



Knowing What You NEGOTIATE: Contract Language for Beginners

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Office of Sponsored
Programs Administration

University of Missouri

Promoting Collaboration in Research

Learning Objectives

- Gain a basic understanding of contract terms and conditions most commonly seen in research agreements.
- Be able to better negotiate terms and conditions in your institution's favor by having a more educated understanding of the contract you are negotiating.



LEGALESE

Breaking it down legal-style

Governing Law/Choice of Law

Definition

The provision/clause in a contract that allows the parties to agree that a particular state's laws will be used to interpret the agreement, even if they live in (or the agreement is signed in) a different state. In the event of a dispute, a governing law/choice of law provision determines which state's legal rules will be applied in the lawsuit.

Governing Law/Choice of Law

Importance

Why include this provision/clause in your agreement?

- Avoid the time and cost spent arguing over what laws apply should a dispute arise,
- Have a say in the which state/country's laws will govern the agreement, regardless of venue. Example: Alabama law in a Missouri venue.

Governing Law/Choice of Law

We can generally accept any state's governing law. Your General Counsel may have specific states they prefer to avoid based on their experience.

TIP: Create a list of unacceptable states and the reasoning for not accepting.

Governing Law/Choice of Law

Sample Language

*"This Agreement shall be governed by the laws of the State of **Missouri**."*

*"This Agreement is governed by and shall be construed in accordance with the laws of the **State of Missouri**, without regard to its conflict of laws provisions."*

*"This agreement, and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this agreement or its formation (including any non-contractual disputes or claims), shall be governed by and construed in accordance with **Missouri law**."*

Jurisdiction

Definition

In the event of a dispute, a jurisdiction provision/clause determines **where (in which state and county) the lawsuit must be filed.**

Jurisdiction

Importance

Why negotiate this provision/clause in the agreement?

- **Avoid the time and cost** spent arguing over where a dispute will be resolved.
- In addition, avoid the costs/time associated with having to **travel out of state or country** during the proceedings. How many would need to be involved? How many days? The costs can really add up.

Jurisdiction

- For MU, we are an Institution of Higher Education and a Public Corporation under the laws of the State of Missouri (Sec. 172.020 RSMo.) As a state entity, we do not consent to another state's or Federal jurisdiction. If nothing else, we will remain silent.

TIP: If your institution is a corporation, owned and operated by a government, be sure to get the **exact section of the law** to reference during your negotiations. This **strengthens your position**.

Jurisdiction

Sample Language

*“The courts of the State of Missouri will have **jurisdiction** to adjudicate any dispute arising under or in connection with this Agreement.”*

*“The parties hereby submit to the **jurisdiction** of the courts of State of Missouri for the purpose of hearing and determining any dispute arising out of or in connection with this Agreement or its formation or validity and for the purpose of enforcement of any judgment against their respective assets.”*

Arbitration

Definition

An arbitration clause requires the participants to resolve their disputes through the arbitration process. This process is an **out-of-court proceeding** in which a **neutral third party** called an arbitrator hears evidence and then makes a binding decision.

Arbitration

Binding arbitration (meaning the participants **must follow the arbitrator's decision** which will be enforced by the courts)

VS.

Non-binding arbitration (meaning participants **may reject the arbitrator's decision** and take the dispute to court)

The most popular is a binding arbitration clause.

Arbitration

Importance

Why include this provision/clause in your agreement?

- **Private** proceeding vs. **public** hearing
- If the dispute focuses on technical information, an **arbitrator who has technical knowledge** in that area can be selected

Arbitration

What are the disadvantages of this provision/clause?

- Binding arbitration ruling can't be appealed.
- Costs of arbitration can be significant or even exceed the costs of litigation.

Arbitration

- For MU, we can only agree to non-binding arbitration or dispute resolution.
- Under the laws of the State of Missouri, the Curators are given certain non-delegable responsibilities including governing the University system. As a result, the authority of the Curators cannot be related to a third party such as an arbitrator.

Arbitration

Sample Language

*"All claims and disputes arising under or relating to this Agreement are to be settled by **binding arbitration** in the state of Missouri or another location mutually agreeable to the parties. An award of arbitration may be confirmed in a court of competent jurisdiction.*

*"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be submitted to **non-binding arbitration** administered before the parties may initiate arbitration, litigation or some other type of dispute resolution process."*

Indemnification

Definition

An indemnification clause is used to compensate for loss or damage. To indemnify a party: 1.) to absorb the losses created by that party, rather than seeking compensation from that party, or 2.) to compensate that party if something you do (or fail to do) causes that party to experience loss, damage, or lawsuit from a third party.

