1 Fair Research Contracting

This is the first in a set of five guidance notes aimed at supporting research institutions with little or no access to research contracting expertise in negotiating the terms of a collaborative research contract.

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The contractual side of research projects is often neglected by research organisations, simply because greater emphasis is placed on scientific matters. This can be compounded where there is no lawyer or institutional framework at hand to support the contracting process.

International collaborative research partnerships are key to improving global health and have the further benefit of creating opportunities for research organisations and their staff to benefit from, and make future use of, research results. However, organisations, which have limited contracting expertise on hand, have the potential to be disadvantaged when negotiating these arrangements. So, care needs to be taken in developing the terms of the research contract. Particular care needs to be taken where one partner country may not have a legal framework in place to govern contractual disputes, or where enforcement mechanisms are weak or inefficient.

It is therefore crucial for contracting parties to carefully consider all aspects of the contracting process: how the outputs of the research will be distributed and utilised, what will happen if there is a dispute, and if so, in what jurisdiction, or through which mechanism, will that dispute be resolved?

KEY QUESTIONS TO CONSIDER

- ☐ **Do you have access to model contracts? Do you understand the standard clauses included in contracts and realise that there is usually room to negotiate terms and conditions?**
- ☐ **The basic elements of a contract are: *(i)* mutual assent, *(ii)* consideration, *(iii)* capacity and (iv) legality. Are these all present?**
- ☐ **What is the nature and purpose of the research collaboration you are engaging in? This will assist you in thinking through what types of terms need to be included (or avoided) in an agreement.**
- ☐ **Is the contract based on reasonableness, responsibility, and good faith?**
- ☐ **Is the agreement legally binding on its own or will it be included as part of an overarching research contract?**
- ☐ **Are you obliged to include specific terms of another agreement you might have with the funder of a particular project or study?**
- ☐ **Who are the research partners (parties) to the contract? Are authorised representatives informed and able to legally bind the institution to the contract?**
- ☐ **By signing the contract, are there any other conditions/policies linked to the contract that the signatories have implied they assure compliance with and which may not be directly expressed in the contract (in other words: have you read and understood all of the fine print)?**
- ☐ **Is the period of performance clearly set out in research contract (i.e. is there a start and end date)? Is it possible to modify the contract? If so, under what conditions?**
- ☐ **What are the implications where research activities described in the contract do not start or finish on the specified dates?**
- ☐ **Can research partners negotiate an extension to the period of performance (such as a 'no-cost extension')?**
- ☐ **Have you carefully considered and understood the implications of the clauses that take priority (often contracts can include general and specific terms and conditions)?**
- ☐ **Should there be a dispute between the parties later on, are there any clauses that explain how disputes should be resolved (e.g. amicable negotiation between senior staff, mediation or arbitration)?**

- ☐ **What will happen if a dispute cannot be resolved – will parties have the right to terminate the contract or to take the matter to court?**
- ☐ **What legislation or specific rules and regulations must be adhered to? Are these provided for in the contract? Do the parties understand their meaning?**
- ☐ **How will the country-specific laws of each partner impact on contractual issues, such as enforceability?**
- ☐ **Can the choice of law (the jurisdiction governing the contract) be negotiated? What will the implications be for your organisation on the choice of law governing the contract?**

▶ KEYWORDS

A CONTRACT
is an agreement creating obligations enforceable by law.

A BREACH
is the failure to perform any term of a contract, written or oral.

A CLAUSE
is a specific term/provision in a contract.

A LEGAL (LEGISLATIVE) FRAMEWORK
is the overall legal framework which is in place within a jurisdiction.

DISPUTE RESOLUTION
is the process of resolving disputes between parties. Dispute resolution can be resolved through consensual processes (e.g., negotiation, mediation), or through adjudicative processes (e.g., arbitration, litigation).

MEDIATION
is the attempt to settle a legal dispute through the active participation of a third party (mediator) who works to find points of agreement.

ARBITRATION
is a formal mechanism to resolve disputes between parties outside the courts; the results of arbitration are considered to be binding.

AN AUTHORISED REPRESENTATIVE
representative is an individual who is authorised to act on behalf of another (individual or organisation).

