

KTI Practical Guide

Consultancy Agreements



Foreword

The KTI Practical Guides have been produced as a resource for those approaching transactions between Irish research performing organisations (RPOs)¹ and commercial companies. Each Practical Guide explains common terms in the agreements and describes the considerations that might apply.

The KTI Model Agreements contained in each Practical Guide take account of the legal constraints upon RPOs when entering into contracts, as well as the unique nature of RPOs, whose primary purpose is not-for-profit rather than commercial. At the same time, the terms of the agreements seek to address the typical commercial priorities of companies, e.g. to have access to intellectual property rights. The Guides are based on European best practice.

The Practical Guides are offered as a starting point for drafting and discussion, as required. Neither companies nor RPOs are mandated to use the Model Agreements.

The KTI Practical Guides and Model Agreements are available on the KTI website to download and use direct. www.knowledgetransferireland.com

Disclaimer

Parties should take their own legal advice on the suitability of any model agreement for their individual circumstances and on associated legal and commercial issues. Neither Knowledge Transfer Ireland, Enterprise Ireland nor any of the individuals or organisations who have produced or commented on these documents assumes any legal responsibility or liability to any user of any of these model agreements or commentaries.

The KTI Practical Guides and Model Agreements were prepared by Anderson Law LLP (Oxford, UK; www.andlaw.eu) with advice on certain Irish law issues from LK Shields Solicitors (Dublin, Ireland; www.lkshields.ie).

¹ RPOs are considered to be Higher Education Institutes (Universities and Institutes of Technology) or State research organisations

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Introduction to Consultancy Agreements

What is a consultancy agreement?

A consultancy agreement is a contract under which one party agrees to provide advice and other related services to another party, usually in return for a sum of money. Consultancy agreements can be distinguished from other types of contract that an Irish Higher Education Institute or State research organisation (together, “RPO”) might enter into as they involve the RPO providing specific services to a third party in respect of which there may be a profit element, in addition to the RPO covering the costs of doing the work.

As a result, an RPO is often willing to agree to terms in a consultancy agreement that it may not agree to in other types of agreement, such as:

- agreeing that ownership of intellectual property rights generated in the course of providing the services are to be owned by the client, often without the RPO (or the academic) having any further right to use any of the results generated;
- giving the client a significant degree of control over defining the scope of work and the timetable for performance (in contrast to an academic-led project); and
- agreeing that the results of the work will be kept confidential, giving the RPO (and the academic) little or no right to publish.

What is meant by “advice” and “other related services” in a consultancy agreement?

The type of “advice” that would be normally covered by a consultancy agreement would include:

- providing an opinion;
- making a recommendation;
- providing assistance with solving a technical or factual problem;
- making an assessment of a technical or factual situation; and
- interpreting facts and situations using the skills and experience the academic has.

The type of “other related services” which would be sometimes provided together with advice would include:

- making presentations; and
- attending conferences or meetings.

Why do RPOs enter into consultancy agreements?

The knowledge and skills of academics are some of the main assets of an RPO and are highly valued by companies and other external organisations. Whilst consultancy may generate revenue, whether for the RPO or for the individual academic, this is rarely the main reason for entering into a consultancy agreement. Commonly encountered reasons include:

- increasing the impact of academic research by making the skills and knowledge that an academic has developed available to third parties;
- developing the skills and knowledge of academic and technical staff and students in the ‘real world’;
- testing ideas, inventions, practices, etc. developed at the RPO; and
- establishing relationships with third parties who may wish to collaborate on, or fund, future research projects, studentships, etc.

Who should enter into the consultancy agreement – the RPO or the academic?

Broadly speaking, there are two different approaches to entering into consultancy agreements:

1) *The RPO contracts directly with the client*

Under this arrangement, the RPO accepts the obligation to provide the services of one or more of its academics to the client. As the contracting party, all payments are made by the client to the RPO and the RPO will also bear any liability to the client in the event of a failure to perform the contract in accordance with its terms.

From the individual academic's perspective, there are a number of benefits to having the RPO contract directly with the client, e.g.:

- all the contract negotiation and administration is handled by someone other than the academic, leaving the academic free to focus on providing the consultancy services;
- the academic can rely on the RPO's professional indemnity and other insurance policies and does not have the additional expense of obtaining such insurance separately (which, in certain fields, can be expensive or even unavailable to individuals);
- the individual academic will not be contractually liable to the client; any contractual liability will fall on the RPO as the contracting party;
- the RPO is likely to have more experience entering into consultancy contracts and can provide templates, advise on the best way to structure particular deals, and may be able to obtain a higher fee by negotiating on behalf of the organisation; and
- the academic will have the benefit of using the name and reputation of the RPO in performing the consultancy work.

2) *The academic contracts directly with the client.*

Under this arrangement, the academic agrees to provide the consultancy services in his/her personal capacity and the RPO would not normally be involved in this arrangement (or derive any direct benefit from it).

Before entering into any direct consultancy agreement, an individual academic should:

- ensure that he/she is permitted under the terms of his/her contract of employment to undertake additional work directly for third parties;
- ensure that all income tax liabilities are accounted for in respect of any payments received in respect of such consultancy work;
- investigate whether any insurance cover is required (such as professional indemnity insurance) and, if so, obtain such policies (note that by contracting directly, an individual will not usually be able to benefit from the RPO's insurance policies); and
- ensure that in performing the consultancy services, he/she does not make use of any RPO facilities, equipment or personnel or use the name of the RPO in any way so as to suggest that the services are being provided by the RPO (including use of RPO letterhead, RPO intellectual property and RPO email address).

Even where the academic contracts directly with the client, the RPO may still have an interest in controlling the academic's consultancy activities, e.g:

- The RPO may wish to ensure that the academic does not enter into commitments which might adversely affect the RPO - e.g. if the consultancy work involves use of background intellectual property, creates a conflict of interest or exposes the RPO to adverse publicity or financial risk;
- The RPO may want to take steps to ensure that the academic does not make use of the RPO's facilities and/or equipment in providing any private consulting services; and
- The RPO may want to know what consultancy is being undertaken by an academic in a particular period in part to ensure that this is within the agreed time allocation under their contract but more importantly to be able to capture the value and impact of the academic community at the RPO.

As a result, where academics are entitled to contract directly with third party clients for the provision of consultancy services, best practice shows that many RPOs impose restrictions on their academics doing so by requiring such academics to:

- ensure that the consultancy work is done within a defined number of days per annum;

- obtain the approval of the academic's head of department before entering into any consultancy agreement or commencing work;
- sign an acknowledgment, waiver, agreement or some other similar document stating that the academic will not access or use any internal resources of the RPO, and that the academic is providing services to the client outside his/her role as an employee of the RPO; and
- confirm that in providing such consultancy services to the client, they will not be in breach of any conflicts of interest policy.

From the academic's perspective, the advantages of entering into a consultancy agreement directly with the client are typically as follows:

- the academic may have more control over the contracting process including timelines and limitations which would be imposed under the contracts policy of the RPO as to what terms can be accepted; and
- the academic will be entitled to retain the whole fee paid by the client.

Of course this pre-supposes that the academic is experienced in the drafting, interpretation and negotiation of contracts and/or has recourse to legal advice.

