

## Time is of the Essence . . . But Should it Be?

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When was the last time you critically reviewed and then tailored the "miscellaneous" provisions of a lease or contract to your particular situation? Ideally, indemnification, limitations of liability, jurisdictional provisions and others are intended to specifically apply to the relationship between the parties under a given agreement. However, what about less well known provisions such as "Time is of the Essence" ("TE") clauses? Will a simple boilerplate statement that time is of the essence in the performance of the obligations under your contract suffice to accomplish the intended purpose of this clause in all situations? Or should TE clauses be specifically tailored in the same manner as the provisions listed above?

The general purpose of a TE clause is to ensure that any delay in the performance of an obligation is automatically a material breach of the contract, no matter the importance or significance of the obligation. If successfully enforced, this allows a wider array of legal remedies for failure to meet performance deadlines than would otherwise be available, possibly including the ability to immediately terminate the contract.

In contracts where timely completion of certain covenants is truly of the essence, the use of a general TE clause makes sense to clarify that the parties agree that all delays will be deemed material breaches. The more difficult question arises in considering contracts which contain many obligations where timely completion is not necessarily material in each instance. In those cases, can the TE clause successfully turn the breach of such obligations from immaterial to material? If yes, then TE boilerplate language does not need to be updated for each contract – provided of course the parties wish to achieve the purpose of the TE clause in the first place. If no, then how can one ensure that the TE clause adequately accomplishes its intended purpose?

The answer is unfortunately not clear cut. Some courts have been unwilling to enforce a generally applicable TE clause upon a completely immaterial delay in performance which results in no actual injury to the non-breaching party. Enforcing TE clauses in such instances could lead to inequitable results. Other courts have given greater weight to the plain language of the contract and enforced the TE provision accordingly. The resolution is heavily dependent upon the facts of each situation and upon the specific case law of the applicable jurisdiction.

Given the uncertainty of the application of a TE clause, there are a number of considerations in deciding whether to include the clause and how best to do so. Generally speaking, boilerplate TE clauses are acceptable when timely completion of a vast majority of each party's obligations truly is vital and failure to complete such obligations would result in harm to the non-breaching party. Courts will generally look more favorably upon a TE clause in these situations as they seem to be appropriate and reasonable for the circumstances. That being said, this method may not be the best practice in other situations.

If only some obligations require timely completion to prevent a harm from occurring, then best practice is to specify that time is of the essence for the performance of those particular obligations. This leaves a court far less room for speculation on the parties' true intent by specifically defining which obligations a TE clause will apply to. This method can be used even if time is of the essence for the performance of many of the obligations in the contract. For example, in a construction contract, a general TE clause is often overridden by a liquidated damages clause. A well drafted construction contract should specify the specific remedies for failure to meet each deadline (whether they be liquidated damages or the designation of a material breach with a right to immediately terminate), rather than relying on a general TE clause. This removes the uncertainty of a generally applicable TE clause and provides clarity regarding available remedies.

TE clauses should be added to the list of those provisions that need to be specifically tailored for each contractual arrangement. The parties need to decide upon the timelines for the performance of all material obligations, whether cure periods will be allowed if the timeline is not met, and if any other remedies apply such as liquidated damages. Specifying those conditions for material obligations whose timely performance is necessary to prevent a harm from occurring will yield better and more consistent results than a generally applicable TE clause.

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