Time Is of the Essence (to Banish That Phrase from Your Contracts)!

By Jeffrey S. Ammon

Two years ago, I urged you to banish the word *indemnification* from your contracts.[1] I now urge you to do the same with the phrase *time is of the essence*.

You will find a *time is of the essence* clause (TOE clause, for short) in the boilerplate of many contracts.[2] A common example: "Time is of the essence in this Agreement." Others might be longer, but only because they are filled with repetition and legalese:

> Time is of the essence in this Agreement, and each party agrees to perform any acts herein required of such party and to execute and deliver any documents required to carry out the terms and provisions of this Agreement promptly within the time periods herein described.

TOE clauses in proposed contracts are routinely accepted by the other party—and its lawyer—without objection. Have you ever negotiated a TOE clause or even objected to one? I doubt it.

What's wrong with saying that *time is of the essence* in a contract?

First, the words give the reader only a vague hint about the meaning. Time is really important? Deadlines are deadlines? The standard TOE clause sounds like something you'd find on a motivational poster: *Seize the day! Don't put off what is important to your life! Time is of the essence!* Or maybe you'd find it in philosophical texts: *Happiness is of the essence of life. Time and tide wait for no man. Time is of the essence in all things.*

Michigan courts have long lamented the clause's lack of clarity:

> It is not very clear what courts and textwriters who use this phrase mean….[3]

> In that setting [a land contract] it is entirely understandable that the significance of "time essence"… is so little understood by laymen and many in the profession…. [T]he party who desires such an extraordinary stipulation [forfeiture with no right of redemption] should be required to put it in intelligible language so that laymen and lawyers who read may understand the significance of the stipulation.[4]

Second, even if the words conveyed some meaning to the reader, the words mislead: a court may find that time is actually *not* of the essence even though a TOE clause exists[5] or that time really *is* of the essence in a contract without one.[6]

Third, even if the clause means that time deadlines are enforced as written, the clause gives no clue to the consequences of missing a deadline. For example, suppose that your client recently signed a two-year services agreement. The agreement requires your client to deliver progress reports by the first of each month, and time is of the essence. What happens if the report due on December 1 is sent two days late, on December 3? What remedies does the other party have on December 2? The typical TOE clause does not answer that question.[7]

The consequence of finding time to be of the essence varies from court to court, depending on many circumstances. Some courts conclude that missing a deadline, even by a day, gives the other party the option to *rescind* the entire contract.[8] Others give a similarly drastic right to *terminate* the entire contract.[9] Keep in mind that rescission and termination are different remedies, although they may be equally drastic.

These severe remedies can sneak up on a contract signer. In the services-agreement example above, may the other party terminate the entire contract if the report is sent two days late? Is that what the parties intended? Did the TOE clause give them any idea that this could happen?

Furthermore, a contract may contain many different time periods and deadlines. Do the parties intend that all deadlines are of equal significance? Or should the right to terminate apply only to certain missed deadlines? The typical stand-alone TOE clause abdicates responsibility for this analysis by applying the same rule to all deadlines.[10] (Of course, some TOE clauses may be tied to a single provision, but the question of the appropriate remedy may still remain.)

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Fourth, even if a court interprets the clause to contain a termination remedy, that remedy may conflict with other remedy terms in the same contract:

- A liquidated-damages clause is inconsistent with allowing a party to terminate the agreement for late performance.
- A specific termination clause may require notice and other prerequisites before termination is effective; those may conflict with interpreting a TOE clause to give an immediate right to terminate.[11]
- A right-to-cure clause may conflict with the TOE clause's right to terminate.

Thus, a TOE clause suffers from four serious deficiencies that prevent lawyers from reliably advising their clients:

(1) Nonlawyer readers can't figure out what it means (and courts are often no help).

(2) Even if the clause had a generally accepted meaning, putting it into a contract is no guarantee that a court will enforce it.

(3) Even if a court enforces it, the clause gives no hint about which remedy may be enforced.

(4) Even if a court interprets it to give a termination remedy, that remedy may conflict with other remedies in the same contract.

