

Who Knew? The Misplaced Use Of “Time Is Of The Essence” Clauses In Construction Contracts

By Steven B. Lesser, Esq. and Jonathan D. Silver Esq.,
Becker & Poliakoff, P.A., Fort Lauderdale, Florida

“Time is of the essence” clauses have become commonplace in most standard form construction agreements published by the AIA,¹ ConsensusDOCS² and EJDCDC.³ For the most part, this clause is typically found in one miscellaneous paragraph to generally indicate that “time is of the essence” (hereinafter sometimes referred to as the “clause”) relative to all specified time deadlines in the agreement. However, relying on a general clause could pose a trap for the unwary construction lawyer.

Developing case law suggests that a generic clause may not be sufficient to transform every specified time frame into a material breach of contract.⁴ To make each deadline a material requirement, the best practice may be to specify that “time is of the essence” with each referenced time limit. This approach will enhance the likelihood that the failure to perform timely will constitute a material breach of contract. Reliance on standardized agreements between the owner and architect pose the greatest risk since a “time of the essence” clause has not been included in these agreements.⁵

Recognizing the significance of deadlines in these agreements, construction practitioners should also exercise care to avoid the owner’s waiver of the clause when granting an extension of time. This article explores these issues and provides practical advice for use of “time of the essence” clauses in real estate, design, and construction contracts.

THE MEANING OF TIME IS OF THE ESSENCE

Judicial Treatment of Time is of the Essence Clauses

Contract law provides that mere delayed performance does not constitute grounds for default under an agreement; rather, for there to be a default, the breach must be material.⁶ Therefore, parties regularly include a “time is of the essence” clause to require timely performance as an express condition of the contract.⁷ In this way, the owner announces at the time of contracting that damages are a foreseeable result of delay.⁸ By operation of law, no matter how trivial a deviance, the failure to meet a required condition within the time specified can automatically equate to a material breach that allows for rescission and termination of all further obligations.⁹ The effective use of the clause can make a deadline material so as to convert a minor breach to an incurable basis for termination of the contract.¹⁰ This approach can provide owners with leverage over contractors when enforcing contract deadlines.

In response, contractors often seek to minimize that risk by specifying that the time limits *are simply terms of the contract* rather than of the essence of the contract. Alternatively, the parties may negotiate to specify that only certain deadlines will give rise to a material breach of contract such as the start, completion or certain interim construction milestone dates.

When Will Time be Considered a Material Term?

“Time is of the essence” is not the standard rule; accordingly, general dates specified within an agreement are considered “not of the essence” unless expressly stated or stipulated as such in the contract.¹¹ Courts generally recognize four methods for determining when time will be treated as material. First, time will be considered of the essence, and therefore material, when the agreement expressly recites such, *i.e.*, “Time is of the essence in this Agreement.”¹² Second, in the absence of an express provision, time will be of the essence where given the nature of the subject matter of the contract, the circumstances imply time was clearly an essential part of the bargain.¹³ The third scenario is when treating time as non-essential would produce a hardship and delay by one party in completing or in complying with a term would necessarily subject the other party to a serious injury or loss.¹⁴ Lastly, a party may expressly make time of the essence by providing notice to the defaulting party that the contract is required to be performed within a reasonable, stated time.¹⁵

Time is of the Essence Impacts Performance and Remedies

When parties expressly include a “time is of the essence” clause in their agreement, the clause affects both the timing of performance as well as available remedies. When time is considered of the essence, then the obligated performance must occur at the “stated and unquestionable time.”¹⁶ In contrast, when time is non-essential, parties generally must perform within a reasonable time.¹⁷ Moreover, as discussed above, by allocating time as essential to performance, the failure to comply is deemed a material breach so that the non-breaching party may either rescind the contract or, if available under the circumstances, move for specific performance.

Scope Of A Time Is Of The Essence Clause

Clause Placement is Important

At first glance, the insertion of a single clause may seem sufficient. However, most agreements contain *multiple*

continued, page 56

promises and performance requirements by each party. Since contracts regularly contain multiple deadlines, it is difficult to predict whether a general clause will successfully express the parties' intentions for strict performance as to all time limits.

Generally, courts are reluctant to apply the general "time is of the essence" clause to all "promises for sundry performance" since each obligation varies in importance.¹⁸ In this setting, one court observed that when the clause has been incorporated from a form contract, it has been inserted without realization of its significance.¹⁹ Thus, the language of the clause taken in connection with the disputed subject matter may present uncertainty as to the intended scope of the clause.

