Time Is of the Essence:
Terms and Conditions in Purchase Agreements

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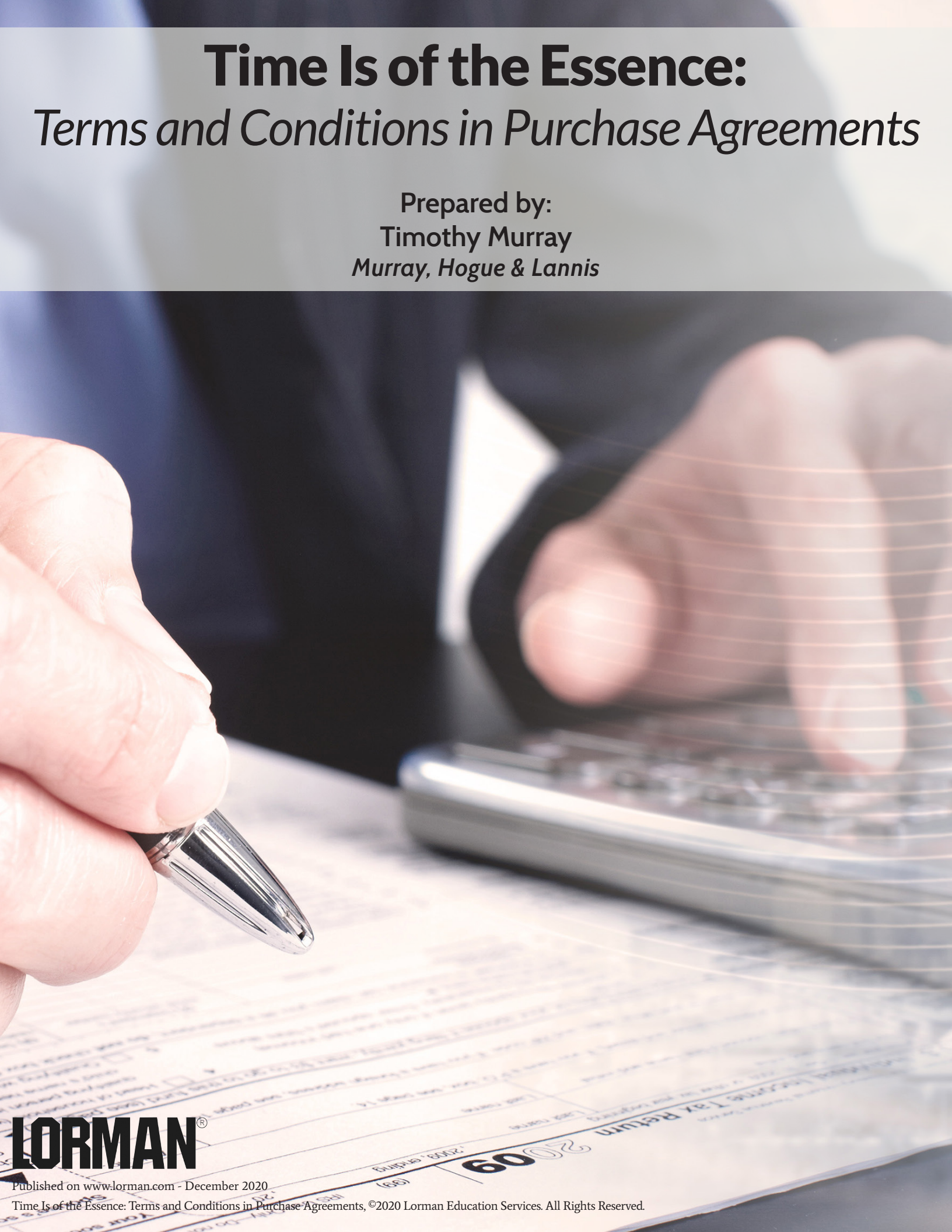

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Published on www.lorman.com - December 2020

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Time Is of the Essence:
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When a contract spells out specific dates for performance, a late performance typically (though not always) is an immaterial breach that will not discharge the non-breaching party's obligations. In fact, a late performance will not entitle the non-breaching party to more than nominal damages.[1] How can a party enforce deadlines in a contract? As explained infra, liquidated damages provisions might be enforceable, but the damages would have to meet the standards for liquidated damages. Can the parties turn late performance into material breaches?

