



# Mutual understanding of the parties to a contract – With whom are you negotiating? – day 2

THE **ABS**  
CAPACITY  
DEVELOPMENT  
INITIATIVE



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*Training on Mutually Agreed Terms: Contracts for making ABS functional*

**30 November – 04 December 2015, Paramaribo, Suriname**

funded by



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# Key element of the content of contracts:

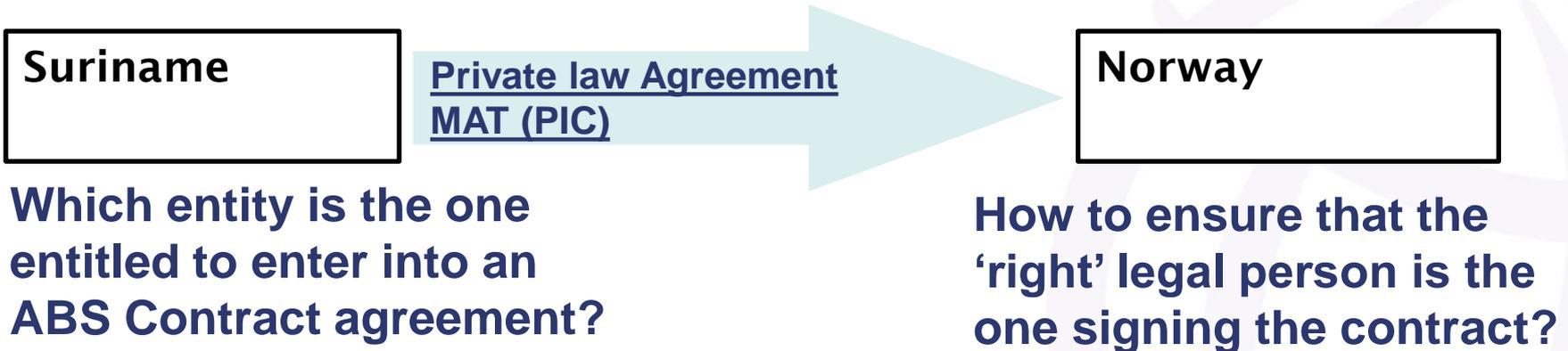
- Parties – legal persons – turning them into being bound
- Subject of the contract – what is being transferred?
- Purpose
- Benefit sharing linked to specific utilisation or products (including IPR)
- Subsequent third party use
- Changes of intent
- Confidentiality
- Dispute settlement



# Contract law

**Contract: Two-party relationship (or more parties)**

- Bind the entity where benefits will be created
- The legal “glue” is in the accept to be bound
- **Ability to accept on behalf of someone/ entities**



# Who is really bound when any of these are taking genetic resources?

- **Academics** – individuals, academic institutions or ?
- **Master student and PhD** – student, academic inst.
- **Small scale company** – individual or company
- **Public breeding companies** – type of entity
- **Large commercial entities** – ind's, CEO, legi, structure
- **Multinational companies** – mother – daughter, legitim
- **Traders** – the type of the trader and complex transfer
- **Collections** – by essence the use of others



# Legal personality:

Governed by national laws in the country where the contract shall be enforced

- **Legal capacity: be a subject of the law**
  - Company, organisation, inst., community, agency, country
- **Capacity to be bound: can the entity undertake legal responsibility?**
- **Does the user country recognise the provider country as having legal personality to enter into an agreement?**



# Identify the legal person with legal capacity:

- **Academics**
- **Master student and PhD**
- **Small scale company**
- **Public breeding companies**
- **Large commercial enteties**
- **Multinational companies**
- **Traders**
- **Collections**



# Solution:

Pre-signing or pre-negotiating search (not sufficient to ask the user!)