Indemnification

Other key words to look for . . .

- “save and hold harmless [the other party]”
- “defend [the other party]”

Indemnification

Importance

Watch for overly broad indemnification language:

*“Consultant shall indemnify, defend and hold harmless the Client, the Client’s employees, directors, officers, **agents, representatives, subsidiaries, affiliated companies, and lenders** from and against **any and all** liability, costs and expenses including, but not limited to, attorney’s fees, that occurred in whole or in part, as a result of the Consultant’s **acts**, errors or omissions.”*

Indemnification

- For MU, we cannot agree to *defend, indemnify, and/or save and hold harmless* the other party.
- MU is a governmental entity of the State of Missouri. As such, we have sovereign immunity from most tort actions. We can only agree to indemnify and hold harmless **to the extent permitted by Missouri Law** (Article VI, Section 26a, Missouri Constitution Section 172.250, RSMo., 1994).

Indemnification

Sample Language

“To the extent permitted by law and without waiving sovereign immunity, each Party shall indemnify and hold the other harmless from and against liabilities, losses, damages, claims, or causes of action, and any connected expenses that are directly caused by or as a result of the negligent performance by each other (or by their agents or employees) of this Agreement.”

Termination

Definition

A termination clause provides one or more of the parties options for terminating an agreement.

Termination

Importance

Every agreement should have an exit plan! Whether it is the university, the department, or the PI who needs to terminate the agreement, we need to negotiate this plan into the agreement.

TIP: Add a reminder to your negotiation cheat sheet to cover termination, in case the sponsor does not address this point.

Termination

Items to cover in termination clause:

Parties—Each party should be able to terminate a funding agreement freely and for any reason.

Process—Written notice should be given.

Timeframe—30 days notice is standard.

Expenses—In the event a funding agreement is terminated before the project is completed, the sponsor will be expected to reimburse the university for all costs incurred through the date of termination and for all non-cancellable obligations.

Termination

Sample Language

*“Either party may terminate agreement by giving written notice of such termination **at least 30 days prior to termination**. Should this occur, the University should be **reimbursed for all actual expenditures and non-cancelable obligations up to and including the date of termination.**”*

TIP: Be sure the termination clause includes **both parties**. Sponsors often build in their right to terminate, but don't offer the same protection for the University. Be sure to negotiate this in.

Confidentiality/Disclosure

Definition

- The confidentiality term of the research agreement makes clear what information the parties agree not to disclose.
- It is ideal to keep this language out of sponsored agreements.

Confidentiality/Disclosure

Importance

Why negotiate this provision/clause?

- Could restrict ability to publish
- Could affect Intellectual property
- Could affect data use/using results for further research
- Adds significant personal responsibility and liability
- Protect ability to create and share knowledge
- Allow compliance with the Missouri Sunshine Law and other laws that may require disclosure

Confidentiality/Disclosure

- Missouri's Sunshine Law (section 610.011): "It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy."

TIP: Make sure you look closely at the DEFINITION of Confidential Information in the agreement.

Confidentiality/Disclosure

- There can be Confidential Disclosure Agreements (CDAs) or Non-Disclosure Agreements (NDAs) that may be stand alone agreements or can precede a sponsored programs agreement.
- These will often be handled by your Technology Transfer office.

Confidentiality/Disclosure

Sample Language

“Mizzou shall not disclose the existence of this agreement and shall not publicize or disclose the project or any results thereof without the prior written consent of Sponsor, unless disclosure is required by law.”

“Unpublished confidential data, information, or materials obtained or developed during the course of this agreement shall not be made available to other persons except as authorized by or required by Sponsor, or as required to be disclosed by the law.”

Publication

Definition

The ability of the University, the Investigators, and students to publish the results of research.

Freedom to publish research is imperative to the academic mission of the University to create and disseminate knowledge.

Publication

Importance

Why negotiate this provision/clause?

