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Enigmatic Aspects of “Time Is of the Essence” in Construction Law of Thailand: A Comparative Study of Common Law in England and Australia

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Abstract

This article studies intricacies of the statement “time is of the essence” in a legal context, in relation to construction delays in Thailand, comparatively analysed in terms of law in England and Australia. Notably, the Supreme Court of Thailand has applied “time is of the essence” in a broader manner than its counterparts in England and Australia, surpassing boundaries set by Section 596 of the Thailand Civil and Commercial Code (CCC), the provision explicitly recognising the concept. These findings suggest that while this Supreme Court approach may aspire to fairly resolve construction disputes, its

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application beyond the statutory framework leads to legal uncertainties, potentially significantly impacting construction contract administration.

Keywords: Time is of the essence — International comparative law — Thailand Civil and Commercial Code — construction

I. INTRODUCTION

In the construction industry, the expression “time is money” is commonly used to underscore the critical importance of completing construction projects in a timely manner. Timely work completion not only allows employers to use the construction work on schedule but enables contractors to move on to their subsequent projects. Therefore, construction contracts often specify a “time for completion” or “due date for practical completion,” which refers to the time within which contractor is required to complete the construction work.¹ Under Thai law, when a contractor fails to achieve completion within the required time, some defences may be raised to avoid liability. Of these, the most powerful is probably that “time is not of the essence.”

This article discusses the legal concept of time is of the essence in the context of construction delays in Thailand. Part II offers a discussion of this legal concept and its ambiguities in the Thai legal context. Part III examines the same concept in English and Australian law, with a comparative study and analysis in Part IV. Part V concludes that the Thai Supreme Court has applied the concept of time is of the essence in a broader manner than its counterparts in England and Australia, extending its reach beyond Section 596 of the Thai Civil and Commercial Code (CCC),² the relevant legal provision under which this legal concept is recognised.

II. THE ENIGMA OF TIME IS OF THE ESSENCE FROM THE THAI LEGAL PERSPECTIVE

Under Thai law, the expression time is of the essence may be found in the text of Section 596 of the CCC:

¹ ไพจิตร พาวาน, ชำนาญ พิเชษฐพันธ์, และกัมพล กิตติพงษ์พัฒนา, คำอธิบายสัญญาจ้างเหมาก่อสร้างมาตรฐาน (สัญญาศรีปทุม) (เฟิร์สออฟเซต 2563) [Paijit Pawan, Chamnan Pichedpan, and Kumpon Kittipongpattana, *Commentary on Standard Lump Sum Construction Contract (Sripatum Contract)* (First Offset 2020)] (Thai) 254.

² ประมวลกฎหมายแพ่งและพาณิชย์ [Civil and Commercial Code] (Thai).

If the work is to be delivered after the time fixed in the contract, or if no time is fixed, after reasonable time has elapsed, the employer is entitled to a reduction of remuneration or, *when time is of the essence of the contract*, to terminate the contract.³

Section 596 of the CCC applies to hiring of work contracts, which cover, *inter alia*, construction contracts.⁴ According to this provision, if the contractor fails to complete the construction work within the agreed-upon time and if that time is of the essence of the construction contract, the employer will be entitled to terminate the contract immediately upon the expiry of that time. However, if it appears that time is not of the essence, the employer will not be permitted to immediately terminate the contract, but may exercise a statutory right to reduce the contract sum payable to the contractor.⁵ In this event, if the employer still wishes to terminate the contract, the employer must comply with Section 387 of the CCC,⁶ requiring it to first give notice demanding the contractor to complete the work within a reasonable time. If the contractor fails to comply, the employer may terminate the contract.

As a matter of principle, the question of whether time is of the essence must be determined on a case-by-case basis. Merely the fact that a construction contract set a time for an obligation to be performed does not mean *per se* that that time will be of the essence for that contract.⁷ Otherwise, there would be no reason for the phrase “time is of the essence” to be used in Section 596 of the CCC. Interpreting the contract, including considering the nature of the construction work involved as well as objectives of the parties, plays a crucial role in determining the essence or non-essence of a time stipulation. One clear example would be a situation where the work, whether by its nature or by the objective of the contract, must be completed by a specific timeframe to be of any use to the employer. As Krivinee Soontornmon noted in her thesis:

A non-performance in the case that the time is of the essence is where, whether by the nature of a contract or by the intention expressed by contracting parties, it can be seen that the object of the contract can be accomplished only when the obligation is performed properly at the time stipulated in the contract and the performance later than that [time], although it is made, will not give effect to the objective as intended. To put it another way,

³ *ibid* s 596 (emphasis added).

