

SURVIVAL AND MERGER BOILERPLATE CLAUSE

Need to know

A survival and merger clause is used to prescribe the rights or obligations under a contract that should continue once the contract ends or after the main purpose of the contract is complete.

CAUTION: A survival and merger clause may not be effective, for example, in relation to (a) collateral promises; (b) an obligation to pay compensation for breach; or (c) obligations that are ancillary to the contract's main purpose.

THE SAMPLE CLAUSE

- (a) *No term of this [deed/agreement] merges on completion of any transaction contemplated by this [deed/agreement].*
- (b) *Clauses [insert clause number and heading] survive termination or expiry of this [deed/agreement] together with any other term which by its nature is intended to do so.*

Survival and Merger Boilerplate Clause

1 What is this clause and why is it used?

1.1 What is a survival and merger clause?

A survival and merger clause identifies certain obligations, rights, warranties or specific clauses that parties intend to continue after their contract comes to an end. The clause also demonstrates the parties' intention that they wish to exclude the common law doctrine of merger. This doctrine provides that contractual provisions "merge" upon completion – meaning that a party's right to sue on the terms of the contract are extinguished upon completion.¹ The doctrine predominantly arises in relation to financing (eg grants of charges, mortgages or other security interests) and real property transactions.

The terms themselves, "survival" and "merger", represent different concepts.

- "Survival" refers to the enforceability of certain rights and obligations after a contract expires or is terminated.
- "Merger" generally refers to the process by which previously acquired lesser rights merge with newly acquired greater rights.

1.2 How does this clause work?

Whether or not a contractual term operates after termination depends on the actual or inferred intention of the parties.² Inclusion of the clause (in a form such as the sample clause precedent) normally represents the parties' intention that all contractual rights and obligations, except those specifically mentioned, come to an end contemporaneously with the end of the contract. However, the clause is not wholly effective in achieving this as explained in section 2 below.

1.3 Why is this clause used?

A survival and merger clause is used to provide greater certainty about which clauses continue to operate after termination or completion of the contract.

2 How effective is it?

There are at least 6 potential limits on the effectiveness of a survival and merger clause.

2.1 Terms that are capable of surviving under common law

Firstly, there are terms that are capable of surviving termination under common law. Whether a term survives will depend on the intention of the parties. Obligations that may survive under common law include:

- obligations to pay compensation for a breach of contract;³ and
- obligations that are ancillary to the main purpose of the contract (eg an agreement to refer disputes to arbitration; an obligation not to disclose confidential information; an obligation for an employee not to compete with the employer; an agreement as to the choice of forum).

2.2 A survival and merger clause can be taken as an exhaustive statement of a parties' intention

Secondly, a survival and merger clause can be taken as an exhaustive statement of the parties' intention regarding which terms are to survive termination. This creates a risk if the parties fail to list all the terms they intend to have effect after termination.

This risk is mitigated in the sample survival and merger boilerplate clause. The sample clause allows the parties to list specific clauses for clarity, but preserves the survival of "*any other term which by its nature is intended to do so*".

2.3 Does the term operate in favour of a breaching or repudiating party?

Thirdly, a court may consider whether a surviving term operates in favour of a party whose breach or repudiation led to the termination. If so, a court may consider whether the intention of the parties (regarding the survival of the term) was contingent upon that party not being in breach of the contract.⁴

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2.4 Public policy or statute can negate the parties express intention

Fourthly, public policy or statute may render contractual terms intended to survive unenforceable or void. For example, provisions of the *Competition and Consumer Act 2010* (Cth) and the *Contracts Review Act 1980* (NSW) may restrict the survival of some clauses if they are unjust or unconscionable.⁵

2.5 Collateral promises may survive the completion of a contract's main purpose

Fifthly, promises which are considered "collateral" to the transaction may survive completion of the main purpose of the transaction. This survival can negate the effect of a survival and merger clause. For example, where a contract of sale also includes an agreement by the vendor to carry out building work, these contractual obligations are, in the absence of contrary agreement, treated as collateral to the sale of land and will survive transfer.⁶

2.6 A survival and merger clause may be ineffective in a fraudulent transaction

Finally, the presence of fraud can ensure equity cancels the transaction. This may render a survival and merger clause ineffective.⁷

3 Drafting and reviewing the clause

3.1 Should I always include it, and what happens if I don't?

For clarity, it is generally recommended that you include a survival and merger clause in a contract.

If this clause is not included in a contract, the terms that operate post termination (or after the main purpose of the contract is complete) will be a question of construction.

3.2 What is the purpose of the sample clause?

The sample clause makes provision for clauses in a contract to be called out in order to preserve

their survival after expiry or termination of the contract.

3.3 When, if ever, should I amend the clause?

There are at least three situations where it might be appropriate to amend the clause. These situations include:

- If there is some time limit on how long the terms continue to survive after completion or termination of the contract, it may be appropriate to specify that time limit.
- If the survival and merger clause is to be an exhaustive statement of the parties' intention about which clauses survive termination or expiry, this should be stated expressly.
- There may be some question about whether a term can operate after termination in favour of a party whose breach or repudiation led to a termination. In that case, it would be appropriate to amend the clause to state whether it is the parties' intention that the surviving term can be relied upon by a breaching or repudiating party.

4 Other practical considerations

As stated above, a survival and merger clause may expressly state which clauses the parties intend to survive termination. The following clauses are commonly intended to survive:

- Confidentiality clauses;
- Indemnity clauses;
- Warranty clauses;
- Non-compete clauses;
- Clauses relating to the maintenance of records;
- Clauses relating to payment obligations after termination; and

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- Arbitration and Alternative Dispute Resolution clauses.

Some survival and merger clauses may also specify that:

- obligations to return documents (or materials) belonging to one party survive; and
- the parties to the agreement have no further obligations to one another except as stated in the survival and merger clause.

Where the agreement terminated is part of a series of agreements (eg a master agreement with a number of agreements made under it), the survival and merger clause may also specify which provisions of the agreements under the master agreement terminate.

ENDNOTES

¹ See generally *Fu v Bucasia Pty Ltd* [2014] NSWSC 325 per Justice Stephenson. See also *Allen v Richardson* (1879) 13 Ch D 524 at 541; *Knight Sugar Co Ltd v Alberta Railway & Irrigation Co* [1938] 1 All ER 266 at 269–70.

² *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350 at 361 per McPherson JA.

³ This includes terms that govern any compensation payable by a party for breach of contract. For example, indemnity clauses; exclusion clauses; agreed damages clauses; and a liquidated damages clause. See discussion of operation of release clauses and requirement of consideration in *Commissioner of Taxation v Orica Ltd* [1998] HCA 33; 194 CLR 500 at paragraph [114].

⁴ See *Halsbury's Laws of Australia* [110-9575].

⁵ *Ibid.*

⁶ See *Gaut v Patterson* (1931) 31 SR (NSW) 612.

⁷ *Halsbury's Laws of Australia* [185-1140].