- Protects academic freedom
- Allows for timely sharing of scientific results
- Preserves fundamental research exemption from export control regulations
- Reduces institutional and personal liability (hard for the institution to manage publication by involved parties)
- Limits the suppression of knowledge
- Protects graduate students who need to utilize research in their dissertations

Publication

- Institution can allow review and comment by sponsor prior to publication. Always seek to avoid review and consent or review and approve.
- Institution can allow sponsor a set period of time to review research prior to publication. This time period should generally be kept to 30 days to prevent delays in sharing research. This allows the sponsor to identify any patentable material.
- When part of a large multi-site study, this time can be extended but you should avoid any delays in publication greater than 18 months.

Publication

Publication restrictions don't always show up in a separate publication section. Read Intellectual Property, Copyright, and Confidential Information sections closely to look for hidden publication restrictions.

TIP: Make sure that if Confidentiality has been included in the agreement that the PI is aware that while he/she may publish results, all reference to proprietary/confidential information would need to be removed from publication.

Publication

Sample Language

Unacceptable: “In the event Mizzou desires to publish or otherwise disclose information gained in the course of this project, Mizzou shall submit findings to Sponsor for **review and approval** prior to publication.

Acceptable: “In the event Mizzou desires to publish or otherwise disclose information gained in the course of this project, Mizzou shall submit findings to Sponsor for **review and comment** prior to publication.

Intellectual Property (IP)

Definition

- Intangible rights protecting the products of human intelligence and creation. A work or invention that is the result of creativity, such as a manuscript or a design, to which one has rights and for which one may apply for a patent, copyright, trademark, etc.

Intellectual Property (IP)

Importance

Why negotiate this provision/clause?

- Affects University ownership of inventions
- Allows for dissemination of creative ideas for the public good
- Commercialization of inventions, royalties, etc.

Intellectual Property (IP)

Mizzou's position regarding intellectual property is determined by the source of funding.

Federal

Almost all federal grants and contracts are subject to the terms and conditions of the Bayh-Dole Act (37 CFR 401). Under these terms, the University may elect to retain title to all inventions conceived or reduced to practice in the performance of the project (37 CFR 401.14(B)). If the University elects to retain title, the federal government shall have a nonexclusive, nontransferrable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any such invention throughout the world. The University reserves the right to negotiate additional licenses to commercial partners.

Intellectual Property (IP)

Federal Flow-through

The Bayh-Dole Act applies to federal funds even when such funds are flowed through a third party. If a company or state agency is flowing federal funds to the University, the company or state agency "will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions" (37 CFR 401.14(G)(1)).

Intellectual Property (IP)

Industry Funds

As a practice, Mizzou will not insist on retaining ownership of intellectual property resulting from industry-sponsored projects. Under special circumstances, however, University researchers may seek an exception to the practice if they have a compelling reason to do so.

Mizzou's policy, in compliance with BPM-203, requires F&A costs to be charged at the applicable negotiated rate plus five percent when a commercial or industrial firm requires rights in data to the exclusion of the University and/or claims ownership rights to intellectual property developed by the University under a project.

Export Control

Definition

Federal export control regulations prohibit the export to foreign countries of certain goods, technology, and technical data without an export license issued by the government.

These regulations were implemented for reasons of national security, economic and trade protection, and the advancement of foreign policy goals.

Export Control

Importance

Why negotiate this provision/clause in the agreement?

- It affects the ability of foreign scholars and students to participate in export-controlled research
- It affects the ability of investigators to disclose or discuss previously unpublished research at conferences and meetings where foreign nationals are in attendance;
- It affects the ability of investigators to engage in collaborations with foreign investigators, including restrictions on teaching foreign collaborators how to use export-controlled items in research (regulated as providing a "service")
- It affects the ability to send research equipment abroad.
- Failure to comply can have serious penalties for the investigator and institution.

Export Control

- It is the position of the University of Missouri Office of Research that research conducted by the faculty, staff, and students of the University of Missouri is in the public domain and considered fundamental research, as that term is defined in export control legislation promulgated by the U.S. Department of Commerce and U.S. Department of State.
- Most University of Missouri research will therefore be exempt from export control licensing requirements. However, where export control regulations are applicable to our research activities, the University requires full compliance with the law.

Export Control

Try to avoid contract language that:

- Forbids the participation of foreign nationals;
- Gives the sponsor a right to approve publications resulting from the research; or
- Otherwise operates to restrict participation in research and/or access to and disclosure of research results.