Normally, the clause will be given effect only if it is shown to be clearly applicable to the contract requirement to which it is sought to be applied.²⁰ For example, a clause in a residential purchase agreement's "Other Essential Terms" section was found inapplicable to a section which governed options for appraisal.²¹ The court held that the intended scope of the provision was to apply to the specified closing date and any slight delay in appraisal negotiation would not affect closing.²²

Similarly, where the buyer was unable to timely receive a bank loan certification, the court "strictly" applied the form contract's clause and held that it was inapplicable because it was in a different paragraph which related to the closing of the purchase as opposed to pre-closing conditions.²³ Additionally, a contract for the purchase of twenty-three developed lots containing a "time is of the essence" clause in the paragraph pertaining to closing did not encompass the provision in the addendum that all construction debris had to be removed by closing.²⁴ These cases may be compared to *Arvilla Motel* where the clause was located under the heading Purchase and Sale.²⁵ Here the court found that "the parties clearly intended to make time essential as to the closing date" and therefore seller had an immediate right to cancel if buyer was unable to timely perform.²⁶ The court reasoned that because the clause was placed within the provision pursuant to which the seller could seek rescission, the parties clearly contemplated timely performance to be a material requirement.²⁷

Guidelines for Drafting

As the previous cases demonstrate, "[a] 'time is of the essence' clause is not necessarily a stock phrase."²⁸ In order to give the clause the intended effect the court will attempt to ascertain whether the required performance is a condition to trigger the other party's obligation.²⁹ As a result, courts have warned against relying on a blanket clause buried in verbose language which may specify a time for performance in multiple contexts.³⁰

Recognizing that use of a single blanket clause in construction and design agreements may impact the ability to enforce those deadlines, case law suggests that the better practice would be to include the clause together with each specified deadline.³¹ Although it is not the norm to have contracts containing more

than one "time is of the essence" clause, drafting the contract in this manner provides the best assurance that the time specified will be given effect as being "of the essence." In fact, one court opined if the condition was of crucial importance, a separate clause should have been explicitly included to govern the condition along with a separate date if necessary.³²


Avoid Waiver Of Time Is Of The Essence

To avoid waiver, a party claiming breach of a "time is of the essence" clause must do so in a timely manner.³³ This is because waiver may be inferred from conduct when a party is led to believe to his detriment such right has been waived.³⁴ "When time has not been made essential to the contract or has been waived, the party entitled to insist on performance must fix a definite date in the future for performance."³⁵

In *Royal Palm*, the owner allowed the contractor to exceed the specified substantial completion date without setting a new deadline.³⁶ The Eleventh Circuit held that the owner's conduct of issuing hundreds of change orders after expiration of the original substantial completion date while failing to establish a new date constituted waiver of the "time is of the essence" clause.³⁷ Under these circumstances, the owner was precluded from recovering liquidated damages.³⁸ The result in *Royal Palm* can be distinguished from *Faussner* where the seller's repeated extensions of time to the purchaser who was unable to raise funds to purchase real estate did not constitute waiver.³⁹

In a construction context, a contractor may be unable to meet its deadline. Rather than terminating the contract, it may prove beneficial for the owner to provide an extension of time but to proceed cautiously to avoid waiving the clause. Based upon the foregoing case law, whenever a deadline is extended, the owner should establish a new date, stating that "time is of the essence," to avoid waiver. In this manner, the newly established deadline can be deemed expressly material and enforceable.

Conclusion

It is well established that courts will not rewrite agreements between parties to a contract.⁴⁰ In a construction setting, standard form agreements containing a generic clause may not be sufficient to make various performance requirements material to support a claim of breach of contract. Standard form agreements should not be accepted at "face value" but must be carefully reviewed and modified to meet the objectives of your client. This is especially true for standardized owner and architect agreements that fail to include a "time is of the essence" clause. To achieve greater certainty in enforcing deadlines, consider using the phrase "time is of the essence" with each obligation that you may ultimately seek to enforce. Lastly, when the time for performance has been extended, in order to avoid waiver of time being of the essence, case law suggests that a revised deadline for performance be established. 