You can avoid these deficiencies by replacing the typical TOE clause with one written plainly. But beware: as you attempt to describe the consequences for missed deadlines, you will find that the subject is more complicated than a typical all-purpose TOE clause would lead you to believe. We'll need more than the five-word *time is of the essence* clause to do the job.[12]

A properly drafted TOE clause should address the following:

- Whether missing a deadline is a breach regardless of how late the action occurs or whether the other party suffers damage.
- Whether the late actor has a cure period. Some missed deadlines may have notice-and-cure-period clauses; others may not.
- What remedies the other party has after a deadline is missed. Will that party have all available remedies that any material or substantial contract breach would create? Does that include a right to rescind or terminate the contract? If so, is there a deadline to exercise that right? And what is the consequence of missing *that* deadline? Do these remedies apply regardless of whether the party suffers damage from that missed deadline?
- Whether different deadlines have different consequences. Can we draft one general clause to cover all consequences, or do we need to address consequences for different deadlines?

Deadlines can be classified into two groups: deadlines for actions that a party must take (mandatory actions), and deadlines for actions that a party may elect not to take without being in default (optional actions). Mandatory actions with deadlines include things like this:

- Making rental payments under a lease.
- Making progress reports under a services agreement.
- Delivering disclosure documents to a buyer under an acquisition agreement.

Optional actions with deadlines include things like this:

- Sending a notice to exercise an option (e.g., to extend a lease, or to buy shares under a shareholder agreement that gives the shareholder an option to buy if a particular event occurs).
- Sending a notice to exercise an option to terminate a contract term earlier than its stated expiration date.

In my experience, clients tend to think that the consequences for these two kinds of deadlines should be different. For a deadline that applies to an optional action, most expect that taking action after the deadline is ineffective (such as trying to exercise the option one day late). This sense is supported by the cases, which generally hold that time *is* of the essence in an option contract (regardless of whether a TOE clause is present). Thus, sending late notice to exercise an option to extend a lease is ineffective.[13]

Mandatory actions have no such commonly accepted interpretation. Again, courts reach different results on similar contract language.

Ideally, each contract deadline would be accompanied by an explanation of the consequences for missing that deadline—especially if the contract has only a few. But this may not be practical in contracts with many deadlines. So a default TOE clause may sometimes be appropriate. I include a sample of such a stand-alone, across-the-board TOE clause on the following page.

Plain language begins with the substitute's heading: *Consequences of Missing Deadlines*. This gives the reader a much better clue about its significance than *time is of the essence*. My substitute provides two rules: one for missing deadlines for mandatory actions and another for missing deadlines for optional actions. My substitute allows the drafter to vary these rules for particular deadlines, since the rules apply unless a particular deadline specifies otherwise.

I suggest that you avoid burying this substitute in the so-called boilerplate sections. You do not want a court to apply the "just because you said it doesn't make it so" analysis to your clause, as some courts do with typical TOE clauses. Put your substitute up front. And consider adding appropriately specific acknowledgments that explain why the particular deadlines are important. After all, the court is attempting to find the parties' intent from the contract language itself. Help the court out.

So do a favor for yourself and your clients. Strike the typical TOE clause from your forms today. And start saying what you mean. Time is of the essence. ■

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Sample clause

Consequences of Missing Deadlines. Unless a deadline specifies otherwise, the following rules apply to each deadline:

(1) ***Optional Actions***. For a deadline on an action that a party may but need not take, action taken after the deadline is ineffective. For example, if [a notice to exercise a renewal option is given after the deadline in section ____] [buyer gives a notice of objection after the due-diligence period in section ____ expires], the notice is ineffective and [that option expires] [objections are waived].

(2) ***Mandatory Actions***. For a deadline on an action that this agreement requires [such as the closing deadline in section ____], or that this agreement requires a party to take [such as payment in section ____ or delivery deadlines in section ____], action taken after the deadline gives the other party a right to money damages. The late action does not, however, give the other party a right to terminate this agreement or to suspend the other party's performance.

Notes:

(1) Coordinate with other terms that may otherwise conflict, such as liquidated-damage clauses, notice-and-cure clauses, and clauses addressing specific termination rights.

(2) Deadlines may be stated as conditions. Some of these deadlines may state the consequences of missing them: "If seller does not deliver the deed by March 15, 2016, buyer may terminate the contract." But not always: "If seller delivers the deed by March 15, 2016, buyer must pay the purchase price at that time." The first example states the consequences, so we need no additional TOE clause. The second example does not, however, so it needs a statement of the missing consequences, either at this place in the contract or in a general TOE clause.