⁴ See, for example, Supreme Court Decision 4687/2553.

⁵ ไพฑูริย์ เอกจริยกร, คำอธิบายกฎหมายจ้างแรงงาน จ้างทำของ รับขน (พิมพ์ครั้งที่ 10, วิทยุชน 2554) [Pathaichit Eagjariyakorn, *Explanation on the Law of Hire of Service, Hire of Work, Transportation Service* (10th edn, Winyuchon 2011)] (Thai) 178.

⁶ Section 387 of the CCC provides that “[i]f one part does not perform the obligation, the other party may fix a reasonable period and notify him to perform within that period. If the former party does not perform within that period, the other party may terminate the contract.”

⁷ See นนทวัชร นวตระกูลพิสุทธิ์, หลักกฎหมายเอกเทศสัญญาลักษณะจ้างแรงงาน—จ้างทำของ—รับขน, (พิมพ์ครั้งที่ 2 ธรรมศาสตร์ 2562) [Nontawat Nawatrakulpisut, *Principles of Specific Contracts on Hire of Service —Hire of Work—Transportation Service* (2nd edn, Thammasat 2019)] (Thai) 91.

*the breach of that obligation will render the performance of that obligation useless.*⁸

Under Section 596 of the CCC, it appears that the concept of time is of the essence functions to limit an employer's statutory right of immediate termination where a contractor fails to meet a construction deadline. Accordingly, one may argue that the question of whether or not time is of the essence is relevant only to the issue of contract termination under Section 596 of the CCC, but irrelevant to whether the contractor is in breach of the contract. This apparently logical conclusion is supported by the reason that the first part of Section 596 provides the employer with the right to reduce the contract sum payable to the contractor regardless of whether time is of the essence. Arguably, as the law provides the employer with the right to reduce contracted payment, it should be the case that the contractor was already in breach of contract.⁹ It would be illogical to provide such a remedy to the employer had the contractor not been in breach of the contract.

However, on closer examination, previous Supreme Court of Thailand judgments have applied the concept of time being of the essence in Thai construction law beyond the context of employer right of termination under Section 596 of the CCC. In Supreme Court Decision 2089/2540, the Court extended the application of this legal concept beyond Section 596 of the CCC by using it to determine whether a contractor was in breach of a construction contract for failing to complete work within the agreed time. In that case, the defendant contracted the plaintiff to renovate a building. When the plaintiff was unable to complete the work by the deadline, the defendant did not terminate the contract but instead allowed the plaintiff to continue working. The Supreme Court decided that such an action by the defendant demonstrated that the defendant did not regard the due date for completion to be of the essence of the contract; for this reason, the plaintiff was not in breach of the contract. The Court held:

The construction contract . . . stipulates that [the construction] must be completed within 160 days. . . . It appears that, when the plaintiff [i.e., the contractor] had failed to complete the same within that time, the defendant [i.e., the employer] still allowed the plaintiff to continue the work. This demonstrates that the defendant did not regard the time for completion as being of the essence. *The plaintiff was not in breach of the contract.*¹⁰

It can be observed that, in this Supreme Court Decision 2089/2540, the concept of

⁸ ไกรวิณี สุนทรมน, “สิทธิของผู้ว่าจ้างในการบอกเลิกสัญญาจ้างทำของ” (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต, มหาวิทยาลัยธรรมศาสตร์ 2551) [Krivinee Soontornmon, “The Rights of an Employer to Rescind the Contract for Work” (LLM Thesis, Thammasat University 2008)] (Thai) 59 (emphasis added).

⁹ See Nontawat (n 7) 91.