JURISDICTION
is the (nation, sub-region, state, or county's) courts who have power to make legal decisions and judgments. Important when thinking about which law will be applied in the event of a dispute.

CHOICE OF LAW
is a stage in litigation where, when there is a conflict of laws between two jurisdictions, a reconciliation must be made between the laws which are in conflict.

AN INDEMNIFICATION CLAUSE
is the clause is included to protect parties from wrongdoing of third parties.

A HOLD-HARMLESS CLAUSE
is the clause is included when the enabling party to the contract does not want to be held liable for any damages causes as a result of the activities enabled by the contract.

A WARRANTY CLAUSE
is a breach of a warranty clause is less 'serious' than a breach of a condition; a breach of warranty may only give rise to damages, whereas a breach of a condition of a contract may give rise to the right to terminate the contract.

WHERE TO GO FOR ADDITIONAL HELP

- National Cancer Institute, The CEO Roundtable on Cancer (2008). *Proposed standardized/ harmonized clauses for clinical trial agreements.* Bethesda: National Cancer Institute. http://transformingtrials.cancer.gov/files/StClauses.pdf
- Min, E.J. (2007). Alternative dispute-resolution procedures: International view. In A. Krattiger, R.T. Mahoney, L. Nelson et al. (Eds.) *Intellectual property management in health and agricultural innovation: A handbook of best practices.* MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A. www.iphandbook.org
- See also ARMA, Brunswick Agreements: https://www.arma.ac.uk/resources/brunswick-agreements
- See also Praxis-Unico Practical Guides: http://www.praxisunico.org.uk/resources/practical-guides.asp
- See also Resolving IP disputes: http://www.wipo.int/services/en/index.html#disputes
- See also the UK Government's Lambert Toolkit: http://www.ipo.gov.uk/lambert
- See also http://www.cohred.org/FRC, where you will find a useful guidance tool on developing and implementing guidance on research contracting, entitled Where there is no lawyer: Guidance for fairer contract negotiation in collaborative research partnerships.

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▶ TIPS

- Evaluate the scope of your collaboration and the objectives that you and the research partner hope to achieve.
- Always look at the risk-benefit ratio for your research and your institution before signing a research agreement.
- Get to know the partner and seek information or clarification from them if any clause is not clear to you (due diligence)
- Always include definitions of the key terms in the contract to avoid ambiguity
- Always include a mechanism for dispute resolution.
- Ensure you understand the jurisdiction (legal forum), and the implications of this for your organisation.
- Ensure there are specified ways for you to exit/ terminate the contract, not only if things go wrong.
- Agree on a common standard for arbitration. If you wish to include this option for conflict resolution, try to select a place that your organisation is familiar with, or at least choose a neutral place.
- Ensure you understand the meaning of legal terminology and the intention of each clause used in the contracts. Indemnification, hold-harmless, and warranty clauses can be particularly difficult to understand and potentially risky for your organisation to sign up to. If you are not sure, seek independent explanation and clarification
- Avoid having conjoined (multiple) limitations of liability written in a single contract clause
- Recognise the need to take tailored guidance, wherever possible. There are *pro bono* legal networks who may be able to review your contract and your questions. For example the network of Public Interest Intellectual Property Advisors (PIIPA) attorneys and supporters: http://www.piipa.org

QUOTE FROM A CONSORTIUM MEMBER

"Scientists and academics often underestimate the importance of contracts for the research projects they carry out. Staff involved in drafting, reviewing and negotiating research contracts should not be seen as obstacles, standing in the way of science, but as partners working hand in hand with academics in ensuring that research projects can be carried out smoothly and that results and achievements benefit all parties involved in a fair and equitable manner."
JENS HINRICHER, HEAD OF LEGAL SERVICES, LONDON SCHOOL OF HYGIENE AND TROPICAL MEDICINE

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FEEDBACK
This is the first version of this guidance note, and we constantly strive for improvement. In the next phase, we will be transforming these generic guides into a web-based decision support system. We would be pleased to receive your feedback, comments or suggestions for further improvement to these guides, or for the future of this project, to cohred@cohred.org