

PART A

INTRODUCTION

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INTRODUCTION TO AGREEMENTS IN THE BIO/PHARMA SECTOR

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A. Introduction

This book considers different types of commercial agreement that are encountered in the biotechnology and pharmaceutical industries. For convenience, those industries are referred to in this book as the bio/pharma sector, and the agreements are referred to as bio/pharma agreements. The focus of the book is on agreements that concern: **A.1.01**

- the research, development, testing, manufacture, and commercialization of bio/pharma products and services; or
- the creation, use, and commercialization of intellectual property (IP) that may be useful in the bio/pharma sector.

Many, or most, bio/pharma agreements have an international element: for example, they might concern the grant of IP rights in more than one country, or involve collaborative research and development (R&D) to be conducted in several countries, or the parties to the agreement might be based in different countries. **A.1.02**

Often the United States of America (USA) is one of those countries, whether owing to its large (and rich) patient population, well-developed bio/pharma industries, or numerous sources of funding for bio/pharma ventures. Even where there is no US element in a commercial transaction, US influence may be seen. European lawyers and commercial managers who conduct business in this sector are familiar with template agreements that have a strong US flavour, even if the parties to the transaction are based outside the USA. **A.1.03**

In recent years, as the bio/pharma sector has grown in Europe, contractual documentation has become more diverse. Those of us who advise regularly on these agreements see a wide variety in style and content. The document we are asked to look at today may be drafted in a clean, modern, ‘European’ style; on the next, similar transaction, the document may be a dog’s breakfast of cut-and-pasted clauses drafted in different continents, each reflecting a different drafting style and based on different legal assumptions. **A.1.04**

Of course, Europe is not a single country, and each European country has its own legal and commercial traditions. Later sections of this book discuss some of the key differences of legal and commercial practice within Europe. Despite these differences, it is contended that a European style in contractual documentation is emerging in the bio/pharma sector. Some key features of the European style are: **A.1.05**

- a more concise drafting style than is encountered in US contracts—obligations are stated succinctly;
- a focus on key commercial issues, with limited interest in addressing remote, hypothetical risks;
- wording that reflects the legal framework within which the draftsman is working (in relation to both regulatory and contract law issues); yet
- at the same time, an influence from Anglo-Saxon contracts (partly US and partly UK), and contracts in this sector are often written in the English language.

A.1.06 This book offers a selection of template agreements that are drafted with this approach in mind, and includes detailed comments that are made from a European perspective. The principal author is a practising English lawyer whose clients are mostly European companies and universities working in the bio/pharma sector. Additional comments are provided by leading practitioners based in a selection of other European countries (Germany, France, Spain, the Netherlands, and Sweden). As with all template agreements, detailed legal advice should be sought as to whether the terms set out in the template agreement are suitable for the specific transaction that is contemplated.

B. Overview of Legal Framework within Europe

A.1.07 Within Europe, there are different legal traditions. Some major European countries have a legal system based on a civil code; many of these codes have German or French roots. As its name suggests, a civil code seeks to codify the rights and obligations of citizens in different areas, including commercial law. When interpreting contractual obligations, it may be appropriate to consider provisions of the civil code, or the specific statute regulating that type of contract. Under civil code systems the main source of law is the statute or written regulation. When a civil code system regulates a type of contract, two main types of regulation may be involved:¹

- (a) public order² regulations, which cannot be varied in a contract; and/or
- (b) regulations that may be excepted by the parties in a contract.

¹ This explanation is based on comments provided by our Spanish consultant; the legal regime in other civil law countries may differ.

² This is an approximate English translation of what is known as *l'ordre public* in French law.

A.1.08 A contract cannot modify public order regulations, therefore any obligations contained in a contract that contravene such regulations will be void.

A.1.09 The non-compulsory regulations contained in the code establish the general conditions for any legal consequence or issue arising out of a contract, where the contract itself has not expressly regulated the issue. Civil law tends to produce specific regulations for each type of contract, but where a legal issue arises and such specific regulations do not exist, the legal issue would be approached by analogy with the existing written law.

