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Introduction to Drafting Successful Access and Benefit-Sharing Contracts

by Tomme Young and Morten Walløe Tvedt

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About the Authors

Tomme Young

Associate research fellow, FNI. Chair, IUCN SSC-WCEL Global Specialist Group on ABS and Related Issues. Frequent author on legal and practical environmental and business issues. Frequent advisor to governments, companies, communities, agencies and institutions on contracts and transactions involving ABS, natural resources and other environmental issues and regimes. Author or coauthor of five books (including Beyond Access, infra, coauthored with Morten Walløe Tvedt), 9 pamphlets and over 30 articles and position papers on these issues. Frequent lecturer in universities, professional seminars and workshops on commercial and legislative implementation of ABS and other environmental regimes. Contact address: tomme.young@gmail.com.

Morten Walløe Tvedt

Senior research fellow, FNI. Tvedt has published extensively in the area of biological resources law and intellectual property in recent years (see www.fni.no for a complete list of publications). The most important monograph regarding genetic resources he co-authored with Tomme R. Young, Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD. IUCN Environmental Policy and Law Paper No. 67/1 (available in English, Spanish and French, www.fni.no/publ/biodiversity.html). Tvedt is currently working on a monograph on patent law and the sui generis option in the plant sector for developing countries. He may be contacted at: mwt@fni.no or by post to Fridtjof Nansen Institute, P.O. Box 326, 1326 Lysaker, Norway.

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Introduction to Drafting Successful Access and Benefit Contracts

This booklet provides an extremely brief summary of the main rules, issues and questions that the parties to an ABS transaction must be aware of when negotiating, drafting and implementing an ABS contract. Clearly, a pamphlet of this size cannot provide an actual guide to these issues – its goal is to introduce the information contained in a researched book that has been developed going more into details of contracting for ABS, offering practical lessons and guidance to the persons who might have the responsibility for negotiating and drafting ABS contracts.

1. Why is Awareness of Contract Law Important in ABS?

From the inception of Access and Benefit Sharing, it has been recognized that the concept will be implemented through private contracts between the users of genetic resources and their providers. The development of the ABS regime through the CBD and Nagoya Protocol (and other instruments and bodies) relies heavily on contracts as the primary mechanism for making ABS work. Unfortunately, especially when applied to trans-national/international contracts, the system of contractual and commercial law is not as clear or simple as many ABS negotiators assumed. The guidance given by the Nagoya Protocol on how to negotiate ABS contracts and which issues should be included is limited (e.g. Art. 6 3. (g), Annex) or not substantive (e.g. Art. 12 3. (b), Art. 19 1.).

The concept of legally binding contracts is quite ancient, with references to their use dating back more than 4,000 years. As such, it relies on principles and practices that are well established in virtually all legal systems around the world. The challenge of ABS, however, arises from the fact that the ABS regime introduces new, unconventional elements that have never been successfully addressed in contract law up to now.

Even with conventional types of contracts, the law of contracts is not entirely clear or predictable. Despite centuries of development, contract law frequently encounters situations in which the parties may disagree over a contractual point and must resolve their differences in court. The law of contracts, therefore, is still developing. The new contractual mechanisms necessary to implement ABS make the contractual law regime even less predictable.

The need to apply contract principles to new and different situations and subject matter necessitates the development of new solutions. At the same time, the value of contracts in any transaction is their ability to add "legal certainty," imposing fixed centuries-old practices and principles by which all parties can have confidence that the contract will be implementable and enforceable. Legal certainty is only available where these practices and principles can apply. It is essential that ABS contracts be developed and implemented in a manner that conforms to the rules applicable to more traditional contracts.

ABS is also challenging by virtue of its international character. Although the CBD and NP are international instruments with up to almost 200 parties, there is no accepted body of international contract law. Every contract is governed by the national law of at least one country. Although all countries have contract law, the manner in any country's law applies to a particular contract may differ markedly from that of another country. In addition, any contract that has international aspects (parties, activities or property from more than one country) has international components that are still far from predictable, in terms of their implementation and legal enforceability. These factors add complication, making drafting, implementation and enforcement much more difficult.

The CBD and NP are very unspecific about the commercial and contractual aspects of ABS. In many essential ways, ABS contracts are completely unlike any of the conventional contract categories. For example, they merge commercial objectives with environmental and social-welfare objectives – in itself a difficult task for any contract. Often the resources accessed are ambiguous (unknown or undescribed), and the expected outcome or result of the actions taken and obligations imposed may be highly uncertain.

The use of written contracts is intended to help the parties avoid disagreements, misunderstandings and the need to litigate. If the contract is well written, it may achieve this goal. Although enforcement of contracts is important, the goal of the parties to ABS contracts (and of the authors of this pamphlet), has very little to do with lawsuits. Indeed, a lawsuit is often an indication of a failed contract. This pamphlet focuses on the goal of creating a successful contract.