continued, page 57



S. LESSER

Steven B. Lesser is Board Certified in Construction Law by The Florida Bar and is Chair of Becker & Poliakoff's Construction Law Group. Mr. Lesser devotes his practice exclusively to construction law and litigation. He is the Past Chair of the American Bar Association's Forum on Construction Law, a nationally prestigious organization devoted to members of the bar who practice in the construction industry. He currently serves on the Florida Bar Board of Legal Specialization and Education. He can be contacted at sslesser@bplegal.com



J. SILVER

Jonathan D. Silver is an attorney in Becker & Poliakoff's Construction Law Group. Mr. Silver's practice focuses on construction and design-defect litigation claims and construction lien disputes. He can be contacted at jsilver@bplegal.com

Endnotes

- 1 "Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement, the Contractor confirms that the Contract Time is a reasonable period for performing the Work." A201-2017 § 8.2.1. In the second sentence the Contractor acknowledges that the Contract Time is a reasonable period for it to substantially complete the work in an effort to prevent the Contractor from subsequently contending that the time is insufficient.
- 2 "Time is of the essence with regard to the obligations of the Contract Documents." ConsensusDOCS-200 (Owner Contractor Agreement), § 6.1.2 (2017).
- 3 "All time limits for Milestones, if any, Substantial Completion, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract." EJCDC C-520 Owner and Contractor, § 4.01 (A) (2013). Interestingly this clause prompts parties to specify that certain events constitute "Milestones" and be subject to the time of the essence clause. It is important to note however, that the agreement may include other significant timing provisions other than "Milestones", "Substantial Completion" and "Final Payment", but none of those provisions have been designated as being subject to time is of the essence.
- 4 Traditional time deadlines could apply to other time related provisions such as the triggering of liquidated damages when the contract time is exceeded, satisfying notice deadline requirements for termination and discovery of unforeseen conditions, the time period for providing the opportunity to cure a material breach, and deadlines for notifying the owner of delay. See CATHY ALTMAN et al., THE 2017 A201 DESKBOOK 116-17 (PETER W. HAHN et al. eds., 2017). The concept applies equally to agreements with design professionals such as the time to respond to requests for information as well as review of shop drawings and submittals.
- 5 See AIA-B Series Agreements (2017); see also EJCDC E-500, §3.02 (2014) (Agreement Between Owner and Engineer for Professional Services) ("Engineer shall complete its obligations within a reasonable time").
- 6 See *Foundation Health v. Westside EKG Associates*, 944 So. 2d 188 (Fla. 2006).
- 7 See 15 WILLISTON ON CONTRACTS § 46:2 (4th ed.).
- 8 See *Hadley v. Baxendale*, 9 Exch. 341 (Court of Exchequer, 1854).
- 9 *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519, 521 (Fla. 4th DCA 1991); *Garcia v. Alfonso*, 490 So.2d 130, 131 (Fla. 3d DCA 1986). However some jurisdictions consider extrinsic evidence by examining the parties' intentions concerning the provision's meaning even where the contract contains an express clause. *Chariot Holdings, Ltd. v. Eastmet Corp.*, 505 N.E.2d 1076, 1082 (Ill. App. 1st 1987); see *Asset Recovery Contracting, LLC v. Walsh Const. Co. of Illinois*, 980 N.E.2d 708, 726 (Ill. App. 1st 2012) (court considered whether plaintiff knew about the delays at the time the contract was made).
- 10 See *Holmby, Inc. v. Dino*, 647 P.2d 392, 394 (1982).
- 11 *I. Kushnir Hotels, Inc. v. Durso*, 912 So. 2d 633, 635 (Fla. 4th DCA 2005).