The Model Consultancy Agreement deals only with the case of RPO consultancy contracts. Personal consultancy contracts are not the subject of advice from KTI. However some of the principles in this Practical Guide are useful in respect of both types of arrangement.

Why is a written consultancy agreement necessary?

The advantages of entering into a written consultancy agreement are as follows:

- *Limiting liability.* The consultant (i.e. the RPO or the individual, depending on the contracting party) can set out the level and type of liability it is willing to accept in respect of the performance of the services. Note that without wording to limit liability, the contracting party could face unlimited liability if the advice provided by the academic or the RPO turned out to be bad, was carried out negligently or did not meet an acceptable or agreed standard.
- *Setting standards of performance.* A written contract will normally include details as to what type of assurances are given by the contracting party as to the quality of the work etc. In contrast to academic research collaboration agreements where results are often provided 'as is', the consulting party may be required to give assurances that the results are accurate, free from defects, have not been copied, do not incorporate any third party materials, etc. The effect of giving any such assurances is that the client will have the right to sue the contracting party for damages if it fails to meet these standards.
- *Assigning arising IP.* If intellectual property arising during the consultancy project is to be owned by the client, this can be covered in the written agreement (note that, if intellectual property is to be assigned to the client, the client will normally insist on a written contract as ownership of intellectual property can only be assigned by an agreement in writing).
- *Licensing background IP.* If either party is to provide access to its background intellectual property, whether for the purposes of carrying out the services, or otherwise, the scope of the licences to use such background intellectual property can be properly defined. Note that where an academic enters into a personal consultancy contract, he/she will not be entitled to grant a licence to background intellectual property owned by the RPO. Note that the Model Consultancy Agreement that accompanies this Practical Guide assumes that no licences to background intellectual property are being provided.
- *Defining the scope of work.* The scope of the services can be properly defined – this can include not just a detailed description of the work to be performed, but may also include limits on the maximum time that the consultant is expected to work on the project, etc.
- *Confirming relevant dates.* The parties can clearly set out any relevant dates for performance, delivery, payment, etc.

Additional considerations for special types of academic consultancy agreements

In addition to the usual consultancy arrangements with companies and public/charitable sector organisations, there are two types of consultancy agreement that are often seen in an academic

context that may require special consideration. These are when an academic is to provide consultancy services to a spin-out company and where an academic is engaged to act as an expert in a dispute between two parties.

- *Consultancy agreement for a spin-out company.* Where technology is spun-out of an RPO, the academic who created or invented the technology will often continue to be involved in the further development of the technology (as well as providing such other services) under the terms of a consultancy agreement with the spin-out company. Typically, the contract used for this type of consultancy is reasonably similar to a contract whereby the academic contracts directly with the client, but it is also possible for this contract to be entered into with the RPO as the contracting entity.

Where consultancy services are being provided to a spin-out company, it is normal to have some provisions in the contract clarifying to what extent the academic will be entitled to continue to research in the area of technology and publish any results. The RPO (and the academic) will also be keen to establish how much time the academic is expected to spend in providing such consultancy services.

On the other side of the transaction, the spin-out company may request some restrictions on who the academic can work with in the future (e.g. a prohibition on providing consultancy to, or working on projects funded by, competitors of the spin-out company). Any such restrictions need to be considered carefully as they may impact on the individual's academic freedom and also their ability to generate future funding for research. Even if acceptable in principle, detailed employment law advice should be taken to ensure that such terms are appropriate.

- *Expert witness agreement.* Under an expert witness agreement, an academic is normally contracted to provide an objective opinion (and usually a written report) in relation to a legal dispute. He or she will often be required to carry out analysis and testing on which such opinion will be based. In addition to carrying out analysis and providing an opinion and/or report, if the other parties do not agree the opinion or report of the academic (or any part of it), the academic may be required to attend court as an expert witness for examination and cross-examination.

An agreement to provide services as an expert witness is normally entered into with the firm of solicitors for a particular party. Sometimes, experts are appointed by the court itself rather than by one of the parties. Unlike other types of consultancy, expert witnesses are usually required to follow rules prescribed by the relevant courts and are required to meet certain standards as laid down by those court rules; accordingly, the expert witness agreement should make it clear that these obligations override any obligations of the consultant to the client.

Negotiating expert witness agreements often involves less focus on ownership of arising intellectual property, although the confidentiality provisions in an expert witness agreement are often stronger than might be encountered in a 'regular' consulting agreement (with the caveat that the confidentiality obligations should not prevent the expert from performing its duty to the relevant court).

It is usual that expert witness consultancy is by way of personal arrangement and not a contract with the RPO.

RPO-client consultancy agreements - who should draft the consultancy agreement?

There is no set rule, but many RPOs wish to enter into a consultancy agreement based on their standard terms and conditions (see the Model Consultancy Agreement that accompanies this Practical Guide for an example). This is especially true for routine, small-scale consultancy work, where the work involved may only take a few hours and fee will be relatively small. Indeed, for very routine and small-scale work, many RPOs will format the consultancy agreement as a letter agreement which is often viewed as being a more 'friendly' format.

Some clients state that they have a policy that they will only enter into agreements based on their own standard terms and conditions, or on terms and conditions contained in a purchase order. Although it is hard to generalise, such terms and conditions may include provisions that are unacceptable to the RPO or may be completely silent on issues that are important to the RPO (particularly in the areas of intellectual property, warranties and limitation of liability). Sometimes, the client's terms and conditions are excessively detailed (containing many provisions which are not of direct relevance to the consultancy services or which seek to cover every remote eventuality) and the RPOs are often faced with difficult choices of deciding which issues to push back on, the management time required to agree terms and whether the cost of legal services required to address concerns is justified.

Key terms in a typical consultancy agreement with an RPO

Most provisions encountered in consultancy agreements are fairly standardised, even if the precise wording used may differ. The areas that are subject to negotiation typically include one or more of the following:

- *Timescales.* Timescales for performance and delivery should be clearly set out in the consultancy agreement and the RPO should ensure that it is confident it can meet such timescales. Care should be taken over any provisions that state that “time is of the essence”, as a failure to meet the relevant timescales will allow the other party to immediately terminate the agreement (in addition to its right to claim damages).
- *Obligation to achieve a particular result.* Most consultancy agreements entered into by an RPO will include a provision stating that no guarantees are given that any particular result will be achieved. What the consultant is effectively promising is that they will carry out the services properly, but they cannot be held responsible if the result is not as expected or hoped.
- *Standard of service.* Most consultancy agreements will include an obligation on the consultant to use reasonable care and skill in performing the services; indeed, if the agreement is silent on this point, such an obligation may be implied into the contract by law. Although it is possible to state in a consultancy agreement that the consultant is under no obligation to use reasonable care and skill in performing services, this raises the question as to why any client would wish to procure services from an organisation which is not prepared to promise that the work will be performed competently. The suggested way to deal with such matters is to expressly include the obligation, but use the liability section to limit liability for breach of this obligation.
- *Intellectual property – Foreground IP.* Typically, where the client is paying commercial rates for consultancy (i.e. the RPO is making a profit in addition to covering its costs), the client will expect to own any intellectual property (“IP”) that is generated in the performance of the services (“Foreground IP”). Care should be taken, however, about how this is phrased in the agreement to ensure Foreground IP is limited to IP that is generated by the consultant in the performance of the consultancy services.
- *Intellectual property – Background IP.* Clients will often request rights in and to the RPO's pre-existing intellectual property or intellectual property generated independently of the consultancy work (“Background IP”), often on the basis that such IP might be needed in order to exploit the Foreground IP. Such provisions are likely to be unnecessary for the routine provision of advice and tend to be seen in agreements where the intent of the consultancy is to generate intellectual property that will be commercially exploited. Where a client genuinely needs access to an RPO's Background IP in order to exploit Foreground IP, then this is normally licensed as part of a separate agreement (or at least additional payments are requested for the use of such Background IP). Any licensing of Background IP should ensure that the Background IP has been specifically identified (not just “any Background IP that the client might need”) and that the scope of the licence can be clearly set out (e.g. can the licensee use the Background IP commercially, can it grant sub-licences, is use limited to a particular field, etc.).
- *Publication.* Consultancy agreements do not normally permit the consultant to publish the results of the work, but depending on the nature of the work, some limited right to publish, perhaps in anonymised format, may be acceptable to the client. If publication is to be permitted, wording can be added to the consultancy agreement to give the client the opportunity to review prior to publication and to remove references to the client's confidential information.

