance figures, except where the failure is due to an error in the FEED. The licensor's basic design is, for me, rely upon information."*

Example: an ancient settlement under the foundations

Say the client passed to the EPC contractor the results of surveys (geology, geodesy) carried out by a separate contractor. When construction works commenced, the EPC contractor discovered an ancient settlement that had not been found by the surveying contractor.

What does this mean for the project? Quite right — suspension of work for up to a year. These are so-called *subsurface risks*. But who will answer for the schedule slippage if the EPC contract says nothing about whether the EPC contractor is obliged to verify the initial data for correctness? In the example above, the EPC contractor ends up in a very bad position.

When we represent the EPC contractor on a project, we always sit down with its technical team and explain why a schedule should be produced setting out, in clear terms, which initial data the EPC contractor is required to verify and which it is not.

For instance, all survey results we classify as *rely upon information*. And if, during piling works, an ancient settlement is found, then the EPC contractor is not liable for the delay and does not pay *delay liquidated damages* to the client.

There is also a test of reasonableness and common sense at play here. Clearly, in theory, the contractor could verify the survey results by going back and re-excavating the site, but that is not reasonable — which is precisely why, in international EPC practice, so-called subsurface risks lie with the EPC client as the site owner.

From the client and lender side

When we represent the client in an EPC project, the question of *rely upon information* also plays an important role both for the client and for the project lenders. Often the shareholders of the client are unaware that they have chosen an EPC contractor who, several months into negotiations, casually mentions over a coffee break that he is only liable for his own design scope — the Russian one. As for the basic design package made by the foreign licensor, whom the EPC contractor himself engaged, he will not be checking it.

Therefore, if the chocolate factory will produce less chocolate than agreed in the technical specification, and the expert appraisal concludes that the error “sits” in the FEED package underlying the Russian design documentation, then the *performance liquidated damages* for failure to meet the guaranteed figures will be uncollectable.

> *Lenders will tell you that such a clause makes the EPC contract non-bankable — put simply, no money will be lent for construction of the factory on such a term.*

A direct contract between the client and the licensor for the FEED package

There are cases where the client engages the foreign designer directly to develop the basic design package, and then hands that package over to the EPC contractor for adaptation to Russian design standards. If, under such a scheme, the EPC contractor says he will not check the FEED package for correctness — because he lacks the expertise — then in that variant the client may go and seek damages against the foreign designer.

However, that variant will not appeal to lenders and is commercially poor for the client, because the foreign designer's liability cap will be calculated from the price of the contract with the foreign designer, which by definition will be lower than the EPC contract price. The client will therefore recover a smaller amount of damages than it could have done from the EPC contractor.

To wrap up: before spending months preparing and negotiating the EPC contract terms, include in the tender package or in the *term-sheet* a clause on which initial data the EPC contractor must, in the client's view, vouch for — paying particular attention to verification of the basic design from the licensor.

Note VI

06

p. 26–28

Affirmation risk under English law

> *How not to lose the right to terminate. On why "today I love, tomorrow I hate" in correspondence with a counterparty under an English-law contract may cost you the right to termination.*

English Law

Elena Stuart
Managing Partner
Stuarts Legal

Increasingly, of late, we encounter requests from our clients to prepare a *notice of termination of contract for breach* under an English-law contract on the grounds that the counterparty has breached its obligations.

They send us the correspondence with the counterparty for us to review — including claim letters requesting the counterparty to remedy its breaches of contract. As we get into the substance of the dispute, we often find the following pattern: the client asks the counterparty to remedy the breach within a particular deadline and threatens to terminate the contract should that demand not be met.

Time then passes; the counterparty tearfully promises to put everything right, only a bit later; the client's heart melts and the contract continues to be performed — until the counterparty annoys the client with a fresh breach.

In practice, however, this “today I love, tomorrow I hate” style of conducting client/counterparty relations under an English-law contract creates the following risk for the client where the letters do not contain certain reservations.

Affirmation of a contract

Under English law there is such a concept as *affirmation of a contract* — i.e. an election not to terminate the contract — and, as a consequence, loss of the right to terminate it on the grounds previously asserted.

In practice, of course, the client does not deliberately waive termination. In practice, the risk almost always materialises by the same scheme, of which the client is often unaware:

1. the counterparty breaches contract conditions giving rise to a right of termination — for example, supplies defective equipment;
2. the client issues a claim asking that the defect be remedied within the contractual deadline, or threatening to exercise the right of termination;
3. the counterparty does not remedy the defect, and the client does not terminate: they meet, they talk; the client gets angry, the counterparty promises to fix everything later on;
4. the contract continues to be performed by the client through acceptance of works, payment of invoices — that is, by its subsequent conduct the client has, in effect, accepted the breaches committed.

Then the parties fall out again, and a few months later the client asks us to issue a notice of termination on the basis of the same defect that was never remedied. Well — termination on that ground is no longer available: it will, with a high degree of probability, be held by the English courts to have been waived.

> *Once a party is in repudiatory breach, the innocent party has a choice: accept the breach and treat the contract as discharged or affirm the contract and press the party in breach to perform.*
>
> *— White and Carter (Councils) Ltd v McGregor [1962] AC 413*

The cost of error: epic fail

Recall: under English law, nothing is worse than a notice of termination sent on the wrong ground. In that case the party sending such a notice is itself deemed to have materially breached the contract

— i.e. it is in *repudiatory breach*, which is a direct ground for the counterparty itself to claim damages and terminate the contract. *Epic fail*, in a word.

You also cannot withdraw a termination notice under English law — you will have to enter into a new contract.

> *If the necessary grounds for termination cannot be proved, the termination could be a wrongful repudiation of the contract, giving the other party the right to accept the repudiation, end the contract and claim damages.*

A protective wording

To avoid this highly unpleasant situation, please remember to include in correspondence with the counterparty a disclaimer along the following lines — especially where the correspondence concerns non-performance of contractual obligations by the counterparty:

> *For the avoidance of doubt, at this stage, we do not affirm or terminate the Contract or waive any rights. We reserve all our rights and remedies in relation to any breach under the Contract.*

> *We know that technical claim letters are typically drafted by technical specialists, and sometimes sent out by them without consulting the legal department. That should not be done.*

The price may be too high. Are the beneficiaries ready to pay it?

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Stuarts Legal operates at the intersection of law, contract architecture and project delivery, where legal precision must match the commercial and operational logic of an EPC project.

CONTACTS

welcome@stuartslegal.com
elena.stuart@stuartslegal.com

Moscow
Johannesburg

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stuartslegal.com
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