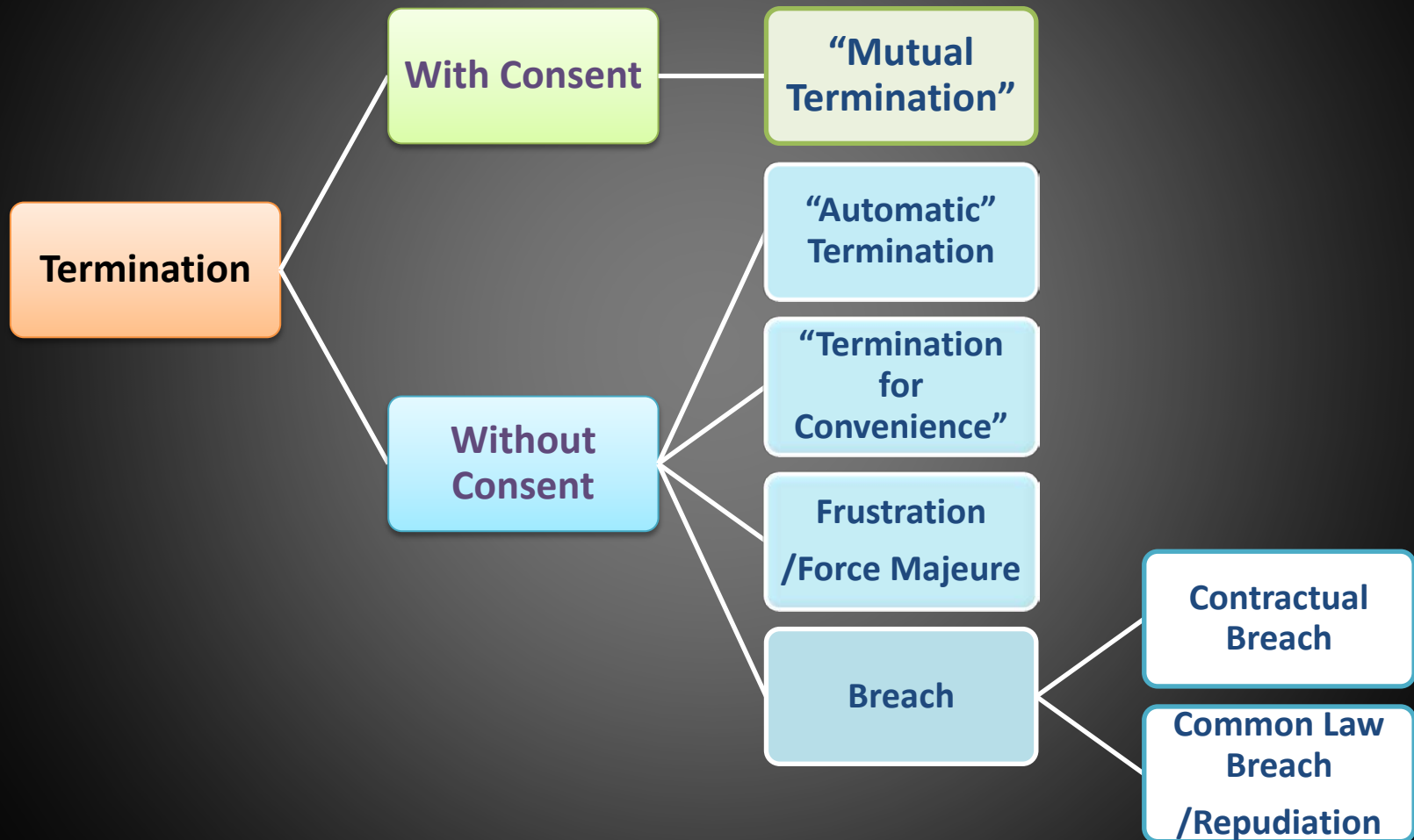


“Termination”

8 March 2016

Types of Termination



Types of Termination

- **By agreement – “mutual termination”**
- “Automatic” termination
- Termination for convenience
- By frustration / force majeure
- **Contractual breach**
- **Common law breach/repudiation**

Mutual Termination

- By agreement of the parties
- Usually achieved through negotiation after problem has arisen in the project

GOOD PRACTICE TIPS

(or how you can help your Legal/Risk Dept):-

-
- Record the bargain & ensure both parties sign - Letter is good enough, with other party signing an acceptance (Authorised Person)
 - Ensure agreement specifies the consequences of termination
 - Since mutual termination is a fresh agreement outside the Contract, you may negotiate & agree on the consequences

-
- If there is no agreement on the consequences, then common law applies:-
 - No further obligations going forward
 - No claim for loss of profit
 - Pre-termination rights & liabilities are preserved
(Pay for direct financial loss - work done, materials delivered, defects must be accounted for)

Spelling Out the Consequences

- What is payable? How much?
- If no specified sum, what is the basis to assess sum?
- Joint measurement & inspection? Independent QS valuation? Record and sign off
- Defects Liability? Patent/Latent? Tests? Retention sum?

