

CUMULATIVE RIGHTS BOILERPLATE CLAUSE

Need to know

Most useful as an evidentiary tool, this clause demonstrates the parties' intention that they wish to retain the rights and remedies available at law, in equity or statute, in addition to those provided for under the contract.

THE SAMPLE CLAUSE

Except as expressly provided in this [deed/agreement], the rights of a party under this [deed/agreement] are in addition to and do not exclude or limit any other rights or remedies provided by law.

Cumulative Rights Boilerplate Clause

1 What is this clause and why is it used?

A cumulative rights boilerplate clause, also known as a cumulative rights and remedies clause, is used to clarify the parties' intention that certain rights and remedies provided for under the contract are intended as in addition to, and not exclusive of, applicable rights and remedies available at law, in equity or under statute.

A cumulative rights clause also removes any possible ambiguity about whether any "special" remedies specified (ie, in one portion of the contract) should be treated as the exclusive remedy for a particular breach. For instance, where a contract expressly provides for a remedy in one situation, the clause is also used to avoid an inference that the same remedy is not available in other situations.

2 How effective is it?

This clause is effective and most often used as an evidentiary tool to indicate that the parties did not intend to exclude any additional rights and remedies which may be available at law, in equity or under statute.

3 Drafting and reviewing the clause

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

A cumulative rights clause should be included if the parties wish to expressly state that they wish to include rights and remedies available at law, in equity and under applicable statute, in addition to those specified in the contract.

However, a failure to include this clause in a contract does not automatically remove the right of the parties to seek additional remedies because a general presumption exists that contracting parties do not intend to abandon any remedies for breach of contract which may arise by operation of law.¹ In the absence of a clear statement of intention, a Court will construe the terms of the contract in their context to determine

the intention of the parties using the various rules of construction.

3.2 Is the sample clause drafted from a specific position?

The G+T boilerplate clause is drafted from a neutral position.

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

This clause should be amended where parties intend to limit or exclude certain rights or remedies available at law for some or all breaches of contract. Contracting parties may also wish to exclude specific provisions from the contract under the sample clause where those rights and remedies are intended to be limited to those provided in the contract.

4 Other practical considerations

The following outlines some of the associated issues with cumulative rights clauses.

4.1 Election

The inclusion of a cumulative rights and remedies clause does not mean that all remedies are cumulative. Remedies are only cumulative if they are based on different wrongs and do not result in over compensation for the same loss.

Where there are conflicting remedies, a party must make an election.² Election can only be made with knowledge and through unequivocal words or conduct.³

4.2 Entire Agreement Clauses

If the parties have discussed or negotiated the inclusion of specific rights and remedies which have not been included in the contract but seek to rely on a generic cumulative rights clause to enforce those rights and remedies, the inclusion of an entire agreement clause may result in those rights and remedies being excluded.

Parties should consider including a reference in the contract to any specifically agreed rights or remedies to ensure that they are preserved.

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4.3 Sole and exclusive remedy clauses

A sole and exclusive remedy clause exhaustively stipulates the remedies available to parties for a particular breach or event. The danger associated with this clause is that, unless clearly specified, only the identified remedies remain - all other remedies fall away. Sole and exclusive remedy clauses are most often employed to cover discrete issues such as completion delay, defects in works, KPIs or termination. As with any type of exclusion clause, parties must use unequivocal wording if they wish to limit or exclude certain rights or remedies available at law for specific events or for some or all breaches of contract.

ENDNOTES

¹ *Concut Pty Ltd v Worrell* [2000] HCA 64 at [23].

² *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635; [2001] HCA 66.

³ *United Australia Ltd v Barclays Bank* [1940] 4 All ER 20.