

TIME AND CONTRACT¹

INTRODUCTION

In today's fast-growing economy, contracts play a very vital role. Parties enter into contracts for varied purposes and generally a specific time of performance is desirable in all cases. However, whether **time of performance** of the contractual obligation is the essence of the contract should be determined by the parties to the agreement at the time of execution of a proper contract and thereafter act strictly as per the terms of the contract.

If parties desire that time is material then the expression "***Time is of Essence***" is very important. This expression denotes that time is material while executing the contract and any delay would attract serious consequences including termination at the option of the party suffering from such delay. Further, in case of breach of this material condition of the contract, it will entitle the innocent party to consider this breach as a repudiation of the contract.

LEGAL PROVISIONS

In India, Sec. 55 of Indian Contract Act, 1872 ("Act") deals with the "***Effect of failure to perform at fixed time, in contract in which time is essential***" and provides that if time is the essence of a contract, then if the contract is not performed at or before the specified time, the promisee has the right to avoid the contract. However, in case the delayed performance is accepted without any objection then this right is lost.

In the contracts where "***time is the essence of the contract***" is ***not the intention of the parties to the contract***, then such contract does not become voidable if the contract is not performed or partly not performed at or before the stipulated time. However, the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

INTENTION OF THE PARTIES

For determining whether time is the essence of contract or not, intention of the parties plays a vital role. Intention to consider time as essence of the contract, should be in writing and must be in an unambiguous language. The mere fact that a certain time is specified in a

¹ The article reflects the general work of the author and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

contract for the performance of promise by the promisor, cannot be considered as substantiating with the statement “Time is the essence of the contract”.

Let us examine one illustration to understand this provision in practical sense.

Illustration: A enters into a contract with B for supplying food at a function which B has hosted on particular day and particular time. Under the terms of the contract, A agrees to supply food at such particular time and on such particular day. Thus, as per the terms of the contract ***time is of essence***. If there is a failure on the part of A (the promisor) to perform his obligation within the fixed time on the particular day, the contract (or so much of it as has not been performed) becomes voidable at the option of B (the promisee). However, the intention and the conduct of the parties is important and should be noted.

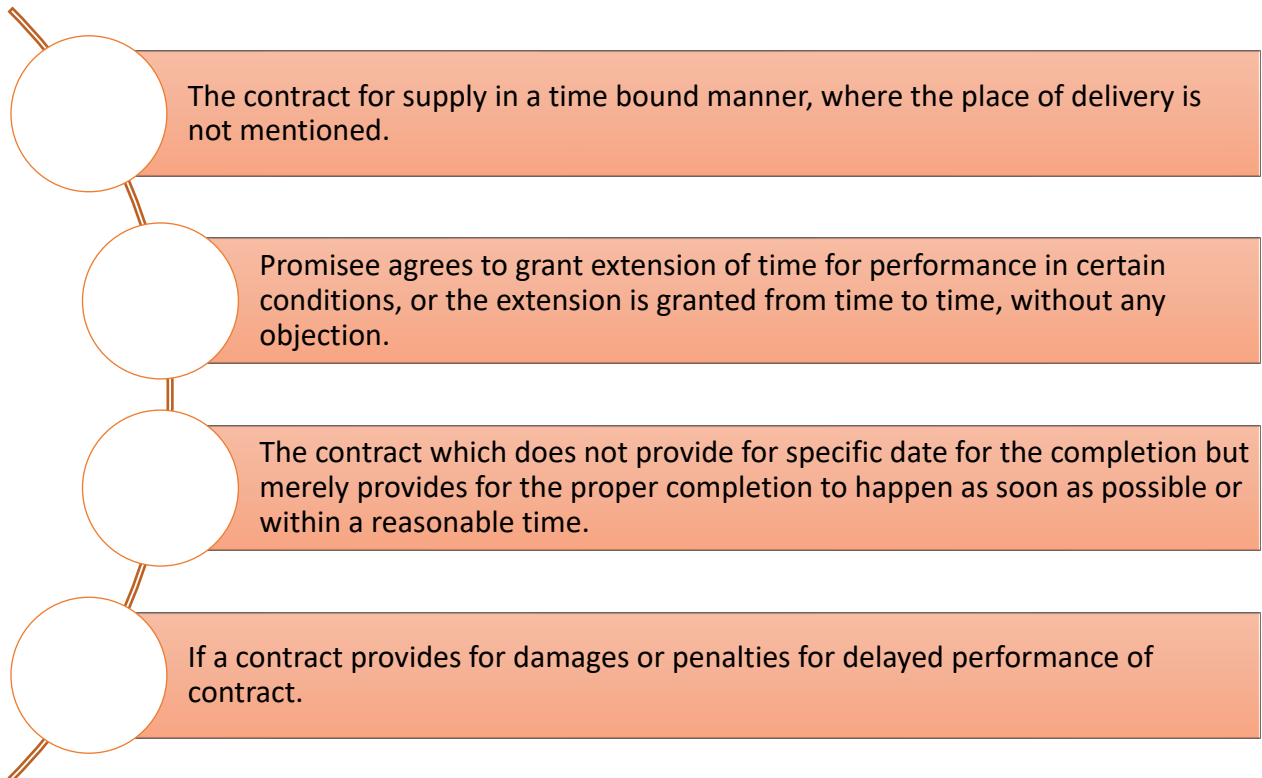
Scenario 1: If B accepts the supply of food after the fixed time without any objection, B cannot claim compensation for any loss occasioned by A due to the non-performance of the promise at the agreed time.