- Unfixed materials? On and off site. Can it be used? Keep or return? How to value? Deal with materials previously certified at 75%. Pay supplier direct?
- If no express agreed terms, then must keep & pay for materials properly delivered to site. Ensure OEM/quality/test certificates etc are in order
- If delivery to site was premature, then may either keep & pay or return the materials.

-
- Sub-contracts / Suppliers – Terminate? Novate? Assign?
 - Novation – 3-party agreement. This ensures all benefits AND BURDENS are transferred to new party.
 - Assignment – 2-way agreement. Does not transfer burdens, only benefits (e.g., benefit of contract payments). Use cautiously. Often this is the wrong structure for what you want to do!

Critical points:-

- No further claims. Waiver and release.

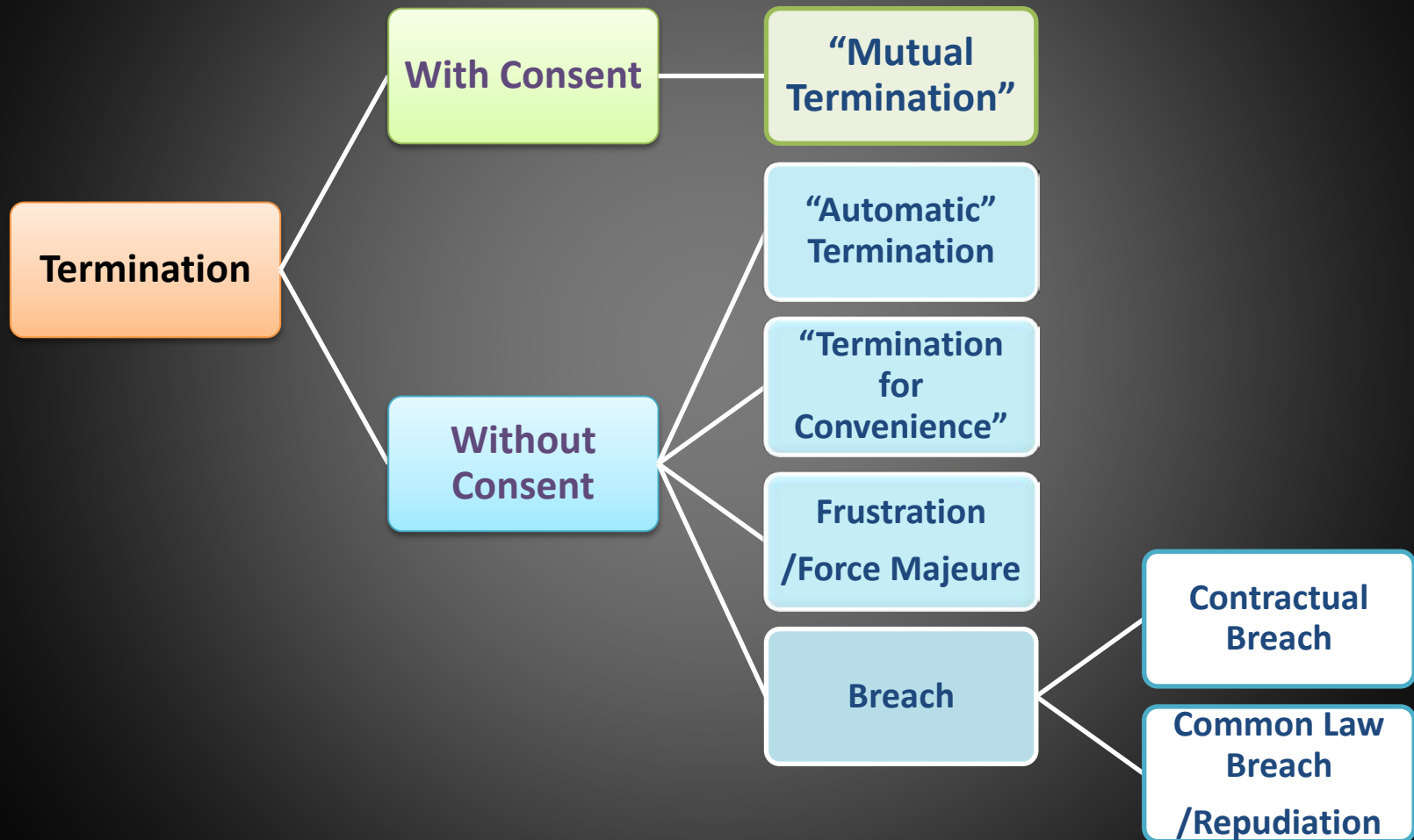
"We, ..., accept this sum of RM... as full and final settlement of all our claims, costs, expenses and causes of action which have or may arise under or in relation to the Contract and we irrevocably discharge and release ... from all liability to us in respect of the same."