The time-honored way to turn a late performance into a material breach is to include the words "time is of the essence" in connection with a date for performance.[2] Even if these magic words aren't used, sometimes courts refuse to treat late performance as a material breach.

But "time is of the essence" provisions can be misused or overused. If it purports to apply to every single deadline in a contract, especially if the contract is a standardized form that is not negotiated, it may be ignored by the courts.[3]

Some jurisdictions do not give conclusive effect to "time is of the essence" provisions. And this is a potential drafting landmine. Consider the following case:

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[1] See Linder v. Swepi, LP, 549 Fed. Appx. 104, 107-08 (3d Cir. 2013).
[2] See Linan-Faye Constr. Co. v. Housing Auth., 995 F. Supp. 520, 524 (D. N.J. 1998).
[3] See Corbin on Contracts § 37.3

Kodak breached its agreement with Du Pont by failing to deliver certain machines by the agreed delivery dates, and Du Pont terminated the agreement. The parties' agreement contained a provision stating that "time is of the essence" for such deliveries. Kodak filed suit, and despite the presence of the "time is of the essence" clause, the court allowed the jury to decide whether the late deliveries constituted a material breach of contract to justify DuPont's termination of the contract. The jury entered an award in favor of Kodak and held that the late deliveries were not material breaches, so DuPont's termination of the contract was an improper termination for convenience, not a termination for cause. DuPont filed a post-trial motion to upset the verdict and argued that because of the inclusion of "time is of the essence" language in the parties' agreement, any delay by Kodak constituted a material breach. The court rejected DuPont's arguments and explained that a late delivery in a contract making timely deliveries "of the essence" is not automatically a material term of the contract. Rather, it is for the fact-finder to decide whether the breach was material to justify the other party's subsequent refusal to perform. The fact-finder must consider the "intent of the parties and weigh the equitable factors and circumstances surrounding the breach …." The judge explained that the evidence was close and conflicting as to whether the delivery dates were material, but the question

> was within the jury's province to decide. This decision was affirmed [by the Second Circuit Court of Appeals]. . . . . DuPont complained that the trial court's jury charge regarding "time is of the essence" did not allow the jury to accord proper weight to the clause. Specifically, DuPont alleged, the district court erred in instructing the jury that it could find "the time of the essence clause to be a material part of the contract" only if it found that Kodak "had to timely deliver the EPS units if it was to be done at all." The Second Circuit rejected this argument. It wrote: "This argument is foreclosed by the governing Illinois law, under which 'the materiality inquiry focuses on two interrelated issues: (1) the intent of the parties with respect to the disputed provision; and (2) the equitable factors and circumstances surrounding the breach of the provision.'" Thus, a "time is of the essence" clause is not conclusive. Even with such a clause, it is up to the factfinder to also consider whether the breach was material to excuse the other party's performance, based upon the totality of the circumstances.[4]

Thus, if one party to a contract is late in performing, and if the contract has a "time is of the essence" provision, the non-breaching party needs to be careful about whether to treat the delayed performance as a material breach. Some courts hold that it would be material breach, but others do not—if the non-

[4] 8 Corbin on Contracts § 37.3 (2018), discussing Kodak Graphic Communs. Can. Co. v. E.I. du Pont de Nemours and Company, 2015 U.S. Dist. LEXIS 834 (W.D. N.Y. 2015) and Kodak Graphic Communs. Can. Co. v. E. I. du Pont de Nemours & Co., 640 Fed. App'x 36 (2d Cir. 2016).

breaching party gets it wrong and treats the contract as ended, that party might be the one in material breach.

DRAFTING TIP:

- Use "time is of the essence" most sparingly—only when time really is of the essence. Avoid general "time is of the essence" provisions that are designed to apply to every obligation in the contract.
- If possible, spell out in the contract the reasons why timely performance is critical—have the other party agree to that.
- Put the magic words "time is of the essence" next to the specific obligation it references.
- Before treating your client's duties under the contract as discharged because the other party was late and the contract has a time is of the essence clause, make sure the applicable law treats such clauses as conclusive.