A.1.10 Within this civil law framework, judicial case law complements and interprets the written law but does not create new law.

A.1.11 From a common law perspective, one of the striking features of contract law under civil law systems is the importance of good faith principles in the interpretation of parties' rights and obligations under contracts, and the possibility of implying terms into the contract based on such principles.¹

¹ eg under Dutch law, where in some recent cases it appears that the courts have made substantial changes to the express terms of the contract based on good faith principles.

The French civil code, originally introduced by Napoleon Bonaparte in 1804, was influential in the development of legal codes in several European countries, including Belgium, Italy, and Spain. The German civil code has been influential in the development of the current legal codes in Austria, Switzerland, the Netherlands, Portugal, and Greece. The Nordic countries developed their own legal systems which avoided codification; although Nordic contract law has been influenced by German law, as we shall see from the comments of our Swedish consultant, in some areas of commercial law, Swedish law is, in effect, similar to English law. **A.1.12**

England (or, more accurately, England and Wales) has a legal tradition based on the common law. The English common law system influenced the legal systems of most US states (with the notable exception of Louisiana, which draws on the French tradition), although English and US laws have diverged significantly as they have developed over the last 200 years. The common law tradition can also be seen in the legal systems of Commonwealth countries and other countries that have historic associations with the UK, including (amongst others, and in no particular order) India, Hong Kong, Singapore, Australia, Canada, and the Republic of Ireland. **A.1.13**

In the English common law system, there is no general codification of laws; the law develops gradually based on court decisions and specific legislation. There is some English legislation which affects the terms of commercial contracts, particularly in the area of clauses that seek to limit or exclude liability.¹ Increasingly, EC-wide laws are affecting such terms, particularly in relation to contracts with consumers. Perhaps the closest that English law has to a commercial code is in the area of sale of goods. The Sale of Goods Act 1979 provides a detailed code governing the relationship between buyer and seller in contracts for the sale of goods. In most of the areas covered by this code, in business-to-business contracts the Act's provisions can be overridden by the terms of a specific contract between the parties.² UK intellectual property legislation provides a limited framework for transactions involving patents, copyright, and other intellectual property, but does not seek to provide a comprehensive code.³ **A.1.14**

¹ eg the Unfair Contract Terms Act 1977.

² The Supply of Goods and Services Act 1982 provides a more limited set of provisions in relation to contracts for the supply of services (with or without goods).

³ eg, in relation to patents, see ss 30—36 of the Patents Act 1977.

Elsewhere in the UK, Scotland's legal system has features based on Roman law as well as common law, and these features affect how contracts are formed and interpreted. Northern Ireland's laws are mostly the same as England's, but with some exceptions—particularly some aspects of property law that are distinctly Irish. It is therefore not appropriate to refer to 'UK law', as there are three separate legal systems within the UK. In practice, those legal systems are similar. The general approach of the common law system in relation to contracts is hands-off: the parties are free to decide what terms to include in their contract, and the courts are reluctant to imply terms into a contract unless this is strictly necessary. Partly as a result of this hands-off approach, common law contracts tend to be more detailed than civil law contracts: the common law contract should state all the obligations of the parties and not rely on the court to fill in the gaps. **A.1.15**

A.1.16 These different legal systems can be viewed as a general framework for commercial transactions.¹ The framework supports both specific laws and regulations that are relevant to bio/pharma transactions (eg company laws, consumer protection laws, pharmaceutical regulations, etc), and commercial practice in the relevant countries (eg how contracts are formed and interpreted). The European Commission is working on the development of a common system of contract law throughout the EU, although it seems unlikely that this will bear fruit in the short term.²

¹ There are, of course, other legal systems within the enlarged EU. For example, former Soviet-bloc countries may have legal systems based partly on socialist laws.

² See the Common Frame of Reference project, discussed at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

A.1.17 Contract law issues are discussed in detail in chapter 13, below.