(3) Make sure your examples don't suggest any particular subclass of deadlines that might narrow the "mandatory actions" category. And don't use an example that already specifies a remedy.

ENDNOTES

1. See Ammon, *Indemnification: Banish the Word!*, 92 Mich B J 52 (September 2013).
2. Contracts for the sale of goods, governed by article 2 of the Uniform Commercial Code, operate under statutory timing rules, and I do not include them within the scope of this article. See UCC § 2-601 (MCL 440.2601) and UCC § 2-309 (MCL 440.2309).
3. *Richmond v Robinson*, 12 Mich 193, 200 (1863).
4. *Rothenberg v Follman*, 19 Mich App 383, 391 n 14; 172 NW2d 845 (1969); see also Adams, *A Manual of Style for Contract Drafting* (3d ed) (Chicago: ABA Publishing, 2013), §§ 13.687–13.697.
5. See *Richmond*, 12 Mich at 202 ("Time cannot be made essential in a contract, merely by so declaring, if it would be unconscionable to allow it."); *Rothenberg*, 19 Mich App at 391, 394 ("Just because the parties have declared that time shall be of the essence does not necessarily make it so. . . .Whether time is truly of the essence . . . depends upon the nature of the subject matter, the purpose and object of the contract and all other relevant facts and circumstances, *not upon the skill of the draftsman*." (emphasis added)); see also 2 Restatement Contracts (1981), § 242, comment d ("[S]tock phrases such as 'time is of the essence' do not necessarily have this effect [of discharging the other party's remaining duties]. . . ."); 8-37 Corbin, Contracts § 37.3 ("The provision 'time is of the essence' may be inserted into a contract without any realization of its significance. Other terms contained in the agreement, interpreted in the light of the conduct of the parties, may show that the provision has no legal effect.").
6. See *Friedman v Winshall*, 343 Mich 647, 656; 73 NW2d 248 (1955) ("[T]he parties may make time of the essence . . . by an express declaration that 'time is of the essence.' An examination of the cases will show, however, that those words are not essential."); see also *Middlebelt Plymouth Venture, LLC v Moe's Southwest Grill, LLC*, 424 F Appx 541 (CA 6, 2011) (upholding remedy for payment made one day late); *Nedelman v Meininger*, 24 Mich App 64; 180 NW2d 37 (1970) (finding that an extension of deadline demonstrated an intent that time is of the essence even without a TOE clause); *Jones v Berkey*, 181 Mich 472; 148 NW 375 (1914) (finding that time is of the essence despite lack of TOE clause).
7. See *Manual of Style for Contract Drafting*, § 13.692 ("[E]ven if it happens to be clear what performance the phrase applies to, the phrase is silent as to the consequences of untimely performance.").
8. See *Cooper v Klopfenstein*, 29 Mich App 569; 185 NW2d 604 (1970).
9. See *Smith v Penn Central Corp*, 856 F2d 196 (CA 6, 1988) (applying Michigan law).
10. See Scheibel, *Time Is of the Essence* (January 2009) (explaining how the typical TOE clause creates havoc in construction contracts because of the number of deadlines peculiar to a construction project) <http://api.ning.com/files/MmlVp7eWNZsrkeysZomnL6Z-69iA3SCQSFkEIwUxdz0ZS-LZ-KjKIO5Yto5JWJv3Z-WiI-eYq-DCX4spnbuO8boWlGd5t3DJR/Time_is_of_the_Essence_January_30_091.pdf> (accessed January 16, 2016).
11. See *Manual of Style for Contract Drafting*, § 13.693.
12. For an article that urges caution in abandoning the use of *time is of the essence* in contract drafting, see Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 Syracuse L R 451 (2015). Oddly, the author favors sticking with inscrutable terms of art because the alternative of saying what you mean "requires [among other things] the drafter to determine the appropriate phrasing of the term, as preferred by the judiciary in the controlling jurisdiction." *Id.* at 488. So we should stick with a term because plain drafting requires, well, plain drafting? And the *Rothenberg* court has told us what it prefers in Michigan: put the term into intelligible language! See *Rothenberg*, 19 Mich App 383.
13. See *Olsen v Sash*, 217 Mich 604; 187 NW 346 (1922) (upholding forfeiture of option because attempted exercise occurred two days late).