It elaborates on approaches that could, if properly applied, enable the negotiators to create functional contracts but it also identifies some of the key factors that prevent ABS contracts from functioning. In doing so, it creates a more amplified understanding of the issues and obstacles to be addressed and to maximize the validity and enforceability of ABS contracts. To this end, it briefly summarizes some of the advice that the authors have offered and explained in the book Drafting Successful Access and Benefit Contracts, emphasizing key practices and basic rules for negotiating and drafting ABS contracts. Specifically, this pamphlet summarizes the following key points:

- a general approach to the development of a strategy for the negotiation of a legally effective ABS contract (section 2, below);
- the need to ensure that every aspect of the contract is unambiguous and externally verifiable (section 3);
- the need to be sure that the right parties are named in the contract, and that they are legal entities that can be bound by the contract (section 4.1);
- the need to draft certain key provisions of the contract so concretely that they are legally recognized as "enforceable" (section 4.2);
- the need to address the risks and impacts of third-party transfers (section 4.3);
- the importance of understanding and applying the concepts of contractual validity and enforceability (section 4.4)
- provisions that help the contract to maximize the parties' legal remedies (section 4.5);
- the use of guarantees and other provisions that help ensure that the contract will be performed (section 4.6); and
- the need to avoid misunderstandings and misuse of legal concepts such as "governing law," "private international law" and "international commercial law" (section 4.7).

2. Develop a Commercial Plan for the Contractual Relationship

A first step towards a successful ABS contract is for each party to that contract to clearly identify their goals and priorities and integrate them into the party's strategy and plan regarding the contract they want and the kind of relationship between provider and user that they want to develop. As early as possible (before the negotiations begin), the parties must begin to map out their objectives and strategy. Depending on the nature of the party (country, community, institution, agency, commercial company, etc.) these objectives could differ markedly at this point. Each party's goal is to consider the issues that may be addressed or affected by the contract, and determine what results are desired or acceptable with regard to each identified issue. While, in general, this process is focused on the party's own needs and expectations, it may also be both relevant and necessary for each party to attempt to predict the other parties' needs and expectations. A provider country or community may need to start the planning process of a contract by thinking about what it wants from the particular user with which it is negotiating. The commercial planning process is the first step and very necessary. Probably, failure of contracts in ABS is a negotiations failure, and no negotiation will succeed if it deletes the planning step. This commercial planning process is not the same as having a realistic view on what the other parties to the contract could offer in terms of e.g. benefit sharing or accept in terms of e.g. restrictions in utilisation. Taking the perspective of the other often gives additional perspectives to those motivating one's own commercial objectives.

This planning process forces the parties to begin thinking in terms of contractual specificity and functionality. Although the international ABS regime is still ambiguous and uncertain, the contract process must instead focus on specifics. It must build a legal and practical relationship that clearly explains what every party must do and may expect. Contract negotiation is, by definition, a "give and take" process. Development of a party's negotiating map and strategy is the first step in "aware negotiation" of a contract that is legally certain and promotes implementation.

The steps in planning and negotiating a contract are based on detailed discussion and analysis by the party. They begin with focus on how the various issues to be negotiated interact and identifying priorities and objectives. This "map" produces a clearer negotiating mandate for an individual who is negotiating on behalf of a group, agency, government or community. Specifically, the parties can determine what they insist on, what they refuse to accept, and where their options are flexible. Another element of the mapping process is an analysis of the other parties, considering the typical categories of such parties (i.e., researchers, commercial product developers, academic institutions, etc.) and the unique needs that each category normally must address. Together, the map and analysis enable each negotiator to identify interactions among elements, to ensure that the negotiations do not gain a benefit in, one clause, but then make it meaningless in another. This process leads inexorably to the development of a negotiating strategy for achieving the party's objective through a concrete, functional, legally valid and durable contract. Over the course of the negotiation, the parties' respective maps and strategies will evolve and eventually look alike. Until the contract is fully agreed, however, each negotiator should continue to rely on their own evolving map, re-evaluating the impacts of every proposed change.

The mapping, analysis and strategic processes are essential components of successful ABS contract negotiations. They are discussed in Chapter 3 of the book *Drafting Successful Access and Benefit Contracts*, which provides tips and suggestions for how to approach them.

3. Avoid Ambiguity

In stark contrast to the international ABS instruments (the Convention on Biological Diversity and the Nagoya Protocol), which are vague and non-specific, contract law is built on specificity and concreteness, and indeed cannot function without it. A contract that says, "I will give you some apples tomorrow in exchange for some money" is not specific enough to be enforced. If, at the time of payment, the seller says that the amount paid is not enough, the buyer may simply respond that the seller did not provide enough apples. The contract's terms do not help these parties resolve their disagreement. Even a judge looking at the contract will say that it was not specific enough to enable him/her to decide. In these circumstances, the judge will normally refuse to hear the case at all.