Invest time and resources in:

- Knowing if the provider 'entity' is recognised by the user-law
- Know the company structure on the user side
- Legally verifiable statement on the personality



**When legal personality is resolved:**

**Is it the 'right' parties to the contract?**



# Personality on the provider side:

- An ABS framework?
- Owners of the resources
- Competent authority, to grant PIC
- With whom shall the contract be negotiated?
  - Authority
  - Others
- Clarity and being possible to manage



# When legal personality is resolved, is it the 'right' company that is obliged?

- Is it this the company, which will sell the products in the market?
- If so, which market?
- If not, which company will create the benefits that should be shared with you?



# Corporate entities

- Start-ups
- Mother-daughter
- Sisters?
- The relationship between the limited company and the persons owning it or even the holding companies



# Who can bind an entity?

**Capacity to bind the entity they represent:**

**Is the one sitting at the table the legitimate representative of the entity?**

**Corporate law in the user country**

**Depends on the constituting documents of the enterprise**

**For academic institutions?**



# Parties – things to keep in mind

2.3 Nestlé South Africa (Pty) Ltd a company incorporated under the laws of South Africa and operating in South Africa bearing registration number 1916/001498/07

- Which company:
  - Mother or daughter company?
  - Will be the one earning money? Will Nestle SA do any sales outside SA?
  - Will be the one which can be brought before a court?
  - Has any assets at all?



# Parties

## COUNCIL FOR SCIENTIFIC AND INDUSTRIAL RESEARCH (CSIR)

The Council for Scientific and Industrial Research (the CSIR) is a statutory South African research council established in accordance with Act no 46 of 1988, and operates inter alia as a “bioprospector” as defined in the Act.

- Why the SA body?
- Will this body include the Council in their contracts with thirdparties?
- Clearer regulation of the transfer situations.



# Ensuring that all necessary parties are bound- ex TEFF:

## 2. Parties

This agreement is signed between:

The Institute of Biodiversity Conservation, whose address is [...], herinafter referred to as the “Provider”

The Ethiopian Agricultural Research Organization, whose address [...], hereinafter referred to as “EARO”

And

Health and Performance Food International bv. (HPFI), whose registered address is P.O. Box 247, Azieweg 4, 9407 TG Assen, NL-9400, the Netherlands, Tel: +31 (0) 6 53 413847, e.mail [j.turkensteen@soilandcrop.com](mailto:j.turkensteen@soilandcrop.com), hereinafter referred to as the “Company”.



# Can you identify the problems here?

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On the provider side are there two users – why?

On the user side there are some observations:

- Turkensteen as a person – bound? NO!

- E.mail “soilandcrop” – indicates that he has his most important work in another company which is not connected to this contract what so ever.

- Corporate structure – persons

Why discrepcionancy between the provider and user side.



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# Their different approaches to ABS in practice:

- Academics
  - Taxonomic, scientific, applied
- Master student and PhD
  - A master/ PhD-thesis
- Small scale company
  - Single product development
- Public breeding companies
  - New varieties for farmers
- Large commercial entities
  - Commercial large scale prod.
- Multinational companies
  - Products for global markets
- Traders
  - Provide others with GR / TK
- Collections
  - Conserve, classify, make available



# Inequities in the parties as a source of problem:

- Ability to understand the nature of a contract
- Corporate entities
- **Negotiation capacity: strategies for negotiation**
- **Some jurisdiction have a revision or invalid if the parties to the contract are imbalanced –**
  - **Governments could be regarded as a stronger party**



# Binding the 'right' entity

- Are all necessary parties bound?
- Where are the benefits going to be created?
- Authorised representative to bind
- To bind to this kind of a contract



# Solution:

Thinking through the party-structure

Consider:

- Adding parties to be solidary responsible for the payment
- Requiring guarantees
- Security account etc



# Assignment:

If you know of any company seeking access to GR and a TK in your country, please search the internet and to gather the relevant information about the company.

If there is no such company, please identify a company with which you would like to enter into an ABS agreement and undertake a similar internet search.

Prepare a short briefing on information about the company and present it to your colleagues.

