

Guide to agreement reviews

This guide is a support tool for you to be able to handle agreements in a simpler and more time efficient way, regardless of the agreement context. The idea is that the guide will make it easier to read and understand a draft agreement and in most cases provide sufficient support in the assessment of whether the agreement conditions are acceptable for the University. The aim is partly for the handling of agreements to be faster and more efficient and partly to achieve favourable conditions for the University in as many agreement situations as possible.

The University's collection of templates for many different agreement types is found on the Legal Division's website, <http://www.medarbetarwebben.lu.se/stod-och-verktyg/juridik-dokument-och-arendehantering/juridik/avtal>. The template agreements can be used as they are to produce a complete draft agreement and as proposals for individual provisions in a negotiation situation. You are always welcome to contact the Legal Division with questions on how to use a template agreement or if you need further advice and support.

Below is a list of the most common contractual provisions, with the University's position on different issues, for draft agreement reviews. Keep in mind that far from all contractual provisions are listed in any individual agreement. There is a dispute resolution clause in most agreements; however, publication provisions and provisions on the management of intellectual property rights mostly appear in different types of research collaborations. In the University's template agreements, there are examples of how the University prefers to formulate different contractual provisions.

1. Parties

The agreement begins by naming the parties to the agreement. The University is always referred to as 'Lund University', and not as individual members of staff, faculties, departments, divisions or research centres.

2. Background/introduction

Following the listing of the parties to the agreement there is often a short background to the agreement and its purpose. For example, there is a description here of whether or not the agreement is based on requirements from a funding body, e.g. a consortium agreement in a Horizon 2020 project.

3. Aim/purpose of the agreement

The agreement should clearly state what it is designed to regulate and the purpose of the agreement – does it concern confidentiality, research collaboration, contract research, transfer of personal data? What are the University and the other parties to carry out or contribute to the project? This is often stated in a project description in a separate appendix to the agreement, potentially taken from the application documents.

4. Management and organisation

If the agreement regulates a collaboration between more than two parties, it is a good idea to describe the project's management and structure/organisation in the agreement. Any

bodies for discussion and decision-making for the project, coordinators and contact persons should be included. It is also possible to describe how decisions are to be taken and communicated through provisions on voting, meeting minutes, veto etc. (see examples in the University's template agreements for contract research and research collaborations).

It is important that any voting rules provide the possibility for the University to veto decisions where there could be significant impact on the project activities for the University, e.g. budget decisions. It is also important that different decision-making bodies are not given the possibility to change anything that is agreed upon in the agreement – such changes require a written supplementary agreement.

5. Reporting

Provisions on how the parties are to report work carried out and results to each other are common, primarily in different kinds of collaboration agreements. It is important to structure the reporting in a practical way and avoid unnecessary administration.

6. Funding and payment

Regardless of whether or not the funding of the work to be carried out in a collaboration comes from a funding body, a company in a contract research situation or if each party is responsible for their own costs, there is normally a reference to a project budget in a separate appendix (potentially taken from application documents). The time and amount for invoicing or ordering is to be clearly stated for both partial payments and the total amount. Advance payment is always an advantage when the University is the recipient to ensure that the funds are available for project costs as they arise.

If the University is the recipient of the payment it is recommended that penalty interest is specified according to the law on late payments (see examples in the template agreements for contract research and research collaborations). It is recommended that you check the budget, payment and VAT questions etc. with a department finance officer or equivalent.

7. Confidentiality

Confidential information is information that one party would like to be able to share with other parties to the agreement but that they would like to keep confidential to others. Avoid an agreement on confidentiality if there is no real need given that the University is covered by the principle of public access to official documents. The agreement should state how a party is to specify that certain information is confidential, for example by labelling or, for oral information, through written communication afterwards. Confidentiality obligations are to apply for the shortest period of time necessary, and preferably for no longer than two-three years. The maximum period of time that the University agrees to confidentiality obligations is ten years. Research results are not to be covered by confidentiality obligations after the results are made public or published, according to the agreement's provisions on publication.

Confidentiality obligations do not apply to information that:

- a. the receiving party properly receives from a third party
- b. is developed outside the collaboration and independently of the confidential information

- c. is publicly known
- d. the receiving party has received permission to disclose from the disclosing party
- e. must be disclosed according to the law

Sometimes there are agreement provisions on the return or destruction of documents that another party has sent. As the University is obliged to archive documents, the University must always reserve the right to keep one copy for archiving purposes.

8. Publication

Freedom of research requires that research results must be free to publish. University staff should always be able to publish their research results, even if the results have been obtained in a collaboration situation. The same applies to joint results, that is, research results that have arisen from collaboration with another party. This applies regardless of who is the final owner or holds a licence for the results according to the agreement.