Similarly, consider an ABS contract by which A grants to B the right of "access" to A's genetic resources, in exchange for B's promise to provide an appropriate share of the benefits arising from utilization of those genetic resources. Over the following months, B collects samples of wild plants, and also purchases grains, legumes, succulents and fruit in local markets. He returns home and engages in plant breeding using germplasm of the collected plants, but also plants some of the grains, legumes, fruits and succulents in his garden, and squeezed juice from other fruits and succulents. Which if any of the various biological items is also a "genetic resource"? Is one "accessing a genetic resource" when he buys it on a local market? Is he "utilizing" the genetic resource if he plant seeds in his backyard? What about if he extracts juice? And what is an appropriate share? How is it to be calculated/evaluated? And how can the drafters of the contract expect a judge to rule on these questions?

These matters cannot be easily be answered by applying the NP or existing national ABS legislation. In a contract, however, the parties must concretely agree on them. If not, the contract will not be legally binding. Thus the overarching rule for a successful ABS contract is that it must be clear, concrete and unambiguous, applying the same rules and principles that are used for the negotiation and drafting of all contracts.

Even among experts who have been actively involved in ABS since its inception, terms like "access," "benefit-sharing," "genetic resources," "traditional knowledge," "derivative," "utilization," "provider," "user" still have multiple meanings, with no internationally accepted legally definition that sufficiently enables the parties to use these terms in the concrete manner necessary in order to create a legally valid and enforceable contract. If parties to an ABS contract use any of these terms without more specific definition, or if they simply restate the ambiguous language of the CBD or NP definitions, their contract will be so ambiguous that it becomes legally unenforceable. In this regard, contracts have a very different purpose than international instruments, like conventions and protocols. Ambiguity was built into CBD and NP in order to make it possible for countries to agree on these overall concepts. In a contract, however, although ambiguity might make it easy to agree, the results will be unacceptable. Each party will take actions based on its interpretation of the ambiguity. A party's expectations will rarely be satisfied, however, because the other parties will be acting in accordance with their own (possibly very different) interpretations. The greatest threat to the enforceability of ABS contracts arises from this type of misunderstanding – especially the use of ambiguous terms without concrete definitions. In negotiating ABS contracts, one should make every effort to avoid ambiguity. Be certain that there are clear answers to questions such as those mentioned above.

The authors recommend that parties avoid using standard terminology from the CBD and NP, instead developing clearer and more precisely defined terms. It can sometimes be effective to use this type of unspecific terms in an international instrument, because international conventions are always subject to further clarification in domestic legislations and in contracts. In a contract, however, it is not helpful to use these terms. In any kind of a contract clarity and specificity is required. For examples you would never accept a contract for buying a car simply stating only that you "buy a car"; you wants the model, technical details, and a specific registration number to be taken into the contract. Contracts are a legal tool that must create and impose concrete obligations. Use of unspecific terminology is very harmful. It will introduce uncertainty where there is no room for such. If the parties to the contract are not very specific in formulating the obligations, they create a contract that has little possibility for success. The use of unspecific terms leaves the interpretation of the meaning of the contract to national judges who are not specialized in biology or biotechnology, and increases the possibility that the contract will be found unenforceable. The drafters of the contract should aim at resolve these difficult questions of interpretation when entering into the contract. On this point there is a need in shifting paradigm in ABS to make contracts work otherwise there will be a whole generation of ABS contracts being signed that will end up as unenforceable. This shift in thinking is required since the CBD and NP both prescribes private law contracts to be the main legal tool in ABS.

If the parties do not follow this advice and insist on using standard ABS terms, be sure to define them more precisely, so that there is no doubt how every possible action or requirement will apply. Till now, contracts have mainly being unsuccessful in providing such more detailed definitions of the terms in CBD and NP.

These issues are discussed in Chapter 2 of the book *Drafting Successful Access and Benefit Contracts*, which provides additional guidance on how to address them.

4. Rules for Drafting Successful Access and Benefit Contracts

The authors have broken down their advice to the drafters and negotiators of ABS contracts into a set of seven "rules" that are designed to increase the likelihood that the ABS contract will be valid, implementable and enforceable. Each of these rules is examined in detail in its own chapter of the book *Drafting Successful Access and Benefit Contracts*. They are very briefly summarized below.