C. Regulation of Commercial Activities in Europe

A.1.18 Increasingly, new legislation within European countries (or at least those that are part of the EU)¹ is being passed at the European level, by means of EC Regulations and Directives. These pan-European laws either become automatically part of national law once passed, or must be implemented in national laws within a defined time period. In recent years, in the UK, the most significant new intellectual property laws and consumer protection laws have been introduced in this way. Related areas of national law, such as data protection, are based on EC laws. Intellectual property and data protection laws are discussed in more detail in chapter 11, below.

¹ For a discussion of the membership of the EU, see the section on European countries and institutions in chapter 12 below.

A.1.19 Another area where EC laws are probably more significant than purely national laws, is competition law (known in the USA as antitrust law). As is discussed further in chapter 12, many EU countries now have national competition laws that have been aligned with EC competition law, and which address competition issues at a purely national scale. Where a competition issue arises on a European scale, EC competition laws should be considered.

A.1.20 Typically, when drafting and negotiating bio/pharma agreements, Article 81 of the EC Treaty will be the main item of legislation that needs to be considered, together with EC regulations and guidance made under Article 81.¹

¹ See further, chapter 12 below.

A.1.21 Another area of European law that is increasingly being harmonized is tax law. For example, Value Added Tax (VAT) is a pan-European law, although its implementation varies between EU countries. See further, chapter 14 below. European laws are also being

developed in areas that might affect bio/pharma companies, but which fall outside the scope of this work, such as the harmonization of company law and the rules governing the issue of shares in public companies.

As well as these general laws, there is extensive regulation of specific activities in the bio/pharma sector. This regulation mostly falls into the following broad categories: **A.1.22**

- Regulation of research activities, including use of animals, human tissue, genetically modified organisms, etc.
- Regulation of products that may be used in humans, including requirements for clinical trials, etc.
- Incentives for bringing medical products to market, including data exclusivity laws, orphan drug status, supplementary protection certificates, etc. To some extent this last category could be considered part of European intellectual property law.

Most of the above areas of law can affect how bio/pharma agreements are drafted. **A.1.23**

D. Types of Agreement, and Commercial Priorities

Preliminary agreements. The agreements in this book are organized by theme. The first section is called ‘preliminary agreements’ and includes a selection of letters of intent, confidentiality agreements (CDAs, or confidential disclosure agreements), and similar documents. Typically, such agreements are signed at an early stage in negotiations, prior to negotiating a detailed agreement. Often, these preliminary agreements are negotiated with very limited involvement from a lawyer, or none at all. For some people, the signature of a letter of intent or CDA is regarded as symbolic, and little attention is given to the detailed terms. As will become clear from the comments on these agreements in later chapters, such an attitude is misguided: the detailed terms do matter. It is understandable if a commercial manager is reluctant to involve his lawyer at this stage. The discussions might not lead to a full agreement, and lawyers are expensive (although a quick legal review of a preliminary agreement should not be too time-consuming, particularly if a good template agreement has been used). Signing a preliminary agreement might have legal consequences, so it is a risky strategy to take no legal advice on its terms. **A.1.24**

Collaborative R&D agreements. There are many types of R&D agreement, from a simple commissioning of a research project at a university, to major R&D joint ventures between multi-national companies. Increasingly, the terms of university agreements are becoming standardized, although IP issues are often points of contention. In the UK, the Lambert Committee was established to develop some standard research agreements for use between industry and universities. The Committee comprised representatives from industry and universities. It developed five versions of a standard research agreement, with each version having different IP terms (ranging from outright ownership of results by the university, to outright ownership by the commercial sponsor). More recently, it has developed three versions of a collaborative research agreement.¹ In Sweden, the Swedish Governmental Agency for Innovation Systems (VINNOVA) has produced a commented model **A.1.25**

agreement for collaborative research with particular regard to cooperation between universities or research institutes and commercial companies.² It is understood that similar initiatives may be in development in other European countries. In general, European universities are perceived as being more flexible in relation to IP terms in contracts than their counterparts in the USA.