- *Warranties.* A warranty is a contractual promise or statement, breach of which will entitle the other party to claim damages. Care should be taken by RPOs when being asked to give warranties, as they are often inappropriate and/or are over and above the risks that the RPO is willing to accept. Of particular concern are likely to be:
 - **Warranties as to non-infringement of third party rights** - the creation of intellectual property is not, normally, the primary focus of the consultancy work and usually no analysis or due diligence will be undertaken as to what RPO intellectual property will be used, nor as to whether third parties might already have patents, etc that relate to the results of the services. Rather, the results of the services are often provided without such warranties and with the use of such results being at the risk of the client (who can conduct freedom to operate searches themselves if need be).
 - **Warranties to use “best efforts” or “best endeavours”** – These are generally unacceptable because the standard being expected is very high and may require that other work of the academic (and possibly work in other parts of the RPO) to be set aside just to ensure that the services have been completed.
 - **Warranties that a particular result will be achieved** – See the discussion above under the heading “Obligation to achieve a particular result”.

Where it is not possible to remove a warranty, it is sometimes possible to limit its scope to a knowledge-based warranty – for example “the RPO warrants that as far as it is aware, but without having conducted any searches or investigations, it has obtained all necessary and required licences, and consents and permits to perform the consultancy services”. Indeed, such warranties are sometimes given as to the knowledge of particular named individuals which avoids the risk that someone in another part of the RPO might be aware of an issue that the consultant and the contracts team have not been informed of. The inclusion of the wording “but without having conducted any searches or investigations” helps to avoid any implication that the RPO is under a duty to take steps to verify this fact.

- *Liability.* It is fairly routine in commercial contracts for one party to try to exclude and/or limit its liability as much as possible, whilst at the same time trying to expose the other party to as much liability as possible.

In terms of limitations of liability, the party providing the consultancy services will normally want to exclude liability for certain types of loss (e.g. loss of profits, loss of contracts, loss of revenue, loss of data, loss of opportunity, indirect / consequential losses, etc.) and, to the extent that there is any other direct liability arising, to cap its liability to a particular amount (which may be expressed as a fixed sum, or by reference to the contract price). Many insurance policies will require the RPO to ensure that such liability limits are included in contracts in order for the policy to cover liability arising out of them.

Where an extremely high cap on liability is being sought by the client, it is often useful to ask why such a high liability cap is required for the particular piece of work in question – often, these figures will come from standard template language and may not be appropriate for the work envisaged. If the client insists on a high liability cap, it is also worth investigating whether specific insurance can be taken out and, if so, adding this premium to the contract price. This moves the discussion away from being one of whether the RPO takes responsibility for its action, to a simple risk/reward assessment.

Care should also be taken whenever the RPO is asked to provide an indemnity to the client. Three types of indemnity are commonly requested by clients: (i) indemnities against third party claims; (ii) indemnities against breaches of contract or non-performance; and (iii) indemnities against employment claims by the individual who will perform the consultancy. In regard to (i), the indemnity for losses arising out of third party claims will normally be irrespective of fault and so the RPO should consider carefully whether it is appropriate for it to be accepting liability for claims that might be made against the client by third parties or whether this is more of a ‘commercial’ or ‘operational’ risk that should be borne by the client. Where the indemnity is for breach or non-performance, i.e. (ii), the effect of this is to create a separately enforceable action (i.e. over and above the claim for breach of contract) and, in some cases, this can result in the indemnified party

being able to recover sums that it would not be able to recover under a breach of contract action. Such indemnities should, therefore, generally be avoided by RPOs. In regard to (iii), it is not uncommon for a party to request an indemnity to cover off the issue of the consultant's employment relationship with the RPO; sometimes a party will request indemnity cover from the employer organisation to cover costs or damages arising from a claim of employment made by the consultant against the recipient of the consultancy services.

- *Overly onerous obligations.* Other clauses that may require particular attention, and which RPOs typically resist, are where the client pushes for overly onerous requirements on the contracting party such as:
 - obligations on the consultant to attend numerous meetings about the progress of the work, often with requirements to travel to the client's premises;
 - obligations to provide numerous reports, with overbearing requirements as to the number of copies and the format of the reports;
 - a requirement that the academic (or sometimes the RPO as a whole) does not undertake any work for other companies, either during or following termination of the consultancy work for the client; and
 - a requirement that imposes pre-determined financial penalties on the RPO (e.g. "liquidated damages" or "penalty" clauses for late delivery).

Issues to consider

The following is a list of some issues to consider when reviewing a consultancy agreement:

- *Templates.* Use of the Model Consultancy Agreement will speed up negotiations and allow a contract to be concluded as swiftly as possible.
- *Parties.* Is the agreement clear as to whether the consultancy agreement is being entered into by the RPO or by the consultant in his/her personal capacity?
- *Terms:*
 - *Payment terms.* Are the payment terms clear and is the price correct?
 - *Scope of work.* Is the scope of work clearly defined? Are there limits on how much time the academic is expected to spend on the project?
 - *Intellectual property.* If Foreground IP is to be assigned to the client, is the academic comfortable with this and should there be a licence back for teaching / research purposes?
 - *Confidentiality / Publication.* Is the academic happy to comply with the confidentiality obligations and/or does the academic need the right to publish some of the results of the consultancy or use the results in his/her research?
 - *Liability.* If the consultancy services are not performed properly (or at all) what is the RPO's exposure and how can this be limited?
- *Monitoring.* The RPO will implement procedures to monitor any obligations contained in a consultancy agreement, including maintaining a database of consultancy agreements entered into.
- *Governing law.* It is expected that Irish RPO agreements will be governed by Irish law and subject to the jurisdiction of the courts of the Republic of Ireland.

