# Checklist for a Consortium Agreement

This checklist has primarily been drafted for Consortium Agreements between partners in Technical cooperation contracts.

## 1. Contents

Technical cooperation contracts normally include the following clauses as described in this chapter:

- General information (Section 2)
- Preamble (Section 3)
- Subject of the contract (Section 4)
- Technical provisions (Section 5)
  - Technical contribution of each party
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  - Production schedule, for information
  - Maximum efforts
  - Modification procedures
- Commercial provisions (Section 6)
  - Confidentiality
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  - Legal protection of results (patent rights)
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  - Sublicences
- Organizational provisions (Section 7)
  - Steering and cooperation committee
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  - Revision of the agreement
- Financial provisions (Section 8)
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- Legal provisions (Section 9)
  - Legal form of cooperation
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## 2. General Information

In addition to the traditional clauses included to identify the parties, it is desirable to include, if possible, an exhaustive list of the persons likely to work on the contract. This allows for insistence on confidentiality for the results of the collaboration.

This clause complements and reinforces the secrecy clause.

The presence of any sponsor should be mentioned, especially if the sponsor has certain rights to the sums that it contributes to the cooperation effort.

## 3. Preamble

The preamble summarizes the reasons for, and the context of, the agreement:

- the strategic reasons for the partners' cooperation, with a possible summary of negotiations;
- reasons why the parties are applying a specific legal framework to the contract;
- languages used in drafting the contract and language version considered to express the will of the parties (in the event of multiple translations);
- definition of terms used in the contract:
  - commercial;
  - technical;
  - financial;
  - legal.

## 4. Subject of the Contract

The subject of the contract must be described extremely precisely, because it influences many clauses in the contract and may include a guarantee incurring the liability of the parties, which could turn out to be very costly.

It is necessary to stipulate as precisely as possible:

- preliminary technical specifications;
- and/or the desired technical results;
- and/or the works to be accomplished.

In order to limit the volume of this section, it may be judicious to include the majority of the technical descriptions in appendices to the contract and preserve only the basic information in the body of the agreement.

## 5. Technical Provisions

### a. Technical contribution of each party:

- as precise a definition as possible of the tasks that each party intends to carry out (possibly referring to appended technical documents);
- relationships between the production programmes of the different participants.

### b. Technical resources made available

- human resources;
- equipment and facilities;

- information, whether protected or not.

These means should be as detailed as possible:

- number of persons;
- qualifications;
- nature of equipment;
- information disclosed:
  - type (plans, manuals, calculations, prototypes, etc.);
  - delivery date;
  - place at which it is made available;
  - language used.

### c. Production schedule, for information

Out of prudence, the parties should not accept an irrevocable schedule, unless they are absolutely sure that it can be met because it offers no problems.

An irrevocably accepted production schedule can be considered to be a guaranteed commitment and may involve payment of indemnities if not met.

There are other methods to guarantee minimum compliance with deadlines, as discussed in the section on Organizational Provisions.

### d. Maximum efforts

In view of the circumstantial character of many operations, it may be useful to specify that the commitments of the participants apply to the availability of human, material and intellectual resources rather than the achievement of the desired results.

It may be advisable to fix a financial ceiling for the outlays that each participant is ready to make.

### e. Modification procedures

The technical provisions give an overview of the cooperation at any given time. The information provided may undergo many changes or even be discarded altogether as the work progresses.

To deal with the highly volatile nature of this situation, it is advisable to provide a very flexible procedure for making changes to the initial specifications. This could go as far as including the termination of certain tasks, the withdrawal of certain parties, the inclusion of new partners, etc.

To avoid disputes, the conditions of this procedure should be clearly indicated in the contract (see Organizational Provisions).

## 6. Commercial Provisions

In addition to the basic confidentiality clause, the commercial provisions mainly specify the division of property and utilization rights on the results of the cooperation, whether initially expected or not.

The basic principle applied in drafting these provisions is to stress the capacities and role played by each party in order to encourage maximum commercial exploitation of the results. There is no strict rule. There are only usages, which should be adapted to each situation.

### a. Confidentiality

The confidentiality clause should cover the following points.

- A secrecy undertaking concerning the information disclosed by the other parties as part of the operation. In most cases, the scope of this undertaking is very wide and subject to few expressly mentioned restrictions (sales literature and relations with any subcontractors).
- Limits on the undertaking in respect of information not considered to be confidential because:
  - it was already known to the signatory before the negotiations started, if this can be shown by irrefutable proof;
  - it is public property;
  - it was disclosed to the signatory by a third party not bound to the other parties by an undertaking of secrecy.
- The period during which this undertaking must be respected. Generally, this period greatly exceeds the contract's expiry date (eg a 10-year term). Frequently, it equals or exceeds the patent protection period.

### b. Ownership of results

The principle is to ensure that common inventions are systematically owned jointly. This is generally the case.

This principle may be subject to variation in the event of an invention being the work of a single party to the cooperation contract and solely the result of its intrinsic skills rather than shared knowledge. In this case, the inventor may be the exclusive owner of the results.