- What if other party modifies the acceptance?

It's a counter-offer. If minor modification, agreement can still stand on other terms. Conduct becomes relevant. Cashing the cheque, demobilising, instructing subcontractors/suppliers to deal direct with Employer etc.

- Final Account (mutual) / Final Certificate (unilateral) needed?

Types of Termination



Automatic Termination

- Can occur by Contract or by common law
- Employer terminates main contractor, the sub-contract becomes “automatically terminated”

- If pursuant to Contract, Contract will normally spell out consequences
- If under common law – consequences depend on who caused the termination and whether it was rightful or wrongful
- Can occur due to Contractor's insolvency/scheme of arrangement

Termination for Convenience

- The “It’s not you, it’s me” Clause – No default termination. With notice.

46 TERMINATION WITHOUT DEFAULT

46.1 Right of the Employer to Terminate

The Employer may at any time, give to the Contractor 30-Day notice of termination of the Contract. Upon the expiry of 30 Days from the receipt of such notice the Contract shall be terminated.

Right of the
Employer to
Termination

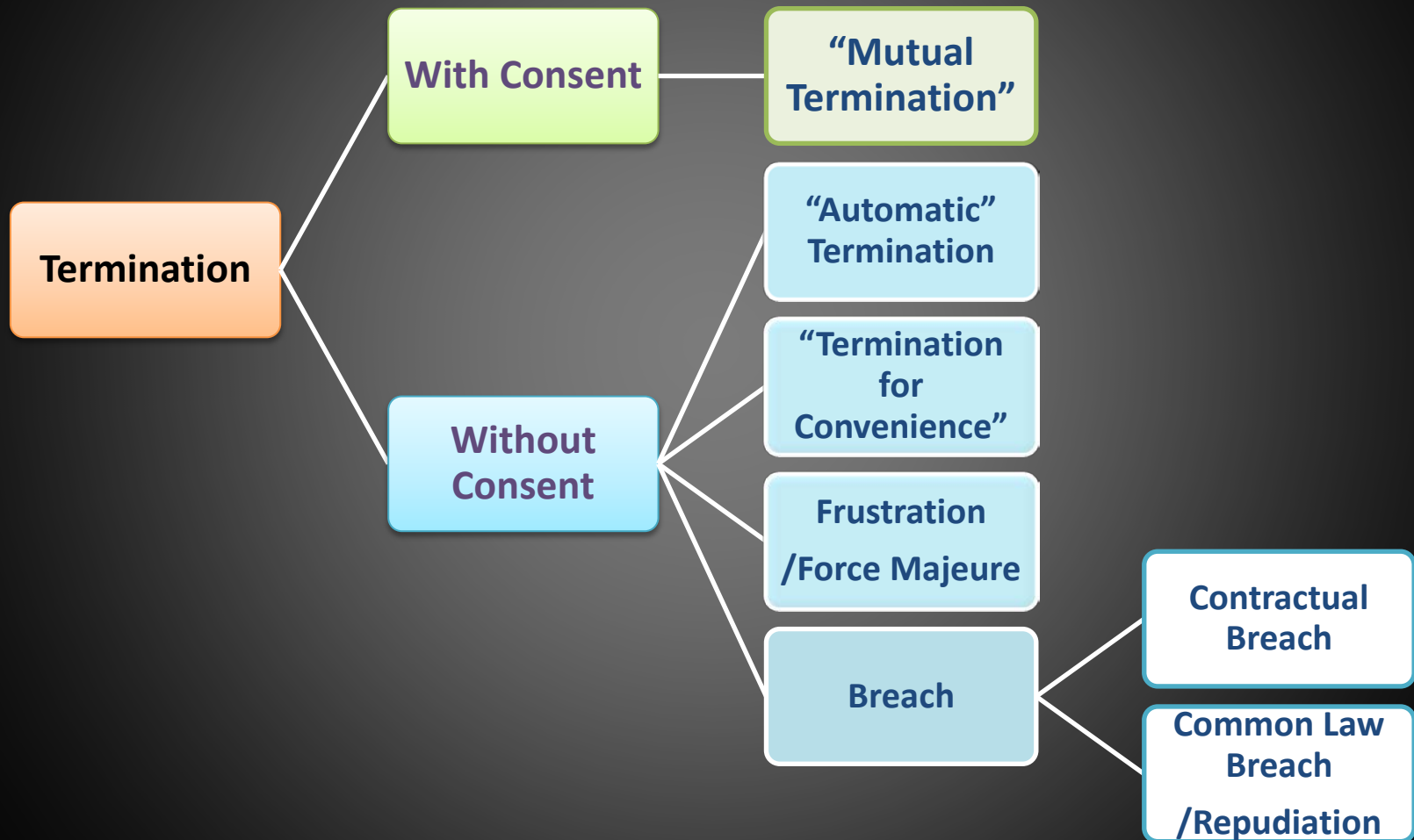
80 TERMINATION FOR CONVENIENCE

80.1 Termination of Contract for Employer’s Convenience

The Employer may, at any time prior to the issuance of the Certificate of Completion of Making Good Defects or the Certificate of Completion of Maintenance, terminate the Systems Contractor’s employment by serving one (1) Month’s notice if, in its absolute discretion, the Employer shall determine that such termination is in the best interests of the Employer in which event the sum payable by the Employer to the Systems Contractor in respect of the Works already Executed shall be the same as that which would have been payable under Clause 80.2.

- Normally for Employer to exercise
- No reason need be given?
- Is there a good faith requirement? Malaysia FC
– Perwira Harta v Letrikon - *obiter*

Types of Termination



Contractual Breach

– Managing the risks

- Identify breach in contractual provisions
- Gather evidence of the breach
- Follow the contractual procedure
- Comply with timeline provisions / conditions precedents
- Call upon/claim the relief or remedy specified in the contract, right to termination/damages
- Follow procedure carefully, otherwise your act of ‘terminating’ may itself be a breach entitling other party to terminate!

Contractual Breach

- Usual contractual grounds for termination by Employer
 - Suspension without reasonable cause or abandon
 - Non-regular and non-diligent work progress
 - Persistent failure to comply with SO instructions

Grounds for Termination by Contractor

- Non-payment
- Interference or obstruction of certification
- Employer's insolvency/scheme of arrangement
- Continuous suspension

Contractual Procedure

- Clause may specify a 2 tier notice requirement
- To give time frame to rectify default
- Notice: registered post or more expedient method

