



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

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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**

Suriname

Private law Agreement
MAT (PIC)

Norway

Which entity is the one entitled to enter into an ABS Contract agreement?

How to ensure that the ‘right’ legal person is the one signing the contract?



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 insitutions?



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, hereinafter referred to as the “Company”.



Can you identify the problems here?

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The Ethiopian A
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And

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 enteties** ➤ **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.

