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The Legal Context for Research Contracting

This is the 5th in a set of 5 guidance notes aimed at supporting low capacity research organisations in negotiating the terms of a collaborative research contract.

The contractual side of research projects is often neglected by research organisations and emphasis is rather placed on scientific/technical matters. Particularly in low and middle income country organisations, there is often no lawyer or institutional framework at hand to support the contracting process. These organisations have the potential to be disadvantaged when negotiating sometimes complex agreements in global research collaborations. This can lead not only to lost opportunities but also possibly barring research organisations and their staff to benefit from and making further use of their own research results. Difficulties can further arise when one partner country may not have a clear legal framework in place or where enforcement mechanisms are weak or inefficient. It is important for contracting parties to consider carefully in the contract what will happen if there is a dispute, and if so, in what jurisdiction, or through which mechanism, will that dispute be settled.

KEY QUESTIONS TO CONSIDER

1. Do you have access to model contracts? Do you understand the standard clauses which may be included in contracts and realise that there is usually room to negotiate terms and conditions?
2. What is the nature and purpose of the research collaboration (this will assist you in thinking through what types of terms need to be included (or avoided) in an agreement)?
3. Is the agreement legally binding on its own or will it be included as part of an overarching research contract?
4. Are you obliged to include specific terms of another agreement you might have with the funder of a particular project or study?
5. Who are the research partners (parties) to the contract? Is your institution aware of the contract undertaking and are there signatories who are authorised representatives in place who are able to legally bind the institution to the contract?
6. 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 the fine print)?
7. Is the period of performance clearly set out in research contract (i.e. it has a start and end date)?
8. What are the implications where research activities described in the contract do not start or finish on the specified dates?
9. Can the research partners negotiate an extension to the period of performance (such as a 'no-cost extension')?
10. Have you carefully considered and understood the implications of the clauses that take priority (often contracts can include general and specific terms and conditions)?
11. 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)?
12. 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?
13. What legislation or specific rules and regulations must be adhered to?
14. Are these provided for in the contract? Do the parties understand their meaning?
15. How will the country-specific laws of each partner impact on contractual issues such as enforceability?
16. Can the choice of law (the jurisdiction governing the contract) be negotiated?
17. What will the implications be for you on the choice of law governing the contract?

CASE STUDY

**** *STILL NEED TO ADD A CASE STUDY*

This document is intended as a tool to help think through the kinds of issues you may encounter in research contract negotiation.

COHRED
Council on Health Research for Development

KEYWORDS

CONTRACT
AN AGREEMENT WITH SPECIFIC TERMS BETWEEN TWO OR MORE PERSONS

BREACH
FAILURE TO PERFORM ANY TERM OF A CONTRACT, WRITTEN OR ORAL

CLAUSE
A SPECIFIC TERM/PROVISION IN A CONTRACT

LEGAL (LEGISLATIVE) FRAMEWORK
THE OVERALL LEGAL FRAMEWORK WHICH IS IN PLACE WITHIN A JURISDICTION

DISPUTE RESOLUTION

MEDIATION
THE ATTEMPT TO SETTLE A LEGAL DISPUTE THROUGH THE ACTIVE PARTICIPATION OF A THIRD PARTY (MEDIATOR) WHO WORKS TO FIND POINTS OF AGREEMENT

WARRANTY CLAUSE
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

ARBITRATION
A FORMAL MECHANISM TO RESOLVE DISPUTES BETWEEN PARTIES. THE RESULTS OF ARBITRATION ARE CONSIDERED TO BE BINDING

AUTHORISED REPRESENTATIVE
AN INDIVIDUAL WHO IS AUTHORISED TO ACT ON BEHALF OF ANOTHER (INDIVIDUAL OR ORGANISATION)

JURISDICTION
WHICH (NATION, SUB-REGION, STATE, OR COUNTY'S) COURTS HAVE POWER TO MAKE LEGAL DECISIONS AND JUDGEMENTS 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

INDEMNIFICATION CLAUSE
ARE INCLUDED TO PROTECT PARTIES FROM A THIRD PARTIES WRONG DOING

HOLD-HARMLESS CLAUSE
THESE CLAUSES ARE 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

WHERE TO GO FOR ADDITIONAL HELP

A collaboration between the National Cancer Institute and the CEO Roundtable on Cancer (2008). Proposed standardized/harmonized clauses for clinical trial agreements.

Mahoney, L. Nelson et al. (Eds.) Intellectual property management in health and agricultural innovation: A handbook of best practices (pp. 675-687). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A.

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 (pp. 1415-1427). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A.

Potter, R., & Rygnestad, H. (2007). Organizing and managing agreements and contracts. In A. Krattiger, R.T. Mahoney,L. Nelson et al. (Eds.) Intellectual property management in health and agricultural innovation: A handbook of bestpractices (pp. 651-658). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A.

Steinbock, M.B. (2007). How to draft a collaborative research agreement. In A. Krattiger, R.T. Mahoney, L. Nelson et al.(Eds.) Intellectual property management in health and agricultural innovation: A handbook of best practices (pp. 714-724). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A.

See also ARMA, Brunswick Agreements: HYPERLINK "https://www.arma.ac.uk/resources/brunswick-agreements" https://www.arma.ac.uk/resources/brunswick-agreements

See also Praxis-Unico Practical Guides: HYPERLINK "http://www.praxisunico.org.uk/resources/practical-guides.asp" http://www.praxisunico.org.uk/resources/practical-guides.asp

See also Resolving IP disputes: HYPERLINK "http://www.wipo.int/services/en/index.html" \l "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.

TIPS

Evaluate the scope of your collaboration and the objectives which 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 a mechanism for dispute resolution

Ensure you understand the jurisdiction, and the implications of this.

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, try to select a place that your organisation is familiar with or a neutral place for conflict resolution;

Ensure you understand the meaning of legal terminology, as well as the intention of each clause described 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.

Recognise the need to take tailored guidance, wherever possible. There are pro-bono legal netowrks who may be able to review your contract and your questions. For example the network of Public Interest Intellectual Property Advisors (PIIPA): 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

We would value your feedback, comments or suggestions on whether this guidance note has been useful to you. Contact: cohred@cohred.org