

TIME IS OF THE ESSENCE

Prepared by
Phillip J. Scheibel, Partner

Fraser Milner Casgrain LLP

January, 2009

Montréal
Ottawa
Toronto
Edmonton
Calgary
Vancouver
New York



FRASER MILNER CASGRAIN LLP

www.fmc-law.com

TIME IS OF THE ESSENCE

A common feature of construction contracts is a clause stating that "time is of the essence". In some instances the clause will be inserted as boilerplate or from a precedent without discussion, while in other cases one or both of the parties will expressly request the clause be inserted into the contract. Either way, in the majority of cases little thought is given to the clause and it is often inserted without a clear understanding of its meaning and effect. Contract drafters should take care as "time is of the essence" clauses may not operate in the same manner in a construction contract as they do in other situations, potentially leading to unexpected results during the project.

Contracts of all sorts specify dates for the performance of various obligations and even absent an express date, there is usually an implied term calling for performance within a reasonable time. When the date is missed, it is a matter of construction as to whether the obligation is a condition such that there has been a fundamental breach entitling the innocent party to rescind or terminate the contract, or whether time is not of the essence meaning only an action for damages lies.

Whether time is of the essence depends on the intention of the parties. Consequently, "time is of the essence" provisions are used not merely to indicate time is important, but rather so that breach of a time obligation will be treated as a condition thereby allowing the innocent party to rescind or terminate the contract and sue for damages.

"Time is of the essence" clauses are used with regularity in other areas of the law, particularly real estate and sale of goods where the courts generally apply a strict approach in enforcing the clause even in the face of potentially harsh results. For example, in *Union Eagle Ltd. v. Golden Achievement Ltd.*, [1997] 2 All E.R. 215 (P.C.), the purchaser in a conveyancing transaction delivered a deposit cheque ten minutes late. In response, the vendors elected to rescind the contract, relying on the missed time deadline and the "time is of the essence" clause in the contract. The court upheld the vendors' rescission of the contract on the basis the parties made express provision for the event and commercial certainty demanded the contract be enforced. Specifically, at para. 9 the court stated:

... In many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.

This approach has been adopted in Canada in the real estate context; see, for example, *1473587 Ontario Inc. v. Jackson* (2005), 74 O.R. (3d) 539 (Ont. S.C.J.).

In contrast, "time is of the essence" clauses generally carry far less weight in construction contracts. The reasons include the distinctive nature of construction contracts, the fact construction contracts typically contain internal remedies addressing delay and because of the disproportionate effect of the remedy as compared to the breach, particularly when a building contract is partially preformed.

Construction contracts are different from agreements for the sale of goods or real estate as they involve various stages of development, numerous parties and countless variables. Additionally, delay is often consequential, expected and outside the control of either party. Moreover, most construction contracts incorporate a variety of terms compelling the contractor to perform its duties in a timely fashion; for example, liquidated damages and express termination provisions specifically address delays in performance. These specific clauses may well override a generic clause declaring time to be of the essence as they raise the question as to whether the parties intended the clause to operate in a field occupied by an express provision. Indeed, there is a good argument that where a party stipulates for liquidated damages, it has declared an intention that damages are an adequate remedy, meaning the time obligation is not a condition that would entitle that party to terminate the contract.

Another difficulty in giving effect to "time is of the essence" clauses in construction contracts as compared to real estate contracts is the sheer number of time reference in construction contracts for various duties, obligations and notices. At that point, it is a matter of construction as to the scope of the clause. Is it intended to apply to every time stipulation in the contract or only the really important ones? And, how does one determine which deadlines are important and which ones are unimportant? It is likely a court will construe the clause narrowly and in a manner that avoids permitting termination of the contract.

Finally, unlike a missed deposit in a conveyancing transaction, a missed time deadline in a construction contract may well arise after substantial performance, leading to concerns of unjust enrichment. Accordingly, there may be reluctance in arriving at an interpretation that permits termination. This general approach in construction contracts and the reasoning behind that approach is reflected in the comments of I.N. Duncan Wallace in *Hudson's Building and Engineering Contracts*, 11th ed. (London: Sweet & Maxwell, 1995) vol. II at p.1107:

However, in examining a contractor's obligation to complete his work to time, construction contracts differ very markedly from nearly all others in that the contractor can be expected to have expended very heavily in performing the contract prior, for example, to a relatively trivial delay after completion, and also that upon fixing of the work to the soil the property in it will have passed to the owner irrespective of the degree of payment, thus conferring a major and irretrievable benefit on the owner as against a possibly only minor or nominal loss suffered by him. No doubt for these reasons the courts have shown an exceptional assiduity in avoiding a time of the essence interpretation of the contractor's completion obligation in construction contracts, it would seem even in cases where express language has been used in the contract.

The above comments appear consistent with the intention of the parties. For example, on the one hand, the parties would probably not expect the contract to be terminated where a contractor is a

day late for some matter or the other on a contract of long duration, and, equally, on the other hand, probably not expect the contract to be terminated where the owner is a day late with a progress payment. More difficult are the cases of significant delay on a significant matter. Even then, however, it is suggested that the use of a general "time is of the essence" clause is ambiguous and therefore suspect.

In conclusion, the insertion of a clause declaring time to be of the essence in a construction contract, unlike its insertion in other contract forms, will not normally, in and of itself, allow the innocent party to rescind or terminate the contract for any breach of a time condition. In determining the party's intentions, the court will look to all the particular terms and circumstances and may well import little meaning to the "time is of the essence" clause.

Construction contract drafters should be aware of the potential limitations of a "time is of the essence" clause and give some thought to how they use such clauses. Generic or boilerplate use may result in the clause having little or no meaning, even in the face of a significant delay. Drafters may wish to be more selective in the employment of such clauses or alternatively consider other more particular contractual measures to address delay.