Drafting a research contract – key elements

Transcript of video

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A research contract should include the following:

• The names of the parties to the contract. Ensure that you name the parties correctly.

• The duration of the agreement. If you have already entered a confidentiality agreement or other agreement, for example with the sponsor, ensure that the duration is the same in all agreements.

• Obligations in the project. Who does what? Where does the research take place? How will the research be carried out?

• Price and other financial terms. How much should be paid? Is it a financial sum, equipment or in-kind contributions? When and how should it be paid? In which currency? Avoid uncertain terms like "pay when work is completed to the funder's satisfaction" which will be unclear when the money is due.

• Confidentiality clause, unless already covered in a confidentiality agreement or non-disclosure agreement.

• Intellectual property rights. What are the parties bringing in the form of background IP and what comes out of the project in the form of results? Who will have the right to own the results and who should have the right to use them? And on what terms?

• Publication rights. Researchers should expect to publish all results of their research without delay or hindrance. Collaborators and sponsors, however, may wish to delay publication for a variety of reasons, typically to allow patenting. They may also wish to review any planned publication to omit information they wish to keep confidential. When negotiating for the university, you should negotiate the right to publish as much as possible with minimal review and delay. If the collaborator

or sponsor requires indefinite delays or absolute approval of publications, you need to consider whether it is even possible for the university to enter into the agreement on these terms, or if it conflicts with the university's academic mission.

• Warranties, liability and indemnity are ways to identify and control risk in the project. For example, will the university be willing to give any warranty that the results can be used in a specific way. You should also include provisions that the university cannot be held liable for the other party's use of the results. A way to limit liability is to avoid unlimited liability by putting a financial cap on the liability loss, or exclude liability for indirect and consequential losses.

• Force majeure. What are the parties' responsibilities if an event outside the control of the parties occurs, like natural disasters, explosions, war, strike or pandemic like Covid-19? Note that when negotiating with the UK and other common law countries, they do not have a general concept of force majeure (except for a limited doctrine of contractual frustration). A party's ability to claim relief for a force majeure event therefore depends upon the terms of the contract, and in particular the force majeure provision. Force majeure terms are considered as express terms and will not ordinarily be implied in contracts governed by English law. In the absence of an express force majeure clause in an English Law contract, parties may be able to rely upon a more limited doctrine of frustration. The threshold for proving frustration is a lot higher than force majeure, and you should therefore consider having a force majeure clause in all research contracts. The doctrine of frustration will not be used by the English courts if the contract contains a force majeure provision, since the court will regard this as an agreed allocation of risk between the parties.

• How should the contract be terminated? You should negotiate to ensure that the sponsor cannot withdraw funding without reasonable notice.

• Dispute resolutions and governing law are important to consider in international contracts. Parties are often positive about their relationship and focused on making the research project work when they start their collaboration. Understandably, they may be reluctant to spend time planning for what should happen if the relationship later turn sour. However, it is vital to give some thought in advance to these clauses to ensure that there are appropriate procedures in place to deal with disagreements. The interpretation and effect of the terms of the contract may vary significantly depending upon which country's laws govern them. By deciding upon a governing law clause, the parties know what law is to be applied to determine questions regarding the rights and obligations under the contract. Where the parties' fails to agree on a governing law clause, there are complex

rules to determine what the governing law of the contract should be, and the outcome can vary depending on the jurisdiction deciding in the case. If you cannot agree whose national law should govern the contract, a solution could be to choose a neutral governing law of a third country. It is also important to include a dispute resolution clause which sets out the process by which the parties intend to resolve any disputes which may arise out of their contract. A dispute can be solved by various methods like litigation in court, arbitration, mediation and negotiation.