Scenario 2: If B at the time of accepting the delayed performance or accepting the late delivery of the food, gives a notice to A of his intention to claim compensation, then B has complete right to claim the compensation for any loss occasioned due to the non-performance of the promise made by A.

The above Illustration makes it clear that the intention and conduct of the Parties is very important to determine whether time is of the essence in such contract.

EXCEPTIONS

It should be noted that merely adding a clause to state that time is of essence, may not suffice and the clause may become ineffective due to certain actions of the promisee or some other inconsistent provisions of the contract, like:



CASE LAWS

1. In the Supreme Court case of ***State of Kerala v. M.A. Mathai***² (decided on 9 April, 2007), it was held that in case there is any delay in the performance of reciprocal promises by an employer, the contractor gets the right to avoid the contract. However, if the employer does not avoid the contract and accepts the belated performance, he cannot claim compensation for any loss sustained by him due to delay in performance, unless he gives a notice of the same to the delaying party.
2. In the recent Supreme Court case, [Welspun Specialty Solutions Ltd. vs ONGC](#)³, court determined whether the contract between Welspun Specialty Solutions Ltd. (“Welspun”) and the Oil and Natural Gas Corporation (“ONGC”) was one where time is of the essence. It was discussed that, for deciding whether time is the essence of the contract, the contract shall be read as a whole and not just certain isolated provisions. The reasoning applied by the Arbitral Tribunal i.e. *the concerned contract already had the provision of extension of time and imposition of liquidated damages, which are the good indicators*

² SCC/Civil Appeal 7333 of 2004

³ SCC/Civil Appeal Nos.2826-2827/2016

that ‘time was not the essence of the contract’ was concurred with by the Supreme Court. On the aspect of liquidated damages, the Arbitral Tribunal held that liquidated damages, which are pre-estimated damages, cannot be granted as there was no breach of contract due to the fact that time was not the essence. Accordingly, the Arbitral Tribunal proceeded to determine the actual damages based on the evidence furnished. While upholding the Award, it was held that as the Time was not of the essence of the contract, it would not be appropriate to invoke the liquidated damages clause.

CONCLUSION:

In order to bring certainty in the business, timely performance of contract is one of the essential conditions of almost all commercial contracts. However, parties should take utmost care while drafting the contract to ensure that inconsistent clauses like penalties for delay or vague clauses of performance are not incorporated in the contract. Further, parties should also act judiciously and not grant multiple extensions or accept delayed performance (without notice claiming compensation) if time is actually supposed to be of essence. Merely emphasising on the “Time as essence of the contract” is not effective and conclusive.

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About Ashvini



Ashvini Kandalgaonkar is experienced in Corporate litigation and non-litigation. She is also into drafting, reviewing and negotiating commercial contracts, HR Documents and a member of ICC committee for various clients. By qualification she is Bachelor of Legal Science and Bachelor of Legislative Law (B.L.S.LL.B) from Mumbai University.