¹⁰ Supreme Court Decision 2089/2540 (emphasis added). See also Supreme Court Decision 2235/2562 although the dispute in this case is a dispute under a loan agreement.

time is of the essence was applied in a manner beyond the scope of Section 596 of the CCC. Apparently, the issue in that case was not about whether the employer was entitled to lawfully terminate the contract but whether the contractor or the employer was in breach of contract. As the phrase ‘time is of the essence’ under Section 596 of the CCC only deals with the issue of contract termination, it is unclear how, and on what basis, the Supreme Court applied the concept of time is of the essence in determining a different legal issue. This ambiguity highlights a grey area in applying the concept under Thai law, adding complexity to its interpretation.

Closely linked to the issue of a contractor breaching a time stipulation is the matter of the contractor liability for stipulated delay damages. These damages, commonly referred to as liquidated damages in common law jurisdictions, are a predetermined sum agreed upon by contracting parties, payable by the contractor to the employer in the event of a failure to complete work on time. Typically, contracting parties agree that such damages accrue on a daily basis, starting from the day after the deadline until actual work completion. In several past judgments, the Supreme Court invoked the non-essential nature of time to excuse a contractor from liability for stipulated delay damages.¹¹ For instance, in Supreme Court Decision 7809/2540, the defendant agreed to undertake interior decoration of a house for the plaintiff, but was unable to finish the work within the agreed time. The plaintiff did not terminate the contract or hold the defendant liable for stipulated delay damages. Instead, the plaintiff granted an extension of time to the defendant and subsequently paid the defendant upon completion of the work. The Court held that the plaintiff did not regard the due date for completion to be of the essence of the contract, so the plaintiff was not entitled to recover stipulated delay damages from the defendant.

Subsequently, the Court decided similarly in Supreme Court Decision 2438–2439/2545. In that case, the Court ruled that, as the employer did not regard the time stipulation to be of the essence, there was no longer a starting point of time which could be used to calculate the amount of stipulated delay damages. As a result, the time for completion was set at large and the employer was unable to recover stipulated delay damages from the contractor. The Court held:

After the expiry of the construction period under the contract, . . . [the employer] did not treat the time for delivery of the work as being of the essence. Therefore, as there was no longer a due date for delivery of the work, [the employer] had no right to levy stipulated delay penalties on a daily basis.¹²

Likewise, in Supreme Court Decision 2467–2468/2552, the contractor was unable to complete construction of a building within the required timeframe. However, the

¹¹ See, for example, Supreme Court Decision 2467–2468/2552; Supreme Court Decision 2438–2439/2545.

¹² Supreme Court Decision 2438–2439/2545.

employer accepted late delivery of a milestone work after expiry of the time for completion for the whole work under the contract and made a corresponding payment to the contractor for that milestone. Based on these circumstances, the Court decided that the employer did not treat the original time for completion as being of essence and, therefore, was unentitled to recover stipulated delay damages arising from contractor failure to complete the work on time. The Court held:

As a matter of fact, the plaintiffs had not regarded the original date for completion, namely 30 September 1995, as being of the essence and already set 15 September 1996 as the new time for completion. Therefore, the 1st plaintiff cannot argue that the 1st defendant was in breach of the contract before 15 September 1996. The 1st plaintiff is not entitled to claim the daily penalties under the contract for the period from 30 September 1995 to 15 September 1996 from the 1st defendant.¹³

In these past judgments, it can be observed that, even when issues at hand were not directly related to contract termination by employers, the Supreme Court still applied the concept of time is of the essence to determine whether contractors were in breach of contract and/or whether they must be liable to employers for stipulated delay damages. On these occasions, time is of the essence as applied by the Supreme Court did not coincide with Section 596 of the CCC. Also, in doing so, the Court did not look at the essence or non-essence of time stipulations to determine validity of employer terminations. Instead, the Court looked at the manner in which contracting parties administrated construction projects before deciding whether contractors were liable to employers for breach of timely obligation. In these cases, the Court apparently did not apply the concept of time is of the essence on the basis of Section 596 of the CCC, but as an equitable principle, emphasising that an employer may not hold a contractor liable for breach of time stipulation if that time stipulation is not of the essence in the contract between them.¹⁴

Nevertheless, it remains difficult to find legal grounds for the Court's application of the concept of time is of the essence outside the scope of Section 596 of the CCC. To resolve the ambiguity surrounding this concept, the same legal concept will be examined from the perspective of English and Australian law before a comparative study is presented in Part IV.