¹ See <<http://www.innovation.gov.uk/lambertagreements/index.asp>>.

² See <http://www.vinnova.se/upload/dokument/verksamhet/starki_foi-miljoer/vinn_excellence/avtalsmanual_eng.pdf>.

A.1.26 It is, perhaps, inevitable that IP issues will sometimes be contentious when negotiating R&D agreements, particularly those that are made between universities and commercial companies. The interests of the two parties in this area may not be aligned. A university is usually a charitable body. Under charity law, it will typically need to reserve certain rights to publish the results of its research. Moreover, this may be a requirement of certain funding bodies, and it is important for an academic's career to make publications. The commercial sponsor may be happy for the academic to publish the results of the research, but it might wish to have some control over the content of the publication. In some cases, the commercial sponsor may prefer to keep the results secret, so that its rivals do not have access to them. A typical compromise is to allow the sponsor to delay publication for a limited period, to enable the sponsor to file a patent application and to remove pre-existing information confidential to the sponsor from the publication.

A.1.27 In the area of IP ownership and use, the commercial sponsor will usually prefer to own any IP in the results outright, with no obligations to exploit the results. But this approach might not be consistent with the university's objective of ensuring that the results of its research are used for the public benefit. The university will usually prefer to grant a licence to allow the commercial sponsor to use the results in return for payments such as lump sums and royalties. In some situations, it might be premature to grant such a licence and the agreement will be structured as an option to negotiate licence terms.

A.1.28 In some countries, these university objectives may be bolstered by legislation that protects the university's intellectual property position.¹

¹ In the US, see the Baye–Dohl Act of 1980, which requires US universities to retain ownership of any IP that they generate. For information on the position in different European countries, see <http://ec.europa.eu/invest-in-research/policy/crest_cross_en.htm> and <<http://www.eutechnologytransfer.eu/>>.

A.1.29 *Services agreements.* The development of bio/pharma products is a complex process that involves people with many different skills. The largest international pharmaceutical companies may have all of these skills in-house, but most biotechnology companies will need to engage outside contractors to provide services. Some of the services, such as the provision or management of clinical trials, or the manufacture of drug product, are discussed below. A few examples of general services that might be the subject of a services agreement include the following:

- storage, vialling, or delivery of drug product;
- drug safety surveillance (pharmacovigilance);

- data analysis;
- technical auditing; and
- regulatory consultant services.

Usually, a service provider will accept contract terms that protect the IP position of the client (ie the company that is developing a bio/pharma product). Sometimes, the performance of the services will involve the use of IP or proprietary information developed by the service provider. Occasionally, there is some negotiation of IP issues around the service provider's IP, including any improvements to that IP that are made in performing the services.¹ Other issues that may need to be negotiated include liability and indemnities (eg to deal with the situation where a patient is injured in clinical trials), and the duration of the contract. The client may need to be able to terminate the contract early if adverse trial results are obtained, or if the development programme is cancelled or de-prioritized. The financial consequences of any early termination may require negotiation. **A.1.30**

¹ See eg the intellectual property terms in Precedent 4(b).

Clinical trials agreements. In the UK, the terms of clinical trials agreements are becoming standardized. All commercial clinical trials that are conducted in National Health Service (NHS) hospitals will usually be made subject to the terms of the standard NHS clinical trials agreement.¹ Whether or not conducted in an NHS hospital, sponsors of clinical trials in the UK usually agree to comply with the Compensation Guidelines of the Association of British Pharmaceutical Industries (ABPI), including the ABPI standard indemnity.² It is understood that UK insurance policies for clinical trials will usually be consistent with the terms of the ABPI Compensation Guidelines, although this should be checked in individual cases. **A.1.31**

¹ See <http://www.dh.gov.uk/en/Researchanddevelopment/a-z/dh_4002073>.

² See <<http://www.abpi.org.uk/>>. The indemnity can be found as an appendix to the NHS clinical trials agreement referred to above.