Collaboration partners can reach an agreement that prior to the publication of results there is to be a preliminary review. This is partly to make it possible for the parties to remove their own confidential information from the publication and partly to provide the opportunity to apply for intellectual property rights, such as patents. The delay in connection with a preliminary review is to be reasonable. The standard delay for a review is 30 days with an additional 60 days in cases when a party is to apply for intellectual property rights, a total of 90 days. The total delay should not be longer than four months, or 120 days. You can see examples of favourable publication clauses in the University's template agreements for contract research and research collaborations.

9. Intellectual property rights

In most cases, it is reasonable that the party that has produced – generated – research results also owns the results. When justified, primarily for fully-funded contract research, it is possible to provide the commissioning party with the rights option to acquire ownership rights or licence, non-exclusively or exclusively, at current market terms (there is an option to acquire clause in the University's contract research template). An assignment is fully-funded only if the commissioning party covers all of the University's direct and indirect costs for carrying out the assignment.

When ownership rights or licences to research results are sold in a contract research situation the payment must be at current market terms. Sometimes the funding to carry out the assignment alone can constitute payment at current market terms, for example, when it relates to basic research-focused contract research that is far removed from application on a market. However, it is important to try to assess if it is reasonable that the other party makes an additional payment for the actual transfer of the intellectual property rights to the results or the granting of a licence to use them. Such an additional payment may be made to an individual employee who has generated the research results in accordance with the intellectual property rights of academic staff and the matter of payment for a transfer or grant may therefore require an agreement directly with the employee concerned. The University's contract research template is designed for this.

The rules on state subsidy prohibit the University from underselling the transfer of ownership rights or the granting of licences. For example, it is not reasonable to grant intellectual property rights in an MTA situation where no funding is provided. Regardless of who has final ownership or licensing rights to the results, the University must at all times reserve the right to a licence to use the results for research and education free of charge.

It is not normally reasonable for background information, i.e. the research results obtained outside the relevant agreement situation, to be transferred or licensed to a third party other than for the implementation of project work. Exceptions may be made, for example if a party requires a licence to the background information to be able to use the co-owned results. However, if this is the case, the other parties with joint ownership are to be paid at the market rate of pay. Sample clauses for the regulation of intellectual property rights in different situations can be found in the University's template agreements.

10. Personal data and data privacy

Personal data is information that can be traced to a physical person who is currently alive, for example, an address, but also biological material or data that can be traced back to a specific individual with the help of a code list. If the agreement covers transfer and/or processing of personal data it is to specify that the GDPR is to be followed. See the University's template for personal data processing agreements. For transfer outside the EU/EES a standard EU agreement, Standard Contractual Clauses, is usually required.

11. Liability and indemnification

It is appropriate that the parties be liable for damages caused through a wilful act or gross negligence. There is to be a right to compensation for a breach of contract. Limiting the liability for damages to the value of the agreement for each party is often recommended. The University's liability for damages shall not comprise compensation for indirect loss or other compensation liability not covered by the University's insurance policy. It is a good idea to check with LU Estates, who have responsibility for the University's organisational insurance.

12. Term and termination

A start and termination date is to be specified if the agreement concerns a fixed-term collaboration. An appropriate term of notice depends on the nature of the agreement. Tied up resources and long-term collaboration require a longer term of notice – how much time is required to redistribute the resources? There shall be a right to terminate the contract if either party is in material breach of the agreement, and does not remedy such breach within a reasonable period of time (maximum of 30 days) after receiving notice thereof.

13. Governing law and dispute resolution/jurisdiction

Swedish law and Swedish courts are preferred when it comes to governing law and dispute resolution.

Arbitration is to be used with caution as it is very costly. In agreements where the value of the agreement for the University is at around SEK one million (as a minimum), including its own resources/co-financing, it may be justified to use arbitration for dispute resolution. Sample clauses can be found in the University's template agreements.

If the parties to the agreement are Swedish public authorities, disputes are to be resolved through mediation between the parties. Ultimately, the parties are to turn to the government for a decision.

14. Signing the agreement

Ensure that the appropriate person signs the agreement on behalf of the University, please see the appendix on agreements to the University's rules on the allocation of decision-making powers. There may also be delegation rules at the faculty and department levels. The head of department is authorised for sign confidentiality agreements and MTAs. The head of department, dean or vice-chancellor is authorised to sign agreements concerning grants, contract research or research collaborations, depending on the value for the University, see the agreement appendix. Extensions or amendments to agreements are usually signed by the person who signed the main agreement.

15. Some additional points

- Remember that only University staff can be principal investigators (PI) and carry out work on projects where the University is a party to an agreement.
- In agreements where intellectual property rights are given to another party or where there is a confidentiality agreement, participating staff are to sign the agreement 'Conditions for participation' for each individual project, <http://medarbetarwebben.lu.se/stod-och-verktyg/juridik-dokument-och-arendehantering/juridik/avtal/villkor-for-deltagande-i-projekt>.
- Is personal data going to be processed and/or transferred? Please see point 10 above.