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THE SIGNIFICANCE OF A "TIME IS OF THE ESSENCE" CLAUSE IN M&A AGREEMENTS

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Introduction

In mergers and acquisitions ("**M&A**") transactions, timely performance is often critical. Signing, satisfying conditions precedent, obtaining regulatory approvals, paying the purchase price, and closing may all be tied to specific dates.

It is, therefore, common for M&A agreements to include temporal mechanisms such as notice periods, grace periods, long-stop dates, and cure periods. This article considers how the "time is of the essence" doctrine operates in Indian M&A transactions and then considers a recent Delaware decision that has potential implications for cross-border transactions.

Indian jurisprudence and takeaways

Section 55 of the Indian Contract Act, 1872 provides that when time is of the essence, failure to perform within the stipulated period makes the contract voidable at the option of the promisee. It also addresses the waiver question and specifies that if the promisee accepts belated performance without reserving the right to claim compensation, such acceptance operates as a statutory waiver of any compensation claim. This creates a bright-line rule, i.e., acceptance without reserving the right to claim compensation constitutes a statutory waiver of the claim.

In *Hind Construction Contractors v. State of Maharashtra*, AIR1979SC 720, the Indian Supreme Court (the "**SC**") held that even where a contract expressly states that time is of the essence, other provisions may point in the opposite direction. The SC viewed the contract as a whole to determine the parties' actual intention and held that provisions allowing extensions of time and imposing penalties for delay were inconsistent with the claim that the original completion date was fundamental to the contract. The same principles were followed in *Welspun Specialty Solutions Limited v. Oil and Natural Gas Corporation Ltd.*, AIR2022SC 1 (the "**Welspun Judgment**"), in which the SC clarified that the words "time is of the essence" cannot be considered on their own. The SC held that whether time is truly of the essence must be deduced basis the entire contract, the parties' intention, and the surrounding circumstances. Extension clauses, liquidated damages provisions, and other mechanisms contemplating delayed performance can all weaken the argument that strict timing was intended.

In *K.R. Suresh v. R. Poornima*, 2025 INSC 617, the SC considered whether time was of the essence in an agreement for sale of immovable property. The agreement required the purchaser to pay the balance sale consideration within four (4) months. The sellers required the sale proceeds to meet an urgent business obligation under a time-bound one-time settlement with their bank. The purchaser failed to make the payment within the stipulated period and did not seek an extension. The SC applied the principles outlined in the Welspun Judgement and held that the circumstances of the current case, i.e., the fixed four (4)

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month period, the sellers' urgent need for the sale proceeds, the forfeiture provision and the absence of any extension, supported the conclusion that time was of the essence. Consequently, the SC upheld the forfeiture of the earnest money following the purchaser's failure to perform within the agreed period.

The foregoing principles are especially relevant in Indian M&A agreements. A typical transaction document contains several time-bound obligations with varying degrees of importance. For example:

- payment of the purchase price must occur on or before closing;
- delivery of specified regulatory approvals must occur before closing;
- certain post-closing filings may have to be completed within specific timelines; and
- delivery of certain ancillary documents may have to be done within reasonable periods of time.

If the agreement provides for an extension of the long-stop date, cure periods to remedy defaults, or the ability to waive pre-closing covenants, a court or arbitrator is unlikely to uphold a claim for making the agreement void because timelines were not adhered to by a counterparty. Therefore, if a buyer wants a signing-to-closing period to be strictly enforced, the agreement should specify the consequences of missing the relevant deadline. The agreement should also state clearly what happens when the long-stop date is reached, i.e., whether termination is intended to follow automatically or at the election of a party. However, in agreements for sale or purchase of property or goods, a time is of the essence provision may work well if it operates on a standalone basis.

As is clear, M&A practitioners in India must keep in mind practical drafting takeaways, which, *inter alia*, include identifying the critical deadlines, linking deadlines to clear consequences, and addressing waivers by making clear whether a waiver is a limited waiver for that particular instance or whether the deadline itself has been extended.

The Delaware perspective: The effect of the anti-forfeiture principle

Delaware law provides a different perspective. In *Thompson Street Capital Partners IV, L.P. v. Sonova U.S. Hearing Instruments LLC,* 340 A.3d 1151 (Del. 2025) (the "**Thompson Street Judgment**"), the Delaware Supreme Court, while interpreting an indemnification provision in a merger agreement that made compliance with specified notice requirements a condition precedent to invoking indemnification, held that, although the provision created a condition precedent and contemplated forfeiture, non-compliance could potentially be excused where the relevant requirements were <u>not material</u> to the agreement and enforcement would result in disproportionate forfeiture. For parties to a US M&A transaction, this decision introduces an additional consideration: even where a contractual deadline operates as a condition precedent, a court may consider whether strict enforcement will result in a disproportionate forfeiture, depending on the materiality of the condition.

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The foregoing decision does not make the contractual wording irrelevant. Rather, it indicates that, in appropriate circumstances, a court may consider the materiality of a contractual condition and the consequences of enforcing it strictly.

Conclusion

For transactions involving Indian law obligations, the Welspun Judgement reinforces the need to consider the agreement as a whole when determining whether a deadline was intended to be strictly binding. For Delaware-governed transactions, the Thompson Street Judgement adds a further consideration, in that the court can assess the issue of disproportionate forfeiture depending on the materiality of the condition breached.

Nevertheless, it is important to make the contractual significance of a deadline clear. The date, the consequence of missing it, the availability of extensions, the long-stop mechanism, and the parties' rights following a delay should all work together as a coherent framework. This will provide greater clarity than relying solely on a general "time is of the essence" provision.

For practitioners advising on cross-border M&A transactions between the US and India, the key takeaway is to draft with specificity. Identify which deadlines are truly critical, link each to a clear consequence, and ensure that extension and waiver mechanisms do not inadvertently undermine the parties' intended timeline. A well-drafted temporal framework, rather than a boilerplate clause, remains the most reliable protection.

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