Important points to note about the Model Consultancy Agreement

The reader faced with drafting a consultancy agreement must always keep in mind that a template can only ever be a starting point. The specific circumstances of the particular arrangement must always be considered and the template tailored as appropriate. For example, a number of fact specific, complex issues may be raised when drafting a consultancy agreement, which by their nature cannot be dealt with in a template. Examples of these issues include the following:

- The Model Consultancy Agreement has not been drafted to take account of the individual requirements of Irish RPOs which might apply. The reader is advised to seek out and address, by additional provisions, any peculiarities or requirements of a relevant institution.
- The Model Consultancy Agreement has not been drafted with regard to any tax law, treatment or policy. It may be advisable to get specific tax advice in relation to any tax issue or treatment

which might arise as a result of performing or implementing the agreement. Tax treatment will depend in part on the parties' circumstances at the time the agreement is made and thereafter.

- The Model Consultancy Agreement has not been drafted to be used by or in relation to consumers. Contracts concluded with consumers are obliged to include an additional layer of legal protections, to be written in plain-spoken language, and to contain other features imposed by consumer-specific laws which are beyond the scope of this Practical Guide.
- In addition, the reader should be aware that in some situations the law relating to “state aid” might need to be considered (e.g. if the industrial party to the consultancy agreement does not pay market value for the benefits it receives). This is a complex area and there is no ‘one-size-fits-all’ way of dealing with it. Accordingly, the reader should seek specialist advice when required.

Checklist of preliminary issues and provisions commonly found in RPO consultancy agreements

The checklist provided below lists (i) some preliminary points that may need consideration, and (ii) the main clauses usually found in a consultancy agreement together with the main issues that should be addressed regarding each provision.

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| Preliminary | |
| <i>Parties</i> | <ul style="list-style-type: none"> • Is the consultancy agreement between the RPO and the client or between the academic and the client? • Are the parties to the consultancy agreement correctly described—have their full legal names and “official” addresses been included? • Where the agreement is between the RPO and the client—should the academic sign to indicate that he/she has read and understood the provisions of the consultancy agreement? |
| <i>Authorised signatory</i> | <ul style="list-style-type: none"> • Does the consultancy agreement need to be signed by a particular person or in a particular department? • Are the authorised signatories correct for each party? |
| <i>Approvals, etc.</i> | <ul style="list-style-type: none"> • Have various approvals/confirmations been obtained (head of department, ethics approvals, confirmation that no conflicts of interest exist, etc.). |
| <i>Access to resources or Background IP</i> | <ul style="list-style-type: none"> • If these are required, have these been clearly identified and is there a procedure for negotiating an agreement to provide/license these? • Has a check been carried out as to whether there will be any use of Background IP? |
| <i>Work to be done</i> | <ul style="list-style-type: none"> • Has this been documented by the client or the academic, including any advice that is to be given? • Has a work schedule been drafted in sufficient detail to describe the work, timelines and deliverables upon which the contract (and pricing) will be based? And has it been agreed between the parties (including the academic)? • Does the work fall into any high risk categories requiring different wording or a different type of agreement (work on humans, animals or with sensitive or dangerous materials)? |
| Contract terms | |
| <i>Date</i> | <ul style="list-style-type: none"> • The date of the consultancy agreement is found in the signature block on the first page of the consultancy agreement; the date of the consultancy agreement is the date on which the last party signs the consultancy agreement. • The date the last party signs the consultancy agreement may, however, be different to the date when the academic starts to provide advice under the consultancy agreement - this is typically addressed by having a definition of “Commencement Date” in the consultancy agreement. |
| Definitions | |
| <i>Background and Foreground IP</i> | <ul style="list-style-type: none"> • Where Background IP is defined, does the definition adequately capture the type of existing intellectual property which is likely to be used by the parties in the consultancy project? • Generally, is there a clear distinction between IP generated in the course of the consultancy project and IP generated outside the project (whether before or during the term of the project)? |

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| | <ul style="list-style-type: none"> • If Foreground IP is to be owned by the client, is it clearly limited to a specific technical area or field? • NB detailed IP issues are referred to later in this table. |
| Consultant | |
| <i>Identification</i> | <ul style="list-style-type: none"> • The academic who is to provide the advice should be named together with the department, section and job details. |
| <i>Scope of work</i> | <ul style="list-style-type: none"> • Is there an appropriately precise description of the services that the Consultant will be providing? • Is it made clear that his/her services are not being provided on an exclusive or full-time basis? • Is it clear that the consultant will only be providing services in relation to a specific project? • Is the programme of work drafted in sufficient detail to describe the work, timelines and deliverables and roles of the parties? • Is the agreed programme of work attached as a schedule to the agreement? |
| <i>Status</i> | <ul style="list-style-type: none"> • Has the Consultant's status been specified in relation to the consultancy agreement, i.e. acting as an employee of the RPO (with the RPO as the contracting party)? |
| <i>Availability</i> | <ul style="list-style-type: none"> • What is to happen if the Consultant is not available (e.g. due to illness)? Does the RPO have a right to replace the Consultant with another individual? • Are there limits to the times when the Consultant will be made available (e.g. maximum number of days per month, no more than x days consecutively, etc). • Is travel and payment and reimbursement for travel by the consultancy adequately covered? |
| <i>Effort</i> | <ul style="list-style-type: none"> • Is the amount of effort to be made by the academic and RPO to be other than "reasonable endeavours"; • What does the amount of effort relate to: the standard of the work, the results to be achieved, when it will be completed? Is the RPO willing to accept these commitments? |
| Duration and Termination | |
| <i>Commencement /Completion Date</i> | <ul style="list-style-type: none"> • The Commencement Date that is inserted should be the date that work is actually to commence, not the date when the consultancy agreement is signed. • If a date is given for when the work will be completed, what happens if the academic does not complete giving the advice by that date? Is the RPO liable for breach? Does the RPO need a mechanism in place which allows the RPO to inform the client that the Completion Date cannot be met and to stop work until a new date is agreed? |
| <i>Right to terminate</i> | <ul style="list-style-type: none"> • Will the agreement terminate automatically or on notice (subject to the client paying outstanding sums)? • Will the client or RPO have the right to terminate early for convenience? • Will the client or the RPO have the right to terminate for breach or insolvency? • In the case of a breach that is capable of being remedied, is the defaulting party to be given a 'cure period' before termination is effective? |