- 12 No particular word or phrase is necessary to make time material so long as it is plainly expressed that it was the intention of the parties that time should be of the essence of the contract. See *Treasure Coast, Inc. v. Ludlum Constr. Co., Inc.*, 760 So.2d 232, 235 (Fla. 4th DCA 2000).
- 13 *Mayfield v. Koroghli*, 184 P.3d 362, 366 (2008); *Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470 (Fla. 4th DCA 2003).
- 14 *Tim Hortons USA, Inc. v. Singh*, No. 16-23041-CIV, 2017 WL 4837552, at *8 (S.D. Fla. Oct. 25, 2017); *Edward Waters College v. Johnson*, 707 So. 2d 801, 802 (Fla. 1st DCA 1998).
- 15 *Id.* However, a contract that contains only a date for performance is insufficient, standing alone, to make time of the essence. *Command Sec. Corp. v. Moffa*, 84 So. 3d 1097, 1100 (Fla. 4th DCA 2012).
- 16 *Holmby, Inc.*, 647 P.2d at 394. Parties are not entitled to a reasonable time thereafter to perform and cure. *Id.*
- 17 *Mayfield*, 184 P.3d at 366.
- 18 *Arvilla Motel, Inc. v. Shriver*, 889 So. 2d 887, 890 (Fla. 2d DCA 2004).
- 19 *Id.*
- 20 *Royal Dev. & Mgmt. Corp. v. Guardian 50/50 Fund V, Ltd.*, 583 So. 2d 403, 405 (Fla. 3d DCA 1991); *Jackson v. Holmes*, 307 So.2d 470 (Fla. 2d DCA 1975).
- 21 *Vanbuskirk v. Nakamura*, No. 67816, 2016 WL 2985026, at *2-3 (Nev. May 20, 2016).
- 22 *d.* Additionally the court noted the appraisal section did not include a specific date and called for an additional procedure before the agreement could be cancelled. See *id.*
- 23 *Jackson*, 307 So. 2d at 471. Interestingly the trial court rejected the seller's argument that they wanted the buyer's loan certification at an early date so they could proceed with assurance to purchase a new home. *Id.* at 472. This result was likely because the clause was preprinted in a form contract.
- 24 *Royal Dev. & Mgmt. Corp.*, 583 So. 2d at 404-05 ("[t]he trial court correctly considered that provision unimportant in this context"); see *Johnson v. Gabbard*, No. CA87-01-005, 1987 WL 16061, at *1 (Ohio Ct. App. Aug. 24, 1987) (parties litigated whether time is of the essence clause governed the entire agreement or applied to only time for acceptance of the offer).
- 25 *Arvilla Motel, Inc.*, 889 So. 2d at 890. The clause appeared in bold on the first page of the printed form contract. *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Rybovich Boat Works, Inc.*, 587 So.2d at 521.
- 29 See *Vanbuskirk v. Nakamura*, No. 67816, 2016 WL 2985026, at *2 (Nev. May 20, 2016).
- 30 See *id.*; *Arvilla Motel, Inc.*, 889 So. 2d at 890; CORBIN ON CONTRACTS § 37.3 (JOSEPH M. PERILLO ed., rev. ed. 1999).
- 31 *Fletcher v. Jones*, 333 S.E.2d 731, 734 n.1 (1985); see *In re: First Farmers Finan. Lit. Orlando Int'l. Hotels, LLC, v. Michael M. Nanosky*, No. 14 CV 7581, 2017 WL 6026652, at *12 (N.D. Ill. Dec. 5, 2017).
- 32 See *In re: First Farmers Finan. Lit. Orlando Int'l. Hotels, LLC*, No. 14 CV 7581, 2017 WL 6026652, at *12 (agreement containing two time is of the essences clauses, one with regard to the closing date and one regarding performance obligations).
- 33 *Adrian Developers Corp. v. de la Fuente*, 905 So. 2d 155, 156 (Fla. 3d DCA 2004); see *Lake Eola Builders, LLC v. The Metro. at Lake Eola, LLC*, No. 605CV346ORL31DAB, 2006 WL 1360909, at *3 (M.D. Fla. May 17, 2006).
- 34 *Faussner v. Wever*, 432 So. 2d 100, 101 (Fla. 2d DCA 1983).
- 35 See *McNeal v. Marco Bay Assocs.*, 492 So.2d 778, 781 (Fla. 2d DCA 1986).
- 36 *RDP Royal Palm Hotel, L.P. ex rel. PADC Hosp. Corp. I v. Clark Const. Grp., Inc.*, 168 F. App'x 348, 354 (11th Cir. 2006).
- 37 *Id.*
- 38 See *id.*
- 39 *Faussner*, 432 So. 2d at 101. Except for the one day oral extension, all extensions were given in consideration of an additional deposit. *Id.*; see *Miami Child's World, Inc. v. City of Miami Beach*, 688 So. 2d 942, 943 (Fla. 3d DCA 1997) (repeated extensions of closing date did not amount to waiver of the time is of the essence clause since forbearance alone is insufficient); *Lake Eola Builders, LLC v. The Metro. at Lake Eola, LLC*, No. 605CV346ORL31DAB, 2006 WL 1360909, at *3 (M.D. Fla. May 17, 2006).
- 40 *Brooks v. Green*, 993 So. 2d 58, 61 (Fla. 1st DCA 2008).