III. THE CONCEPT OF TIME IS OF THE ESSENCE

¹³ Supreme Court Decision 2467–2468/2552.

¹⁴ It should be noted that the Supreme Court also applied the concept of time of the essence in this manner outside the field of construction disputes, extending to disputes under different types of commercial contracts, including loan agreements, sale and purchase contracts. See Supreme Court Decisions 2235/2562, 1887/2541, and 5416/2537.

UNDER ENGLISH AND AUSTRALIAN COMMON LAW

In England and Australia, the concept of time is of the essence is rooted in the law of repudiation¹⁵ and the distinction between two categories of contractual terms, conditions and warranties. These represent the essential and non-essential terms of a contract, respectively.¹⁶ In broad terms, a breach of condition is considered repudiatory, giving the affected party the right to terminate a contract and to recover damages suffered.¹⁷ Conversely, a breach of warranty does not give rise to the right of termination, but only the right for the affected party to recover damages suffered.¹⁸

It follows that timely performance of an obligation is of the essence of a contract if it is a condition, rather than warranty.¹⁹ In the context of a construction contract, if the contractor fails to complete the work within the time required in the contract and if the time stipulation is a condition, the employer will have the right to accept repudiation and immediately terminate the contract.²⁰ If the employer chooses to terminate, the contract will be put to an end and the parties will be discharged from obligations under the contract. Generally, this means that the employer will no longer be bound to pay the contractor the contracted sum for the work done.²¹ In this sense, under English and Australian common law, when the due date for completion is made the essence of the construction contract, the contractor's obligation to complete the work by that date is a “condition precedent to the contractor's being entitled to payment of the contract price.”²²

Generally, it is the responsibility of the employer to prove that due date for completion is of the essence of the construction contract.²³ However, the question of whether or not a time stipulation is of the essence of a contract is primarily a matter of

¹⁵ See Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (11th edn, Thompson Reuters 2021) 252.

¹⁶ See Mindy Chen-Wishart, *Contract Law* (4th ed, Oxford University Press 2012) 467; Ian Bailey, *Construction Law in Australia* (4th ed, Thompson Reuters 2019) 120 <<https://doi.org/10.1093/he/9780199644841.001.0001>>.

¹⁷ Chen-Wishart (n 16) 467.

¹⁸ *ibid.* See also *Gibbs v Tomlinson* (1992) 35 ConLR 86, 98–100 (“*Gibbs*”).

¹⁹ John Carter, Wayne Courtney, and Gregory Tolhurst, “An Assimilated Approach to Discharge for Breach of Contract by Delay” (2017) 76(1) *Cambridge Law Journal* 63, 70 <<https://doi.org/10.1017/S0008197316000830>>.

²⁰ See *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111, 120 (“*Peak*”).

²¹ See *United Scientific Holdings v Burnley Borough Council* [1978] A.C. 904, 945 (“*United Scientific Holdings*”).

²² Julian Bailey, *Construction Law* (2nd edn, Informa Law 2016) 969–70. See also *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 31.

²³ Mohamad El Daouk, “Time of the Essence in Building Contracts” (2023) 15(2) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 5 <<https://doi.org/10.1061/JLADAH.LADR-949>>.

contract interpretation.²⁴ The task is to determine whether the time stipulation was intended by the parties to be an essential term.²⁵ In undertaking this task, courts in England and Australia generally take into account several factors, such as the language used in the contract and the nature of the obligation to which the time stipulation applies.²⁶ Simply requiring the contractor to complete the work by a certain date does not in itself make time of the essence.²⁷ In this connection, *Halsbury's Laws of England* states:

[T]ime will not be considered to be of the essence unless (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence;²⁸

All ambiguities vanish if the construction contract clearly says that time is to be of the essence.²⁹ However, as seen in *Halsbury*, even in the absence of such a clear indication, a time stipulation may also be essential if the nature of the construction work and its surrounding circumstances require it to be so. So time will generally be of the essence if the contractor's failure to complete the work on time would deprive the employer of substantial benefit under the contract.³⁰ Yet courts in England and Australia are generally reluctant to decide that time is of the essence in the context of construction contracts,³¹ because, more often than not, the consequences of a contractor's failure to meet a completion deadline may be remedied by damages.³² The presence of provisions for extension of time and liquidated damages, typically found in most construction contracts, may also indicate that the parties did not regard the due date for completion to be essential.³³