In practice, very few (if any) substantive changes to the NHS agreement are made by sponsors, where that agreement is used. Changes were sometimes made to the original version of the NHS agreement, but since its revision (most recently in 2007) its terms have become largely accepted. **A.1.32**

In 1998 the Swedish Association of the Pharmaceutical Industry (Läkemedelsindustriföreningen, LIF) and the Swedish Federation of County Councils (Landstingsförbundet, Lf) concluded a standard main agreement concerning clinical trials. The author is not aware of any similar standardization of clinical trial agreements and compensation arrangements in other European countries. **A.1.33**

Despite this standardization in the UK, there will still be situations in which the NHS contract is not considered appropriate or desirable. These situations may include: **A.1.34**

[A.1.35] Chapter 1: Introduction to Agreements in the Bio/Pharma Sector

- where the trial is conducted in a private (ie non-NHS) hospital;
- where the trial is an academic-led trial rather than a commercial trial;¹ and
- where the trial is conducted outside the UK.

¹ Guidance notes accompanying the NHS clinical trial agreement make clear that it is only intended for use in commercial trials sponsored by a bio/pharma company.

A.1.35 Clinical trials agreements may involve different people and organizations, including:

- the sponsor;
- the investigator (doctor) who is running the trial, who may enter into an investigator agreement himself, or may arrange for his employer (usually a hospital or university) to do so;
- the hospital in which the trial is run;
- where the trial involves academic studies, a university may be involved (which might have a close connection with the hospital). Sometimes, the investigator may be an employee of a university and an honorary employee of the hospital (or vice versa); and
- any clinical research organization (CRO) that is responsible for supervising the trial, supplying the drug product, ensuring that the data from the trial are properly collected, etc.

A.1.36 If a CRO is involved, the sponsor may enter into a CRO agreement with the CRO and leave the CRO to contract with the hospital and/or investigator, or the sponsor may contract with the hospital/investigator directly. One version of the NHS agreement referred to above is a three-way agreement between sponsor, CRO, and hospital.

A.1.37 Whichever route is followed, careful thought needs to be given to who the parties to the contract(s) should be. The template agreements in chapter 5 include both an investigator agreement and a CRO agreement, as well as the standard NHS document. The patient is usually not a party to the clinical trials agreements but will usually have signed a consent form in relation to his participation in the trial. A sample patient consent form is included in chapter 5, but this will almost certainly require revision to make it suitable for the individual trial.

A.1.38 *Product manufacturing and supply agreements.* Different types of manufacturing and supply arrangement are encountered, including:

- contracts under which a company is engaged to supply a product for use in clinical trials. Such contracts may involve, first, the development of a manufacturing process which will enable the product to be manufactured in greater quantities than were needed for initial research activities;
- contracts for full-scale manufacture and supply, eg for Phase III trials or for commercial sale; and
- contracts under which a licensor supplies product to its licensee. Sometimes licence agreements in the bio/pharma sector do not grant manufacturing rights but instead include obligations on the licensor to arrange the supply of product to the licensee. The reasons for this type of arrangement vary. It may be convenient to use a single manufacturer in all territories, or the licensor may wish to reserve manufacturing rights in order to give him greater control over the activities of the licensee.

Distribution and marketing agreements. Distribution agreements in different industry sectors share some common features. The basic relationship between a principal and his distributor is a familiar one, whether the products being distributed are pharmaceutical drugs, spare parts for tractors, or the latest computer game. Nevertheless, distribution agreements in the bio/pharma sector have some unique features, partly as a result of the extensive regulation of bio/pharma products. **A.1.39**

A distinctive feature of marketing bio/pharma products is the so-called co-marketing agreement, and its cousin the co-promotion agreement. Under these agreements, the party appointed to undertake marketing or promotion shares responsibility for these activities with the bio/pharma company. For example, both parties might employ their respective sales forces in the same territory. From the customer's perspective, and depending on how the arrangement is set up, it may or may not be clear that two different sales organizations are involved. **A.1.40**