The contract may also subject the inventor to restrictive clauses:

- territorial division, by virtue of which the inventor owns the discovery only in its home country and the other parties are free to register it in unprotected countries;
- division of markets, by virtue of which the inventor owns the discovery only in business sectors in which it is already active;
- free licensing of results for the other parties.

### c. Legal protection of results (patent rights)

Generally, the contract provides that the cost of patenting the results should be shared by the parties that benefit from such a patent, whether they own it or not.

It may be useful to stipulate an option clause in the event that the designated owner of the result waives its option to start registration proceedings within the period stipulated in the contract. After this period, another party would have the right to start these proceedings in order to become the owner of the patent, even if it has had no hand in the invention. In this case, it generally bears the total cost of protecting the invention.

### d. Commercial utilization of results

Generally, technical cooperation agreements result in joint ownership of the results. In this case, each party is free to use them as it sees fit.

Such utilization is frequently subject to restrictions aimed at optimizing effectiveness by limiting the freedom of the parties to their prime speciality:

- territorial division between the participants;
- division of applications markets.

It is obviously necessary to take care in drafting these clauses, whose application is capable of interfering with the principle of the free trade of goods within the EC (Treaty of Rome).

If the result is owned by a single party, such a party is free to use it as it sees fit or maybe as subject to restrictions of the type mentioned above:

- territorial division;
- division of markets;
- free licenses for the other participants, which are then fee to use the same results.

If one of the participants in the operation is not normally involved in the commercial utilization of the results (for example a university research laboratory), it may be desirable to specify that such a party has nevertheless the right to use the results for its own research purposes.

If the participants likely to use the results of the cooperation have very similar set-ups capable of turning them into competitors during the commercial utilization phase, it is advisable to settle this rivalry when signing the contract by stipulating that a joint production and marketing structure (Economic Interest Grouping or joint venture) will be created to use the results of the cooperation. In this case, the rules governing the organization of such a structure must be specified.

### e. Commercial obligation

Many contracts, particularly those concerning projects partly financed by national or EC authorities, stipulate a period during which the participants are obliged to start using any results commercially.

If the results have not been used commercially by the end of this time, the authorities can in certain circumstances reserve the right to force the participants to grant licenses to other companies wishing to exploit the results.

This type of clause is designed to limit the risk of results being frozen by companies not wishing to use them or see them used by competitors.

### f. Relevant Patents, know-how and information

The application of a cooperation agreement may require the use of knowledge, owned by one of the parties, resulting from work carried out prior to the agreement.

In this case, the contract generally provides that the party owning the knowledge must disclose it to the other participants, provided that the latter undertake to use it only to carry out their obligations under the agreement.

In the event that the cooperation produces marketable results, partly based on the patents or know-how owned by one of the parties prior to the agreement, the contract may provide that such a party grant them on advantageous financial terms to the other participants wishing to use them commercially.

It is always useful to cover the eventuality of the owner refusing to disclose or license its knowledge if the disclosure of such information is likely to do serious damage to its own business.

### g. Sublicences

The licensor can authorize the licensee to grant sublicences to third parties within clearly defined limits. In this case, it is necessary to indicate:

- the conditions under which such sublicences are granted;
- the need to obtain the licensor's prior consent in accordance with duly explained grounds.

## 7. Organizational Provisions

### a. Steering and co-ordination committee

Regardless of the legal form around which the cooperation is organized, it is highly desirable to provide for the creation of a co-ordination structure for the partners as soon as the work is started. This structure may have different names (steering committee, liaison committee, management committee, etc.), but its role is always the same:

- to define, divide and develop the tasks;
- to check the progress of the works;
- to co-ordinate the research teams;
- to co-ordinate the preparation of the reports (technical, financial, etc.);
- to advise and direct the partners on the developments necessary for the project;
- to permit formal exchanges of information between the partners.

The contract should carefully define:

- the committee’s exact delegated responsibilities;
- its organization conditions (composition, etc.);
- its operating conditions (meetings, decisions, chairmanship, etc.);
- the scope of its power.

The work of this steering committee is frequently translated into daily management and representation duties by a coordinator (or manager) selected from among the parties.

Here, too, the contract should clearly define his responsibilities and powers.

### b. Cooperation supervision

Each party undertakes to follow the production schedule and budget specified in the technical provisions of the contract. In view of the uncertain character of many projects, these production timetables are generally given for information only and do not incur the liability of the parties.

However, the risk of uncontrolled time and cost escalation is very real in many projects. To limit this risk, it is desirable to provide for a strict and effective inspection and supervision system managed by the steering committee:

- frequent progress meetings (ranging from once a month to one per quarter);
- frequent technical and financial progress reports (actions completed and results obtained);
- optional exceptional meetings as soon as agreed estimated deadlines are overrun, including the right for the parties to review their position within the cooperative venture as based on clearly stated reasons.

### c. Revision of the agreement

In order to avoid disputes, the contract should provide simple and clear cooperation agreement revision procedures:

- modification of technical provisions;
- modification of financial provisions;
- withdrawal of partners;
- acceptance of new partners;
- termination of the agreement after full completion of the programme.