Under English and Australian law, even if time was originally of the essence, it may cease to be so through the concept of waiver or the doctrine of estoppel if the employer

²⁴ Tony Lim, "Essence of Time in Construction Contracts" (2012) 9(2) *Australasian Journal of Construction Economics and Building* 1, 1 <<https://doi.org/10.5130/AJCEB.v9i2.3016>>.

²⁵ See *Alliance Petroleum Australia NL v Australian Gas Light Co* (1985) 39 SASR 84, 105 ("*Alliance*"); Julian Bailey (n 22) 970.

²⁶ Lim (n 24) 1.

²⁷ See John Stannard, "So What If Time Is of the Essence?" (2005) *Singapore Journal of Legal Studies* 114, 119.

²⁸ *Halsbury's Laws of England* (4th edn, Butterworths 1974) vol 9 [481] ("*Halsbury*"). See also *United Scientific Holdings* (n 21) 944; *Alliance* (n 25) 91.

²⁹ See *Lombard North Central Plc v Butterworth* [1987] QB 527, 535.

³⁰ *United Scientific Holdings* (n 21) 928.

³¹ See El Daouk (n 23) 2. See also Badrinath Srinivasan, "The Law on Time as Essence in Construction Contracts: A Critique" (2021) 8(1) *RGNUL Financial and Mercantile Law Review* 1, 12–13.

³² Julian Bailey (n 22) 970.

³³ See Furst and Ramsey (n 15) 253–54; El Daouk (n 23) 5. See also *Gibbs* (n 18) 99–100; *Super Keen Investments Ltd v Global Time Investments Ltd* [2000] HKCFA 104, [10].

fails to terminate the contractor within a reasonable time after the due date for completion.³⁴ When a time stipulation was originally not of the essence or was originally of the essence but later ceased to be so, the employer may make the time stipulation of the essence by serving notice to the contractor, generally termed “notice making time of the essence.”³⁵ This notice must require the contractor to complete the work within a reasonable timeframe set by the employer³⁶ and must clearly communicate that completion of the work by that time is essential.³⁷ Should the contractor fail to complete the work within the time specified in the notice, the employer may terminate the contract.³⁸

Nonetheless, it is also important to note that under English and Australian law, the question of whether a due date for completion is of the essence is relevant only in determining whether the employer is entitled to terminate the contract. In other words, this legal issue is irrelevant to determining whether the contractor is in breach of contract and whether the employer is entitled to damages caused by delay in completion. In England, this position has been settled since the decision of the House of Lords in *Rainieri v Miles*.³⁹ As John Stannard noted:

The [common law] position is now affirmed that where a time is set for the performance of a contractual obligation, failure to keep to that time is a breach of contract, and the promisee is accordingly entitled to damages. Whether time is of the essence or not is totally irrelevant to this issue. . . .⁴⁰

IV. COMPARATIVE STUDY AND ANALYSIS

This Part will present a short comparative study between the concept of time is of the essence under Thai, English, and Australian law. It will also proceed to further analyse how the Thai Supreme Court has applied this legal concept beyond the scope of Section 596 of the CCC. For this purpose, English and Australian law will be collectively referred to as the common law legal system.

Based on discussions in Part II and Part III, the concept of time is of the essence

³⁴ Julian Bailey (n 22) 971. See *Rickards v Oppenheim* [1950] 1 KB 616, 623–24;

³⁵ Julian Bailey (n 22) 971–72; Furst and Ramsey (n 15) 254. See also Halsbury (n 28) [481]; *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327, 348–49; *Shawton Engineering Ltd v DGP International Ltd (t/a Design Group Partnership)* [2005] EWCA Civ 1359, [32] (“*Shawton*”); *Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd* [2022] WASCA 69, [562].

³⁶ See, e.g., *Louinder v Leis* (1982) 149 CLR 509, 513 (“*Louinder*”).