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| | <ul style="list-style-type: none"> • What is to happen when the agreement terminates? Return of materials / information, etc? |
| Price and payment | |
| <i>Setting the price</i> | <ul style="list-style-type: none"> • Has the appropriate price calculation method been determined (fixed, by the hour, by the day etc)? |
| <i>Payment terms</i> | <ul style="list-style-type: none"> • When can invoices be raised by the RPO? <ul style="list-style-type: none"> ○ on signature of the consultancy agreement? ○ in advance of performing the work? ○ after all the advice has been provided? ○ when some result has been achieved (milestone)? |
| <i>Expenses</i> | <ul style="list-style-type: none"> • Are the fees inclusive or exclusive of expenses incurred by the Consultant? • Are there any limits on the type of expenses or the amount? • Are the expenses to be paid at the same time and in the same way as the price? • Is any documentary proof required to be provided of any expenses? |
| <i>Other</i> | <ul style="list-style-type: none"> • If calculations are based on a day or other fixed period, is there a definition of what is paid for part-units (e.g. hours)? • If the client provides instructions (or does not provide instructions) which result in delay in undertaking the advice or there is a change in the advice that is to be provided, can the RPO charge for this? • Unless the fees quoted are expressed to be 'exclusive of any VAT which may be payable' they will be treated as <i>including</i> VAT. It is advisable to clarify whether the fees or expenses are 'exclusive' or 'inclusive' of VAT even if the Consultant is not yet registered for VAT at the time the agreement is signed as this may change at a later date. It should be noted that VAT is chargeable where the consultant is not registered but is required to be registered, usually because the VAT registration threshold has unknowingly been (or is about to be) exceeded. |
| Confidentiality | |
| <i>One-way or two-way?</i> | <ul style="list-style-type: none"> • Does the consultancy agreement include suitable confidentiality provisions? • Do these provisions sufficient protect the RPO's interests? |
| <i>Types of confidential information</i> | <ul style="list-style-type: none"> • Is it likely that any confidential information is to be disclosed by the academic? Is this information sensitive or valuable? • Has a check been carried out to ensure that such disclosures will not affect any (potential) patent applications? • Is there a period by which confidentiality will survive termination? Is the period long/short enough? |
| Visits to RPO premises | |
| <i>Are visits permitted?</i> | <ul style="list-style-type: none"> • Are client visits appropriate for this consultancy offering? • Is the client allowed to make visits to the RPO's premises? • Can the client have a third party visit in its place? • If visits are permitted, are there any conditions attached to such visits? <ul style="list-style-type: none"> ○ Permitted times when can the client make a visit? ○ Only when prior written notice has been given? ○ Only when mutually agreed between the parties? |

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| | <ul style="list-style-type: none"> ○ When some stage has occurred in the advice being given? |
| <i>Purpose of visits</i> | <ul style="list-style-type: none"> • Is the purpose of the visit clear and specific (e.g. “inspect the progress of the Project”)? Does it include access to financial records, etc.? • Are there any standards to be met or criteria to be met during the visit? • Are there to be any consequences if the client does not find the visit satisfactory? |
| Property | |
| <i>Is any provided?</i> | <ul style="list-style-type: none"> • Will the client be providing any equipment, hardware, computers, software, etc. for the Consultant to carry out the advice. |
| <i>What is provided?</i> | <ul style="list-style-type: none"> • Is it necessary to specify the equipment that is being provided, i.e. is what being provided especially valuable, fragile or important to the agreement that it needs to be identified particularly? • If equipment is to be identified, have details been logged in a separate schedule (i.e. description, serial number(s), date of delivery, value)? |
| <i>Consequences</i> | <ul style="list-style-type: none"> • Is ownership of the property dealt with, i.e. is the equipment to remain the property of the client when the agreement is terminated or is the RPO to become the owner? • On termination, does the equipment need to be returned to the client? Who is pay for de-commissioning and transport? • Is there exclusion of liability for loss, damage or destruction of the equipment on the part of the RPO? Is the RPO to be responsible for damage if caused by its negligence (and this subject to any limits)? |
| Ownership of IP | |
| <i>Background IP</i> | <ul style="list-style-type: none"> • Is Background IP being provided by either party (note that the Model Consultancy Agreement that accompanies this Practical Guide assumes that there will not be any Background IP being provided). • If Background IP is to be provided, is it clearly identified and is the agreement clear that it remains the property of the party who owns or has rights to it? • If a licence to use Background IP is being granted, is the scope of this clearly defined – i.e. what the Background IP can be used for, the duration of the licence, whether it can be sub-licensed to third parties, etc. |
| <i>Foreground IP</i> | <ul style="list-style-type: none"> • Is the Foreground IP to belong to the client? • Is the RPO required to disclose Foreground IP generated by the academic to the client? • When it is required to do this? On creation, promptly, within a reasonable time, not specifically specified? |
| Warranties | |
| <i>Warranties</i> | <ul style="list-style-type: none"> • What warranties (if any) is the RPO prepared to offer in regard to the advice provided by the academic? • Should the RPO be prepared to offer anything higher than an assurance that it will use reasonable efforts to perform the work? Is it prepared to give an assurance that it will carry out the work with reasonable care and skill? • Does the consultancy agreement clearly state that the RPO/academic is NOT warranting or giving any other assurance that any result or objective will be achieved or that any time limit will be met? |
| <i>What are the consequences of</i> | <ul style="list-style-type: none"> • Does the RPO have the right to re-perform the services? |

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| <i>a breach any warranty given?</i> | <ul style="list-style-type: none"> • Should the RPO refund fees, offer some compensation or do some extra or different work? • Should the parties meet and agree what needs to be done? • Should any remedy be limited to a sum, such as the value of the contract, or be related in some way to the insurance the RPO has? |
| Liability <i>Limitation / Exclusion of liability</i> | <ul style="list-style-type: none"> • Is there an overall cap on liability under and in connection with the consultancy agreement? • Are there any types of liability that should not be subject to the cap or exclusions (e.g. breach of data protection laws, etc)? • Are particular types of loss excluded (e.g. loss of profits, loss of contracts, loss of revenue, loss of data, loss of opportunity, indirect / consequential losses, etc.)? • Is there a carve out to ensure that liability is not being limited where it cannot be under applicable law? • Do the liability limits and exclusions apply to both parties? |
| <i>Indemnities</i> | <ul style="list-style-type: none"> • Is the RPO being asked to give any indemnities? • Does the RPO require any indemnities from the client? • If so, are these limited to indemnities covering losses arising from third party claims? • Is the indemnifying party able and willing to take the commercial risk covered by the indemnity? • Does the indemnifying party have the assets to back up any liability or is it covered by an appropriate insurance policy? • Is liability under the indemnity covered by any liability cap? • Is the indemnity subject to any conditions, e.g.: <ul style="list-style-type: none"> ○ the indemnified party gives the indemnifying party giving prompt notice of a claim; ○ the indemnified party not admitting liability in respect of a third party claim; ○ the indemnified party allowing the indemnifying party to conduct any defence of a third party claim; and/or ○ the indemnified party providing all necessary assistance and documentation to the indemnifying party in connection with any defence. |
| Boilerplate <i>Law and jurisdiction</i> | <ul style="list-style-type: none"> • Does the consultancy agreement state which law and jurisdiction should apply to it? • If for any reason the law is not that of the Republic of Ireland, why not, is this necessary? And does the chosen law and jurisdiction comply with the RPO's insurance policies and internal policies? |

Model Consultancy Agreement



Dated _____ 20[●]

(1) [*Full legal name of the RPO*]

and

(2) [*Full legal name of the Client*]

MODEL CONSULTANCY AGREEMENT

CONSULTANCY AGREEMENT^{i ii iii iv v}

This Agreement dated _____ 20[•]^{vi} is between:

- (1) [•] (the “RPO”), [an academic institution incorporated or established under [statute or charter in Ireland],] whose [principal address or registered office] is at [•]^{vii}; and
- (2) [•] (the “Client”), [a company or insert relevant entity type^{viii} incorporated in [•] under registration number [•],] whose [principal place of business or registered office] is at [•]^{ix}.

Background:

The Client is engaged in the research and development of [•].

The RPO has expertise in the field of [•].

The Client wishes to engage the RPO to provide the Services in connection with [•], all subject to the provisions of this Agreement.