Post-Termination Relief

- Employer
 - Can compel contractor to vacate site. C/f position in Mid East
 - Forfeiture of temporary works, plants, tools and materials
 - Assignment of sub-contracts and suppliers
 - No payment till set-off of losses and cost

Post-Termination Relief

- Contractor
 - Must vacate site & remove temporary works & plant (if instructed)
 - Payment: value of work done & other loss & expense including loss of profit
 - Lien over unfixed materials & goods until payment

Common Law Breach

- Breach of a fundamental term of the contract
- Or breach going to the root of the contract
- Has the Employer evinced an intention not to be bound by the contract? “Repudiation”
- For repudiation, consistent/repeated breaches preferred

-
- Accept the repudiation & consider contract at an end
 - But check that there is no clause in the contract that ousts/excludes common law rights?
 - If there is an express ouster – then no common law right of termination

Which to Choose - Contractual or common law termination?

- If there is an express preservation of common law rights, then common law rights are available

Employer's rights and remedies not prejudiced

25.8

The provisions of Clause 25.0 are without prejudice to any other rights and/or remedies which the Employer may possess.

78.1.11 The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer under the Contract or otherwise.

51. Determination of Contractor's Employment

- (a) Without prejudice to any other rights or remedies which the Government may possess, if the Contractor shall make default in any one or more of the following respects, that is to say: Default of Contractor.

Common Law or Contractual Termination?

- If silent?

Then the c/law rights are available but the contract mechanism takes precedence, i.e., use c/law termination only for those repeated/serious breaches not catered for in the termination clause

- C/law - If breach is crystal clear or persistent – degree of certainty should be high
- Money-wise, which is more favourable? Contract may oust certain damages (indirect/consequential damages). Common law allows damages for loss of opportunity.

Don't Muddle the Rights

9. DETERMINATION

9.1 If the Subcontractor shall commit default in any of the following respects:

e) repudiates this contract; or

then the Main Contractor may, after giving ten (10) days' notice in writing to the Subcontractor, terminate the employment of the Subcontractor without thereby releasing the Subcontractor from any of his obligations or liabilities under this contract, or affecting the rights and authorities conferred on the Main Contractor under this contract, and thereafter the Main Contractor may itself complete the Subcontract Works or may employ a third party to complete the Subcontract Works.

- All damage that flows naturally and directly from the breach
- If termination rightful, then damages as specified in contract
- If termination wrongful, then common law consequences