³⁷ See, e.g., *Shawton* (n 35) [44].

³⁸ See, e.g., *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, 623–24.

³⁹ *Rainieri v Miles* [1981] AC 1050, 1059. See also *Louinder* (n 36) 513; *RJR Holdings Pty Ltd v Balleroo Pty Ltd* (1991) 56 SASR 151.

⁴⁰ Stannard (n 27) 118–19.

under Thai law apparently resembles that in English and Australian law. Conceptually, the manner in which the concept of time of the essence seemingly functions as to limit employer rights of termination in case of a breach of time stipulation under English and Australian law is similar to how Section 596 of the CCC operates. Under both legal systems, the question of whether a time for completion stipulated under a contract is of the essence is used to determine the issue of whether the employer has the right to immediately terminate a contract when the contractor fails to meet the agreed-upon construction deadline. If the contractor fails to complete the work by the time for completion and if that time is of the essence, the employer may immediately terminate the contract. Conversely, if the time for completion is not of the essence, the employer is not entitled to terminate the contract immediately. Instead, the employer must first serve a notice on the contractor, requiring it to complete the work within a reasonable time determined by the employer. If the contractor fails to do so, then the employer may terminate the contract.⁴¹

However, despite these core similarities, the concept of time is of the essence under Thai law differs substantially from the common law legal system as Thai Courts have applied this legal concept beyond the context of employer right of termination. As seen in Part II, on different occasions, the Supreme Court relied upon essence or non-essence of time to determine whether the contractor was in breach of contract for failing to complete work on time and, by extension, whether the contractor was liable to the employer for stipulated delay damages. This position materially differs from the common law legal system in which, as mentioned earlier, the question of whether time is of the essence is irrelevant to the question of whether breach of contract exists.

Such a fundamental difference may not stem from an inherent difference in the laws themselves, but rather from the way in which Thai courts apply the concept of time being of the essence. This is because, upon examining the text of Section 596 of the CCC alone, there is nothing in that provision suggesting that the issue of time being or being not of the essence can also be used to determine whether the contractor is in breach of contract. As discussed in Part II, controversy and uncertainty surrounds the legal basis on which the Thai Supreme Court extends application of the concept of time is of the essence beyond the scope of Section 596 of the CCC.

Supreme Court decisions applying the legal concept in this way may not be without reason. Unlike common law jurisdictions, the Thai legal system lacks a range of well-established equitable principles in place for construction disputes. Under common law,

⁴¹ In the case of Thai law, this notice is required for the purpose of contract termination as provided under Section 387 of the CCC. In the common law legal system, this notice is known as a notice making time of the essence as discussed in Part III.

there are the prevention principle,⁴² the doctrine of estoppel,⁴³ and the concept of waiver⁴⁴ which judges and arbitrators may rely upon as equitable principles to protect contractors from what they see as unfair treatments by employers. To ensure fairness between parties, the Thai Supreme Court may have resorted to the concept of time is of the essence as a means to achieve what the Court saw as a fair and just outcome. For example, in Supreme Court Decision 2467–2468/2552 discussed in Part II, the Court examined the fact that the employer accepted the late delivery of some milestone work after the expiry of the overall time for completion before reaching the conclusion that the employer did not treat the stipulated time for completion as being of the essence, thereby depriving it of the right to levy stipulated delay damages. In that case, the Court might have deemed it unfair if the contractor were penalised by the employer by way of stipulated delay damages, considering the way that the employer administrated the construction project. Notably, the way the Court applied the concept of time is of the essence was comparable to the doctrine of estoppel as applied in common law jurisdictions. This doctrine prohibits one party from asserting certain rights to the extent that such party previously made the other party assume that those rights would not be asserted. As Lord Denning noted in *Moorgate Mercantile Co Ltd v Twitchings*, “[w]hen a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.”⁴⁵

Unfortunately, applying the concept of time is of the essence in this way has resulted in significant uncertainty surrounding application of this legal concept in the Thai legal system. It becomes challenging to define parameters in which this legal concept operates. It also makes interpretation of Section 596 of the CCC more confusing. As Professor Nontawat Nawatrakulpisut observed, the question of whether or not time is of the essence under Section 596 of the CCC should be considered in the light of the objective of the work for each hire of work contract.⁴⁶ If delayed completion would render the work useless to the employer, then time is of the essence. For instance, if the Thai government contracted a builder to construct a replica of the Eiffel Tower in Bangkok to welcome the French President’s visit to Thailand, completing the work after the President’s visit would