Licence agreements. Perhaps more than any other industry sector, the bio/pharma sector places a high value on patents and on IP generally. Many bio/pharma companies use IP licensing as a route to the commercialization of their products or intellectual property. Detailed, industry-specific licence terms have evolved over the last 25 years, as the biotechnology industry has grown. Chapter 8 provides a selection of template agreements for licensing, including both brief and very detailed agreements. **A.1.41**

As with most commercial transactions, there are some key terms to most licence agreements, including: **A.1.42**

- Which IP is involved, and what activities are being licensed? Are the rights granted on an exclusive or non-exclusive basis, and for which territory, field, duration, etc?
- What payments are to be made? These may, for example, include up-front payments, milestone payments, and royalties.

Unlike some other types of commercial transaction, the negotiation of IP licence agreements often involves a large, second tier of commercial issues, which might not have been mentioned in any term sheet, but will probably require discussion. This second tier includes issues such as sub-licensing rights and conditions, performance obligations, royalty-stacking, warranties, termination rights, and rights to improvements. Careful thought will also need to be given to the competition law implications of any terms that are agreed, particularly in areas such as exclusivity, non-compete clauses, field restrictions, pricing, IP enforcement, etc. Tax advice may be needed on the structuring of any payment provisions and on compliance issues. In some ways, licence agreements are the most sophisticated and complex of the types of agreement covered in this book. **A.1.43**

Assignments. An assignment of IP is analogous to the sale of a house—it involves an outright transfer of ownership of the IP. By contrast, a licence agreement is similar to a lease of a flat or apartment; ultimate ownership of the property remains with the licensor or lessor. **A.1.44**

A.1.45 The detailed wording of assignments tends to be rather formal and technical. The wording is slightly different for patent assignments and for copyright assignments, respectively. This is due to the fact that patents and copyrights are different types of IP that are exploited in different ways and under different legal regimes.

A.1.46 Chapter 9, as well as including two formal IP assignments, includes some contract terms under which individuals—employees, academics, and students—agree to assign IP that they generate to their employer or sponsor. Contract terms in this area may be affected by employment laws in the country in which the individual is employed or engaged. It is therefore important to obtain legal advice on whether the template agreements need to be adapted to meet local laws.

E. How to Use this book

A.1.47 This book is principally about the drafting of agreements. Where the book is used to assist a draftsman in preparing an agreement, an obvious starting point is to find the most suitable template agreement and consider how it needs to be revised for the specific transaction. When doing so, the draftsman may wish to consider:

- detailed comments set out next to each template agreement in Part B of this work, on the opposite side of the page from the relevant clause;
- general comments on the type of agreement, which are to be found at the beginning of each template agreement and at the beginning of the relevant chapter in which the template agreement is found;
- an overview of relevant European laws, in Part C of the book; and
- primary materials on European competition laws (eg the text of the Technology Transfer Regulation), to be found in Part D of the book.

A.1.48 Once a first draft of the agreement has been prepared, it may be appropriate to discuss it with colleagues in other departments (or with the client), particularly if the transaction is commercially significant. Drafting bio/pharma agreements is usually a team effort. The commercial team will often have established the financial terms before preparing the first draft, although tax advice may be required on payment structures. General legal advice on the draft should be sought from a suitably qualified and experienced lawyer in the country whose law is to govern the contract, and perhaps also in any major territory in which the contract will be performed (eg if it is a licence agreement covering the US territory, US antitrust law advice may be desirable). A regulatory expert may have comments on clauses dealing with regulatory issues (eg the wording of an adverse events clause, or the content of a technical agreement which defines the parties' responsibilities to comply with regulations). R&D managers will probably prepare the first draft of any work plan (although this may need legal and commercial input as well, to ensure that the obligations are appropriate and clearly expressed). Any schedules or annexes to the agreement, which may have been drafted by colleagues, should be checked to ensure that their terms are both clear and consistent with the main agreement.