The Parties agree as follows:

1. Definitions

1.1 *Definitions.* In this Agreement, the following words shall have the following meanings:

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| Affiliate | In relation to a Party, means any entity or person that Controls, is Controlled by, or is under common Control with that Party. |
| Claims | All demands, claims and liability (whether criminal or civil, in contract, tort (including negligence) or otherwise) for losses, damages, legal costs and other expenses of any nature whatsoever and all costs and expenses (including legal costs) incurred in connection therewith. |
| Commencement Date | The commencement date as set out in Schedule 1. |
| Completion Date | The completion date as set out in Schedule 1. |
| Confidential Information | All technical or commercial information that: <ol style="list-style-type: none"> (i) in respect of information provided in documentary form or by way of a model or in other tangible form, at the time of provision is marked or otherwise designated to show expressly or by necessary implication that it is imparted in confidence; (ii) in respect of information that is imparted orally, any information that the Disclosing Party or its representatives informed the Receiving Party at the time of disclosure was imparted in confidence; and (iii) any copy of any of the foregoing^x. |
| Consultant | The individual(s) identified in Schedule 1 who will perform the Services on behalf of the RPO or such other persons as may be appointed in accordance with Clause 2.2. |

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| Control | Direct or indirect beneficial ownership of 50% (or, outside a Party's home territory, such lesser percentage as is the maximum, permitted level of foreign investment) or more of the share capital, stock or other participating interest carrying the right to vote or to distribution of profits of that Party, as the case may be. |
| Fees | The fees to be paid to the RPO by the Client as set out in Schedule 2. |
| Foreground IP | All Intellectual Property generated by the RPO in the performance of the Services. |
| Intellectual Property | All intellectual property of any description including copyright, trade marks, database rights, design rights, patents, utility models, and applications for, and the right to apply for any of the foregoing items. |
| Parties | The RPO and the Client, and " Party " shall mean either of them. |
| Services | The services to be provided by the RPO for the Client as more fully described in Schedule 1 ^{xi} . |

2. Consultancy services

- 2.1 *Services.* In consideration of the payment of the Fees by the Client to the RPO, the RPO shall provide the Services to the Client from the Commencement Date, all in accordance with the provisions of this Agreement.
- 2.2 *Consultant.* The Services will be performed by the RPO through the Consultant. The RPO may, at any time throughout the term of this Agreement, substitute any Consultant with an alternative Consultant with similar qualifications and experience on the same terms as set out in the Agreement. Unless otherwise agreed by the Parties in writing, a change in the named Consultant will not incur a change in the Fees.
- 2.3 *Timetable.* Where Schedule 1 states that Services are to be performed within a specific timeframe, then the RPO shall use reasonable efforts to perform the Services by the relevant date. Where Schedule 1 does not require that Services are to be performed within a specific timeframe, then the RPO shall nonetheless use reasonable efforts to perform the Services in a timely manner. Time for performance of the Services shall not be of the essence.
- 2.4 *Delays.* If the RPO foresees any potential delays in the completion of the Services, the RPO will notify the Client as soon as is reasonably practicable and take reasonable steps to mitigate any delay to the Completion Date.
- 2.5 *Reports.* The RPO will provide reports to the Client at the times and in the format specified in Schedule 1. If no times are specified in Schedule 1, the RPO will provide a report to the RPO within a reasonable time following completion of the Services and following the receipt by the RPO of all Fees due under this Agreement^{xii}.
- 2.6 *Independent contractors.* The relationship of the RPO to the Client shall be that of independent contractor. This Agreement is not intended to, and does not, create any contract of employment or other legal relationship between the Client and any Consultant.

3. Fees

- 3.1 *Invoices.* The RPO shall provide the Client with invoices for the Fees due to the RPO in accordance with the payment milestones set out in Schedule 2. In the absence of payment

milestones set out in Schedule 2, the RPO shall provide the Client with invoices monthly in arrears for Fees due in respect of Services delivered.

- 3.2 *Payment.* The Client shall pay all valid invoices within thirty (30) days of receipt.
- 3.3 *Daily rate.* Where Fees are quoted on a daily rate basis, a day shall mean up to seven (7) hours work. Any hours worked beyond seven (7) hours in a day shall be charged pro-rata to the Client.
- 3.4 *Expenses.* Unless otherwise stated in Schedule 2, the Fees are exclusive of all expenses reasonably incurred by the RPO in the performance of the Services and the RPO shall invoice the Client for the reimbursement of the same in addition to the Fees.
- 3.5 *Currency and VAT.* All amounts stated are to be paid in Euro and are exclusive of Value Added Tax which, subject to the provision of a valid Value Added Tax invoice, shall be paid by the Client in addition.

4. Client's obligations

- 4.1 *Provision of facilities, information, etc. by the Client.* During the term of this Agreement, the Client shall, and shall ensure that its staff and agents:
- (a) co-operate with and assist the RPO, as the RPO reasonably requires;
 - (b) provide all information and documentation that the RPO reasonably requires; and
 - (c) make available to the RPO such facilities as the RPO reasonably requires.

5. Intellectual Property

- 5.1 *Foreground IP.* All Foreground IP shall be the sole property of the Client. At the request and expense of the Client, the RPO shall execute such documents as may be necessary to transfer title to and apply for patents or other protections for such Foreground IP. All Foreground IP shall be treated as Confidential Information belonging to the Client.^{xiii}

6. Confidentiality

- 6.1 *Confidentiality obligations.* Each Party (the "**Receiving Party**") undertakes from the Commencement Date:
- (a) to maintain as secret and confidential all Confidential Information obtained directly or indirectly from the other Party (the "**Disclosing Party**") in the course of or in anticipation of this Agreement and to respect the Disclosing Party's rights therein;
 - (b) to use such Confidential Information only for the purposes of this Agreement;
 - (c) to disclose such Confidential Information only to those of its employees, contractors and sub-licensees pursuant to this Agreement (if any) to whom and to the extent that such disclosure is reasonably necessary for the purposes of this Agreement; and
 - (d) to ensure that all those to whom disclosure of or access to such Confidential Information has been given, including its officers, directors, employees and professional advisers, comply with the provisions of this Agreement, and the Receiving Party shall be liable to the Disclosing Party for any breach of this Agreement by any of the foregoing.

- 6.2 *Exceptions to obligations.* The provisions of Clause 6.1 shall not apply to Confidential Information which the Receiving Party can demonstrate by reasonable, written evidence:
- (a) was, prior to its receipt by the Receiving Party from the Disclosing Party, in the possession of the Receiving Party and at its free disposal; or
 - (b) is subsequently disclosed to the Receiving Party without any obligations of confidence by a third party who has not derived it directly or indirectly from the Disclosing Party; or
 - (c) is independently developed by the Receiving Party by individuals who have not had any direct or indirect access to the Disclosing Party's Confidential Information; or
 - (d) is or becomes generally available to the public through no act or default of the Receiving Party or its agents, employees, or Affiliates.
- 6.3 *Disclosure in accordance with legal obligations.* To the extent that the Receiving Party is required to disclose any of the Disclosing Party's Confidential Information by order of a court or other public body that has jurisdiction over it or under other legal obligations, such as under a *bona fide* freedom of information request, it may do so, provided that, before making such a disclosure the Receiving Party shall, unless the circumstances prohibit:
- (a) inform the Disclosing Party of the proposed disclosure as soon as possible, in any event, no later than five (5) working days after becoming aware of the proposed disclosure; and
 - (b) permit the Disclosing Party to make representations (written or otherwise) in respect of the disclosure and/or confidential treatment of the Confidential Information.
- 6.4 *Duration of obligations.* The obligations of confidentiality and non-use set out in this Clause 6 shall survive termination of this Agreement for any reason for a period of five (5) years from the date of termination.