Decision-making conditions should be mentioned:

- routine steering committee meetings;
- calling of exceptional meetings;
- powers of each party;
- decision-making method (unanimously, majority agreement, etc.).

## 8. Financial Provisions

### a. Financing plan

- Detailed estimate of the total cost;
- financial contribution of each party;
- outside financial assistance (from authorities, banks, venture capital, etc.);
- expenses and financing plan;
- annual budget.

Detailed documents may be referred to appendices in order to keep the body of the contract light.

### b. Modification procedures

The data in the financing plan is generally for information only and may undergo many changes.

In order to account for this changeable nature, the contract should clearly specify the conditions governing financial modifications and their consequences on the organization of the cooperation (see Organizational Provisions).

### c. Mutual payments

Under certain circumstances, several parties may be caused to incur a common expense (personnel, equipment, etc.).

It is desirable to provide for the procedure governing the payment of this type of expense by each party in the contract:

- reimbursable advance of a participant and method of reimbursement;
- joint account and conditions of paying in funds;
- terms of payment;
- currency;
- impact of exchange rates and bank transfer costs;
- payment of taxes;
- interest, if any, etc.

### d. Audit of expenses

The contract should provide for the right to examine the expenses of every party at the request of the steering committee or one of the partners.

Accordingly, each party should keep detailed accounting records of all its expenses:

- personnel expenses (using daily work sheets filled in by each employee);
- receipts for travel and accommodation expenses;
- invoices for the purchase of equipment, consumables, outside services (consultants, experts, etc.).

These accounts should be accessible at all times, even retroactively. Audits by external auditors may be organized.

## 9. Legal Provisions

### a. Legal cooperation status

Technical cooperation agreements may take different legal forms:

- an agreement;
- an association;
- a consortium;
- an Economic Interest Grouping or European Economic Interest Grouping;
- a joint venture.

The only structure requiring large commitments from the partners is the joint venture, which requires the pooling of capital and technical experience.

The other legal structures are barely more binding than ordinary agreements. Their advantage is that they require a less involved organization than a joint venture, while facilitating relations with third parties due to a legal existence not offered by ordinary cooperation agreements.

### b. Term of the contract

It is necessary to specify the following items.

- The effective date of the contract.
- The expiry date of the contract.
  - The termination date fixed in the contract, including the possibility of tacit renewal and extension.
  - Cancellation with notice by one of the parties, which should be made particularly easy in order to preserve the flexibility of the contract (eg breakdown of the cooperation into several phases with the right to free withdrawal at the end of each phase).
  - The withdrawal of a participant should not entail the automatic termination of the contract.
  - The admission of new partners should be possible without affecting the contract itself (eg by adding an amendment).
  - The revision - even basic - of the technical or financial provisions should not entail the automatic cancellation of the contract.
  - Contract modification conditions should be clearly defined (see Organizational Provisions).

- On the expiry date or when a participant withdraws, the contract may provide for the return of all documents exchanged during the cooperation.
- The confidentiality clause may survive the contract for a specified period.
- The arbitration clause (see d. below) may also survive the contract.

**c. Penalties for non-compliance with contractual obligations**

In the interest of all parties, it is advisable to stipulate such penalties precisely in the contract:

- payment of fixed indemnities (delay in providing information, non-compliance with exclusivity clauses, etc.);
- financial compensation to offset the damage;
- payment of interest (delay in payments);
- cancellation of the contract in the most serious cases (failure to provide information, failure to pay, disclosure of a secret, etc.).

**d. Applicable law and settlement of disputes**

The law used to settle disputes is frequently the national law of one of the parties and generally the law offering the highest degree of technological protection. However, any national law can be applied, even if it is not directly connected with the contract (eg a French-German contract under Swiss jurisdiction).

A contract may also stipulate that the rules of international trade, which are frequently closer to the problems encountered than State laws, will be applied.

It is not in the interest of the parties to reach the stage of court proceedings. This is always damaging, resulting in:

- a serious deterioration of the relations between the parties;
- wasted time;
- bad publicity.

Most contracts provide a dispute settlement clause under which the parties have recourse to an arbitrator (normally the International Chamber of Commerce) to settle their disputes and find an agreement.

In this case, the contract must stipulate the applicable arbitration procedure and the scope of its jurisdiction (arbitration site and the way in which recognized experts will intervene).

**e. Secondment of personnel**

Many agreements require the participants to second personnel to other organizations, frequently abroad.

In this case, it may be useful to stipulate in the contract the main conditions of such secondment, which may entail an independent agreement separate from the main cooperation contract.

The following points should be taken up:

the work needed to prepare the secondment;
accommodation;
interpreters;
travel allowances;
working hours;
remuneration;

overtime;
travel expenses;
holidays;
medical care and reimbursement of costs;
other social security items (life insurance, pension funds, etc.);
settlement of accounts and payment;
working conditions;
employer liability;
insurance;
applicable law;
arbitration.