⁴² See, for example, *Peak* (n 20). See also Julian Bailey (n 22) 966; Furst and Ramsey (n 15) 256–57; Ian Bailey (n 16) 281–83; Robert Gemmel, *Quantification of Delay and Disruption in Construction and Engineering Projects* (2nd ed, Thomson Reuters 2021) 53–54.

⁴³ See, for example, *Fortney & Weygandt, Inc. v Lewiston DMEP IX, LLC* (2019) ME 175. See also Julian Bailey (n 22) 971; Ian Bailey (n 16) 132; John Dorter and John Sharkey, *Building and Construction Contracts* (Thomson Reuters 2023) [9.80].

⁴⁴ See, for example, *Dodd v Churton* [1897] 1 QB 562, 564; *RDP Royal Palm Motel, L.P. ex rel. PADC Hospitality Corp. I v Clark Const. Group, Inc.*, 168 Fed. Appx. 348 (11th Cir. 2006). See also Julian Bailey (n 22) 971; Ian Bailey (n 16) 132; Phillip Davenport, “Variations Ordered after the Date for Practical Completion” (1991) 17 Australian Construction Law Newsletter 53.

⁴⁵ *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, 241.

⁴⁶ Nontawat (n 7) 91.

make it useless for the Thai government, so time would indeed be of the essence. However, this may not be the case for most construction contracts. While late completion may deprive the employer of certain benefits, without an express provision in the contract, it is difficult to say that the work becomes completely useless solely because of a late completion. Arguably, for the purpose of Section 596 of the CCC, time for completion may not be of the essence for most construction contracts. Therefore, when the Supreme Court extends the concept of time being of the essence beyond the scope of Section 596 of the CCC and determines that, based on certain actions of the employer, it no longer considers time to be of the essence, it may contradict the definition of “time is of the essence” under Section 596 of the CCC. If a time stipulation under a construction contract was never of the essence under Section 596 of the CCC, it becomes questionable how parties could subsequently regard that time, which was never of the essence, to be thenceforth not of the essence.

Complexities surrounding the concept of time is of the essence may significantly impact employer decision-making in administering a construction project. Generally, a construction contract is not a simple commercial transaction in which the employer engages the contractor and waits for all obligations to be performed. It is usually a complex legal relationship in which the employer is usually encouraged, or even required, to participate by supervising and monitoring construction work.⁴⁷ When the contractor encounters difficulties during construction, the best practice would be for both parties to collaboratively discuss these issues to find the best way to proceed mutually.⁴⁸ However, by applying the concept of “time is not of the essence,” it can be argued that the employer may adopt an overly conservative approach in decision-making. That is to say, it is possible for the employer to act extremely conservatively in administering the contract, given that it cannot risk losing entitlement to stipulated delay damages.

VII. CONCLUSION

This article found that the concept of time is of the essence in the Thai legal system fundamentally resembles its counterparts in England and Australia. However, the key difference identified is that the Thai Supreme Court has broadened the scope of application of this legal concept beyond what is explicitly provided under Section 596 of the CCC, by using it to determine issues related to breach of contract and entitlement to damages. To circumvent the complexity and uncertainty surrounding this legal concept, contracting parties should agree on a thorough, clear contractual mechanism for

⁴⁷ See Donald Charrett, “Lex Constructionis—Or My Country’s Rules?” (2021) 38 International Construction Law Review 61 <<https://doi.org/10.4324/9781003206897-40>>.

⁴⁸ See Paula Gerber and Brennan Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths 2013) 33.

extending time in a construction contract from the outset of each project to increase contract administration efficiency.

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* **Indexing Thai names.** “Although family names are used in Thailand, Thais are normally known by their given names, which come first, as in English names. The name is often alphabetized under the first name, but practice varies.” *The Chicago Manual of Style* (17th edn, University of Chicago Press 2017) §16.85.