7. Warranties

- 7.1 *No implied warranties, etc.* Each of the Parties acknowledges that, in entering into this Agreement, it does not do so in reliance on any representation, warranty or other provision except as expressly provided in this Agreement, and any conditions, warranties or other terms implied by statute or common law are excluded from this Agreement to the fullest extent permitted by law.
- 7.2 *Performance of the Services.* The RPO shall use reasonable endeavours to perform the Services and shall use reasonable care and skill in the performance of the Services.
- 7.3 *No other warranties.* The Client acknowledges that this Agreement provides for the performance of consultancy and that specific results cannot be guaranteed. The RPO expressly does not warrant that any result or objective, whether stated in this Agreement or not, shall be achieved, be achievable or be attained at all or by a given Completion Date or any other date, nor does the RPO give any warranty that the content or use of any results, Intellectual Property, reports, information or other materials provided in connection with this Agreement will not constitute or result in any infringement of third-party rights.

8. Liability and indemnity

- 8.1 *Liability of the Parties.*
- (a) To the extent that either of the Parties has any liability in contract, tort (including negligence), or otherwise under or in connection with this Agreement, including any liability

for breach of warranty, their liability shall be limited in accordance with the following provisions of this Clause 8.1. However, the limitations and exclusions of liability set out in this Clause 8.1 shall not apply to any indemnity against third party Claims given under Clause 8.2.

- (b) The aggregate liability of each Party shall be limited to the greater of (i) a sum equal to the total Fees paid to the RPO by the Client under this Agreement; or (ii) [●].^{xiv}
- (c) In no circumstances shall either Party be liable for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by the other Party or its Affiliates that is (i) of an indirect, special or consequential nature; or (ii) any loss of profits, revenue, business opportunity or goodwill.
- (d) Nothing in this Agreement excludes or limits any person's liability to the extent that it may not be so excluded or limited under applicable law, including any such liability for death or personal injury caused by that person's negligence, or liability for fraud or fraudulent misrepresentation.

8.2 *Indemnity.* The Client shall indemnify the RPO^{xv} against all third party Claims which may be asserted against or suffered by the RPO and which relate to:

- (a) the use of any results, materials or other items generated or supplied in the course of the Services (the "**Delivered Items**"); or
- (b) the manufacture, distribution, sale, supply or use of any products or services which incorporate any Delivered Items,

by or on behalf of the Client or its Affiliates or subsequently by any third party, including claims based on product liability laws.

9. Term and Termination^{xvi}

9.1 *Commencement and termination by expiry.* This Agreement shall come into force on the Commencement Date and, unless terminated earlier in accordance with this Clause 9, shall terminate automatically by expiry upon completion of the Services.

9.2 *No replacement Consultant available.* If a Consultant becomes unavailable and the RPO is unable to provide a suitable replacement to perform the Services, then either Party may terminate this Agreement by written notice to the other Party, such termination to take effect as specified in the notice.

9.3 *Early termination.* Without prejudice to any other rights of remedies, either Party may terminate this Agreement, at any time, on written notice to the other Party (the "**Other Party**"):

- (a) if the Other Party is in material breach of its obligations under this Agreement and, where the breach is capable of remedy within thirty (30) days, the Other Party has not remedied the breach within thirty (30) days of receiving written notice which specifies the breach and requires the breach to be remedied; or
- (b) if: (i) the Other Party becomes insolvent or unable to pay its debts as and when they become due; (ii) an order is made or a resolution is passed for the winding up of the Other Party (other than voluntarily for the purpose of solvent amalgamation or reconstruction); (iii) a liquidator, examiner, receiver, receiver manager, or trustee is appointed in respect of the whole or any part of the Other Party's assets or business; (iv) the Other Party makes any composition with its creditors; (v) the Other Party ceases to continue its business; or

(vi) as a result of debt and/or maladministration the Other Party takes or suffers any similar or analogous action.

9.4 *Consequences of termination.* On termination of this Agreement^{xvii} for any reason other than termination by the Client under Clause 9.3 above, the Client shall pay to the RPO:

- (a) any payment which was due to the RPO prior to the date of termination but which was not paid prior to termination; and
- (b) a proportion of the next payment (if any) falling due after the date of termination reflecting the RPO work prior to the date of termination and any non-cancellable commitments entered into by the RPO.

10. General

10.1 *Force majeure.* Neither Party shall have any liability or be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement that result from circumstances beyond the reasonable control of that Party^{xviii}, including labour disputes involving that Party. The Party affected by such circumstances shall promptly notify the other Party in writing when such circumstances cause a delay or failure in performance and when they cease to do so.

10.2 *Amendments.* This Agreement may only be amended in writing signed by duly authorised representatives of the Parties.

10.3 *Sub-contracting.* Subject to the written authorisation of the Client, the RPO may sub-contract any part of the Services. The RPO shall be responsible for the work of any sub-contractor and for such sub-contractor's compliance with the provisions of this Agreement.

10.4 *Assignment.* Neither Party may assign, mortgage, charge or otherwise transfer any or all of its rights and obligations under this Agreement without the prior written agreement of the other Party.

10.5 *Entire agreement.* This Agreement, including its Schedules, sets out the entire agreement between the Parties relating to its subject matter and supersedes all prior oral or written agreements, arrangements or understandings between them relating to such subject matter. Subject to Clause 8.1(d), the Parties acknowledge that they are not relying on any representation, agreement, term or condition which is not set out in this Agreement.

10.6 *Waiver.* No failure or delay by either Party in exercising any right, power or privilege under this Agreement shall impair the same or operate as a waiver of the same nor shall any single or partial exercise of any right, power or privilege preclude any further exercise of the same or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies provided by law.

10.7 *Notices.*

- (a) Any notice to be given under this Agreement shall be in writing and shall be sent by post, or by fax (confirmed by post) to the address of the relevant Party set out at the head of this Agreement, or to the relevant fax number set out below, or such other address or fax number as that Party may from time to time notify to the other Party in accordance with this Clause 10.7. The fax numbers of the Parties are as follows^{xix}: The RPO – [●]; the Client – [●].
- (b) Notices sent as above shall be deemed to have been received three (3) working days after the day of posting, or on the next working day after transmission (in the case of fax messages, but only if a transmission report is generated by the sender's fax machine

recording a message from the recipient’s fax machine, confirming that the fax was sent to the number indicated above and confirming that all pages were successfully transmitted).

10.8 *Interpretation.* In this Agreement:

- (a) the headings are used for convenience only and shall not affect its interpretation;
- (b) references to persons shall include incorporated and unincorporated persons; references to the singular include the plural and vice versa; and references to the masculine include the feminine and vice versa;
- (c) references to Clauses and Schedules mean clauses of, and schedules to, this Agreement;
- (d) references in this Agreement to termination shall include termination by expiry; and
- (e) where the word “including” is used it shall be understood as meaning “including without limitation”.

