

# IT BYTES

## ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

# WHAT IS THE EFFECT OF A NOTICE ISSUED OUTSIDE THE TIME SPECIFIED IN A CONTRACT?



## WHEN DOES THIS QUESTION TEND TO ARISE?

**Often an IT contract will contain optional provisions that a party may use to adjust certain aspects of the contract. For example, there may be a right to renew or extend the term of the contract, or a right to seek a price adjustment to reflect changing market conditions. Typically, the contract will say that the relevant party may exercise the right by issuing a notice within a defined time period. But what if the party in question sleeps through their metaphorical alarm clock and is late in issuing the notice?**

## WHAT DOES THE LAW SAY?

The effect of a failure to give notice in accordance with a time stipulation is a question of construction, namely, whether the time stipulation is of the essence of the clause. If it is, then the clause can only be effectively invoked within the time stipulated.<sup>1</sup>

In determining whether time is of the essence in this context, a court will apply the usual principles relevant to the construction of contracts. This means that the court will:

- look at the text, context and purpose of the clause;
- consider what a reasonable person would have understood the terms of the clause to mean;
- consider the rest of the contract to ensure the clause is given a reading that is coherent and harmonious with the rest of the contract; and
- consider whether a particular interpretation is businesslike and makes commercial sense.

A case that illustrates how a court applies the above principles to determine whether a time stipulation is of the essence is *Chevron (TAPL) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd* (2021) 58 WAR 102. In this case, a buyer and a seller of gas had entered into a supply agreement which contained a notification clause enabling either party to issue a notice to invoke a price review. The clause specified that the buyer or seller could only issue a price review notice between 90 and 120 days before a defined 'Price Review Date'. The buyer attempted to trigger a price review notice but issued the notice three weeks after the conclusion of the designated window. The seller said that the notice was not valid because it was issued out of time.

<sup>1</sup> It is important to distinguish this situation (where a party fails to comply with a time stipulation that forms part of a non-promissory condition precedent for the exercise of a power), from a situation where a party fails to comply with a time stipulation that forms part of that party's obligations (where the party is obliged to do something for the other party within a particular time). In the latter case, depending on whether the time stipulation is of the essence, a failure to comply may lead to a counterparty having the right to terminate.

The Western Australian Court of Appeal agreed with the seller that the time stipulation was of the essence, such that the buyer's attempt to commence the price review process was not effective. In reaching that conclusion, the Court considered a number of features of the clause and contract, including the following:

- The notification clause conferred a power on the parties to initiate a price review. The time stipulation formed an element of that conferral of power and thereby defined and delimited the extent of that power. No reasonable businessperson would have contemplated that a price review could be initiated other than by issuing a notice in accordance with the notification clause within the stipulated period. Any other construction of the clause would have given the time stipulation no work to do.
- The clauses governing the price review process required a number of steps to be taken prior to the Price Review Date. For this process to operate harmoniously with the notification clause, the notice had to be issued within the designated window.
- The fact that the notification clause provided a window of time for giving notice, as opposed to specifying a single day, suggested that the parties had contemplated and intended to reduce the likelihood of a party missing the opportunity to initiate a price review by accidental oversight.



## WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

Whether a particular time stipulation is of the essence can be difficult to ascertain, and there is no certainty as to the views a court might arrive at in construing that time stipulation (in the Chevron case, the Western Australian Supreme Court found at first instance that time was not of the essence in the context of the price review clause, demonstrating the scope for reasonable minds to differ).

When drafting, you can eliminate doubt by expressly stating what the consequences will be if notice is not issued in time. In the absence of an express provision, the safest approach is to assume that any time stipulation will be treated as being of the essence and, therefore, to strictly comply with all such stipulations. If you fail to do so, you may be unable to effectively exercise the rights that you have bargained for under the contract. A diligent contract manager who has diarised all important dates and milestones under the contract can be a lifesaver in this context.

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