

## IT BYTES

### ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

# WHAT IS THE EFFECT OF MAKING TIME OF THE ESSENCE IN A CONTRACT?



## WHEN DOES THIS QUESTION TEND TO ARISE?

**Sometimes a contract will provide that ‘time is of the essence’ either in relation to some or all of the obligations under the contract. This may be stated in the provision that imposes the obligation itself, or may be included as a ‘boilerplate’ term. Either way, these statements can often be confusing for a lay person – after all, isn’t it ALWAYS important for the contract to be performed on time?**

## WHAT DOES THE LAW SAY?

Where a contract stipulates that ‘time is of the essence’ with respect to an obligation, timely performance of that obligation is likely to be considered an essential term of the contract (sometimes referred to as a ‘condition’ of the contract).

If a term of a contract is an essential term, the party relying on the term may be able to terminate the contract at common law if the term is breached by the other party (in addition to any termination rights specifically drafted into the contract) (see our separate IT Bytes article [here](#) for further details on rights to terminate at common law).

This means that where a contract stipulates that ‘time is of the essence’ with respect to an obligation, late performance of that obligation may entitle the non-defaulting party to terminate the agreement.

The exact phrase ‘time is of the essence’ does not necessarily need to be included in the agreement for parties to agree that timely performance is an essential term. Other drafting can have the same effect – for instance, where a contract expressly states that a party may terminate the agreement where a time stipulation is not met.

It is also possible for ‘time of the essence’ to be implied into a contract in respect of obligations in certain circumstances. However, use of an express term like ‘time is of the essence’ is always preferable to provide certainty.

If a contract does not specify that ‘time is of the essence’, subject to any express termination rights in the contract, a mere failure to comply with a time period specified in the contract does not usually entitle the other party to terminate. However, delays can impact a party’s ability to exercise rights that are specified as applying only within a specific window of time. As an example, the Western Australia Court of Appeal considered in *Chevron (Tapl) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd* [2021] WASCA 193 whether a party was prevented from initiating a price review outside of the prescribed time period in a gas supply agreement even if the agreement did not provide that time was of the essence. Based on the construction of the agreement (and, in particular, the time periods involved in the complicated price review process once initiated), the Court of Appeal held that the time period in the price initiation clause was an essential term and so the price review could only be initiated within the time period provided for in the relevant term of the agreement.



## WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

If timely performance of some or all obligations is important in your contract, you should consider expressly providing that ‘time is of the essence’ in relation to those obligations.

Certain types of agreements typically provide that time is of the essence for key obligations, for example, agreements for the supply of perishable goods or sale of real estate. This makes sense where the benefit of the contract will be difficult or impossible to realise if performance is delayed. That won’t always be the case for IT contracts. It is after all hardly uncommon for IT projects to be delayed!

There may be good reasons why the timing is important. In this case, it may be helpful to provide that ‘time is of the essence’ to provide suitable leverage (in the form of a right to terminate the agreement) in the event of a delay. However, in doing so, you should consider whether a right to terminate is right for your circumstances and whether there are more specific remedies or consequences that can be provided for in the contract to deal with delays to critical milestones. Afterall, if you exercise your right to terminate your contract, you may be no closer to getting what you need done on time. If you need to protect yourself from delayed performance you may have better-suited tools at your disposal – for example, liquidated damages clauses (see our IT Bytes article [here](#), which covers liquidated damages and penalties) or requiring the delayed party to develop and implement a remediation plan if they are delayed (e.g. by deploying additional resources or reprioritising work to make up for the delay).

It is also worth bearing in mind that counterparties may often be reluctant to agree to make time of the essence, on the basis that a right to terminate may be a disproportionate remedy for a short period of delay in meeting what may not be such an important delivery obligation. Accordingly, it is always important to consider how valuable a termination right really will be to you in the event of a delay, and whether there are other options that you should consider instead of, or in addition to, making time of the essence.

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