10.9 *Further action.* Each Party agrees to execute, acknowledge and deliver such further instruments, and do all further similar acts, as may be necessary or appropriate to carry out the purposes and intent of this Agreement.

10.10 *Announcements.* Neither Party shall make any press or other public announcement concerning any aspect of this Agreement, or make any use of the name of the other Party in connection with or in consequence of this Agreement, without the prior written consent of the other Party.

10.11 *Law and jurisdiction.*

- (a) This Agreement shall be governed by and construed in accordance with the laws of the Republic of Ireland and each Party agrees to submit to the exclusive jurisdiction of the courts of the Republic of Ireland.
- (b) Notwithstanding Clause 10.1110.11, before commencing any litigation, each Party shall consider in good faith whether it would be reasonable in the circumstances for the Parties to agree to pursue any alternative dispute resolution processes. Such alternative processes may include internal escalation procedures and/or mediation in accordance with the WIPO mediation rules. For the avoidance of doubt, however, nothing in this Agreement shall prevent or delay a Party from seeking an interim injunction.

Agreed by the Parties through their authorised signatories:

For and on behalf of
[Insert full legal name of the RPO]

For and on behalf of
[Insert full legal name of the Client^{xx}]

 Signed

 Signed

 Name

 Name

 Title

 Title

 Date

 Date

Schedule 1

Service Specification

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|---|---|
| Service to be provided | <p>Give details about the work to be undertaken including:</p> <ul style="list-style-type: none"> • what will be actually be done; • what is its purpose; • who will undertake the work; • will it involve use of any facilities and equipment and if so whose; • are there any dependencies (i.e. obligations on either the Client or third parties that must be satisfied for the Services to be completed)? |
| Location for performance of the Services | Gives details about where the services will be performed. |
| Deliverables | List what will be provided to the client |
| Timescale | Commencement Date: ^{xxi} |
| | Completion Date: |
| | Milestones: |
| Reports | Include details of what reports (both final and on-going) will be provided by the RPO and on what dates / intervals. If a particular format is to be used, this should also be specified. |
| Meetings | Give details of any meetings that will be held or attended and when and where these will take place. |
| Name of Consultant | Insert the full name of the consultant the RPO will use to perform the services. |

Schedule 2

Payment and Notices

| | |
|-------------------------------------|-----|
| Fees (exclusive of VAT) | [•] |
| Payment milestones | [•] |
| Expenses | [•] |
| RPO's address for notices | [•] |
| Client's address for notices | [•] |

Drafting Notes

ⁱ This Model Consultancy Agreement is intended to be used only where the RPO is providing consultancy services to a client. Under this template, the academic will carry out the consultancy work as part of his/her employment duties to the RPO. Accordingly, there is no direct contractual link between the academic and the client, nor will any payments be made directly or indirectly to the academic. Care should be taken before entering into any arrangement under which the academic is doing private work and is being remunerated for such work over and above his/her normal salary in case this conflicts with current government policy or the institution's policy. For further details about consultancy agreements the user should consult the accompanying Practical Guide entitled "Introduction to Consultancy Agreements".

ⁱⁱ Users of this document should note that the authors have not drafted it to take account of the individual requirements of Irish RPOs which might apply. Users are advised to seek out and address, by additional provisions, any peculiarities or requirements of a relevant institution.

ⁱⁱⁱ Users of this document are advised that the authors have not drafted it to be used by or in relation to consumers. Contracts concluded with consumers are obliged to include an additional layer of legal protections, to be written in plain-spoken language and to contain other features imposed by consumer-specific laws which are not dealt with in this template agreement.

^{iv} Users of this Model Consultancy Agreement should be aware that in some situations the law relating to "state aid" might need to be considered (e.g. if the industrial party to the consultancy agreement does not pay market value for the benefits it receives). This is a complex area and there is no 'one-size-fits-all' way of dealing with it. Accordingly, the user should seek specialist advice when required.

^v Users of this Model Consultancy Agreement are advised that it has not been prepared with regard to any tax law, treatment or policy, and that it may be advisable to get specific tax advice in relation to any tax issue or treatment which might arise as a result of performing or implementing this agreement. Tax treatment will depend in part on the parties' circumstances at the time the agreement is made and thereafter.

^{vi} This should be the date on which the last party signs the agreement – it is often left blank and inserted by hand by the last party to sign.

^{vii} Insert the full name of the RPO, the statute or charter under which it was incorporated or established, and its registered/principal address. Individual RPOs will have their own legal formalities which will need to be completed to bind the RPO.

^{viii} As contracts can only be entered into by bodies that have a separate legal personality, it is essential that the agreement clearly identifies the precise legal entity that is entering into the contract. For Irish companies, it is possible to obtain the relevant details by carrying out a search on the Irish Companies Registration Office website (<http://search.cro.ie/company/>). Where the company is incorporated outside of Ireland, it is sometime possible to obtain these details from the equivalent commercial register in the proposed client's country of incorporation (but note that these are not always free to access). For other types of organisation (e.g. Non-Governmental Organisations, Governmental departments, etc.) or for companies where such information is not easily obtained from public sources, it is often most efficient to ask the proposed client's legal advisors to confirm in writing the full legal name of the proposed contracting entity, its country of incorporation, its status (i.e. the kind of legal entity it is), its registered address and its registration number (if any).

^{ix} Insert the full name of the client, its registered number (or equivalent), and its registered/principal address.

^x Note that the parties may wish to state that oral disclosures have to be followed up in writing within a particular period. Although the confidentiality clause is drafted as a two-way provision, in most cases, it is likely that the RPO will be the party receiving confidential information. Accordingly, it will normally be in the RPO's interests to keep this definition relatively narrow (which is achieved in this instance by requiring written information to be marked as confidential).

^{xi} The details of the services should be clearly and objectively defined in Schedule 1.

^{xii} Some consultancy agreements would make delivery of the final report conditional upon the RPO's receipt of all fees from the client.

^{xiii} The impact of this sentence is that the consultant / RPO will be unable to use or publish the results for as long as the confidentiality obligations subsist.

^{xiv} This figure is included as an example only – the RPO will need to take a view on what is a reasonable level of limitation. Note that a minimum liability figure is included in agreements like this to reduce the risk that the limitation clause would be perceived to be unreasonable (and therefore not effective).

^{xv} When using this template agreement, the RPO should note that it may be requested to insert a provision which accepts liability where a claim is made by the academic to the effect that he/she is an employee of the client.

^{xvi} Consider whether the RPO wants to also include a right to suspend the services (e.g. if payments are not made on time) which is sometimes a 'softer' option to termination.

^{xvii} This only deals with payment obligations post-termination. This clause could be expanded to also deal with the return of materials, provision of final reports, how work in progress is to be handled, etc.

^{xviii} Some agreements include a long list of force majeure events. If there are particular issues that might be relevant, it may be worth including specific mention of these.

^{xix} Complete with the fax numbers to which notices about the consultancy agreement should be sent.

^{xx} The name of the entity in the signature block should be identical to the entity named as a party at the top of the agreement.

^{xxi} Insert the date on which the consultancy agreement is to commence. This can be after the date on which the agreement is signed if appropriate.

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