TIP: Protect fundamental research exclusion by eliminating contractual clauses that destroy our ability to claim the exclusion.

Export Control

- If you are dealing with classified projects or working on a contract that **REQUIRES** export control language to be included, contact your Export Control officer as soon as possible.
- If an export control license is required it can take considerable time and effort and can take months to process.

Export Control

Contact your Export Control Officer if:

- **The research project involves:**
- Shipping equipment to a foreign country
- Collaborating with foreign colleagues in foreign countries
- Training foreign nationals in using equipment
- Working with a country subject to a U.S. boycott
- Is the RFP marked "Export Controlled"
- Is the sponsor requiring pre-approval rights over publications or the participation of foreign national students

Other Terms to Look for

- **Work for Hire**

Work for Hire in an agreement means the sponsor will own the copyright/IP on the created work, NOT the institution or investigator.

- **Conflict of Interest**

Aside from PHS FCOI, if you see Conflict of Interest language in an agreement, make sure it is specific and related to scope of work. Broad COI requirements are hard to enforce and define.

The FAR

Let's get FAR out!



FAR (Federal Acquisition Regulation)

Definition

- The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds.
- It governs the three processes involved in the process of government purchases which includes the planning and recognition of acquisition, formulation of government contracts, and administration of the contracts published.
- Used on federal contracts and federal flow through contracts

FAR (Federal Acquisition Regulation)

Definition

- FAR is comprised of eight subchapters (labelled A to H) and contains 53 parts. These provisions are duly divided into subparts and sections which may be used as reference for certain cases.
- More on the FAR:
- <http://www.acquisition.gov/far/>
- <http://www.ucop.edu/raohome/clauses/guidance.html>

BUSINESS

Ironing out the details



Business Review

Don't forget to negotiate the **business side** of your agreements. Be sure to pay attention to terms and conditions that affect the **administration of the project**.

TIP: Not sure what to negotiate? Meet with your post-award team to discuss what they need/want to see when administering a project. Ask for sample invoices, effort verification documents, etc. to share with the sponsor to illustrate what we can provide.

Business Review

Terms to look for . . .

- Insurance
- Ownership of equipment
- Invoicing, receipts, timesheets
- Warranty
- Currency exchange
- Interest accrued and returned

NEGOTIATION

Where the rubber meets the road



Negotiation Process

If you've never negotiated an agreement, you may be unsure of the process. Here are some suggestions:

- **Conduct your negotiations via email** when possible. The reasoning is simple: it leaves a paper trail complete with dates and names.
- Confirm that you are **working with the correct person** who has the authority to negotiate language changes. Otherwise, you are wasting everyone's time.

XXXX,

Greetings from the University of Missouri. I am reaching out to you on behalf of Dr. XXXX to discuss some possible changes to the attached agreement. Below I have outlined the requested additions which are underlined, the requested deletions ~~which are stricken through~~, and the reasoning for each:

1. *The Grantee's acceptance of this agreement, as evidenced by the authorized signature in the space provided below, signifies that the Grantee's tax-exempt status as a recognized organization per Section 115 of the IRS Code Section 501 (c)(3) and Section 509(a) organization is current, . . .*

Reasoning: We are exempt via Section 115 of the IRS Code.

2. *Exceptions to the clause must be approved by the Foundation in writing. Grantee shall not make available such Public Materials, or any derivative works of the Public Materials, under any other licensing terms, without the Foundation's prior written consent. Notwithstanding the above, Grantee shall have the right to publish scholarly articles in appropriate journals without receiving permission from Foundation.*

Reasoning: According to MU's Collected Rules and Regulations, "faculty members have the right to freedom of inquiry, discourse, research, publication and teaching." We see this as a possible publication restriction due to the licenses granted in order to be published in scholarly journals.

I look forward to your thoughts. |

Negotiation Process

- **Put the ball in their court.** Ask them to suggest alternate language they would be comfortable with based on our expressed needs.
- **Break down the wall.** If a sponsor is taking a hard line and not willing to accept your specific language, **ask the reasoning behind their position.** This could lead to better understanding and the ability to come forth with more appropriate language. I like to use **“In order to better understand . . .”**
- Remember, you don't get what you deserve, you get what you negotiate!

Thank you!

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