4.1 Make Sure You Contract with the Right Parties

The first "rule" focuses on the parties to the contract. It raises a number of challenges, including confirming the "legal personality" of companies and institutions, the parties' "legally recognized capacity to contract" and the ability of each party to actually meet the commitments it makes. To many non-lawyers, the provisions specifying and binding particular parties look simple. And in domestic/local contracts, they are simple. For this reason, they are often overlooked. In international contracts – especially in ABS contracts – however, they are extremely important. Failure to address these questions properly can have a major impact, affecting enforcement and compliance. Perhaps most important, it can have a very serious impact on the parties' motivation to meet his ABS obligations.

In brief, in order to be valid, a contract must have at least two parties. The contract is binding only on entities or persons that are named parties to it, and specifically given responsibilities in it. In addition, all entities (companies, agencies, institutions, countries, communities, etc.) that are parties must have "legal personality" in order to be bound by a contract. "Legal personality" is the concept that defines whether an entity or company is legally be capable of entering into a contract – whether it can hold legal rights and be bound by legal obligations within a given legal system. The parties must independently confirm that every such entity involved in the contract meets the applicable requirements of legal personality. Failing this, the contract will be unenforceable.

Where individual persons are bound by the contract, a comparable issue relates to whether the person has the requisite "legally recognized capacity" to enter into a contract. Legally recognized capacity rules determine whether a party (company, entity, community or individual) can be bound by a contract. The rules of legal capacity are often intended to protect those who are less wealthy or sophisticated (especially rural individuals and communities) from contractual situations that put them at an unfair disadvantage. Often, a contract with a party that lacks legally recognized capacity cannot be enforced.

Both "legal personality" and "legally recognized capacity" are concepts governed by national law. The relevant rules differ greatly from country to country. Therefore, one must have at least some insight in national contract law of any country that is or may be involved. Often, if a contract is invalidated due to one of these issues, the law will not enforce it.

Another key aspect of this rule relates to authority and representation. An entity can only be bound by a contract, where the person signing it is that entity's "authorized representative." This too is a matter that is decided under national law, and those laws, too, vary greatly from country to country.

When a contract is formally executed, it is also important to determine which parties are "necessary participants" and whether they are all properly bound. If the contract depends on the actions or involvement of some other party, then the contract must assign to one or more parties the duty to involve that party, and specify what happens if that party fails to act or to agree to be involved. Connected to this is the practical need to know as much as possible about the other parties – including investigation into sensitive and confidential issues such as their financial status, nature and stability. In many ABS contracts, for example, one or more of the parties was a recently formed "start-up" company. It is important before entering into a contract with such a company to know what to expect and how much risk is involved[3].

3 These issues are discussed in Chapter 4 of the book Drafting Successful Access and Benefit Contracts, which provides additional guidance on how to address these challenges.

4.2 Be Specific and Concrete Regarding All Substantive Obligations and Processes

The negotiation of an ABS contract has, broadly speaking, two goals. The first is to decide what the contract will do and how. The second is to write it all down, clearly and concretely. This second rule is generally applicable to every part of the contract; however, for purposes of explaining it, the book *Drafting Successful Access and Benefit Contracts* examines how this rule is applied to one of the most critical elements of every successful contract: the need to ensure that the contract clauses that describe the subject matter (res), each party's obligations and the objectives of the contract are consistent, unambiguous and concretely written .

Concrete, specific drafting is absolutely essential. For the negotiators and contract draftsmen, this means not only that "the devil is in the details," but also that the overarching provisions must be very precise. The ABS contract drafters' challenge is to ensure that (both in generalities and in specifics) each contract is clear enough that a judge or arbitrator or other external person who has no involvement in the contract can know clearly and exactly what each party must do and when.

As noted above, an ambiguous contract is difficult or impossible to implement and often cannot be legally enforced. It cannot produce positive results, in the event that any disagreement might arise. Consider, for example an employment contract where the terms and requirements are ambiguous. If the employer and employee could not settle any disagreement between themselves, they could not resolve their disagreement by reference to the contract, because each side would interpret the ambiguity differently. Thus, the employee would never know what to do, and the employer would never know what to expect. If their disagreement went before a judge, that judge would have no basis on which to know what the parties expected. In most countries, the contract would be considered invalid, and the judge would not even be allowed to issue a ruling. In a few situations, he might rule on some kinds of claims under other principles of damage, crime or tort, but he could not use the parties' contract as a basis for his ruling.

For ABS contracts, this situation is even more complicated. Unlike employment law, there is no existing body of supporting law applicable to ABS. This means that if the ABS contract does not precisely explain what the parties are expected to do, the court will usually be unable to find any other basis to rule on their case. It could not act at all. In that situation, there is little possibility that the parties can later come to a compromise, when a disagreement or conflict arises. Any type of contract must clearly state the parties' objective, subject matter and functional obligations, this need is double in ABS contracts, where lack of clarity and concreteness could well be fatal to the entire relationship.

In ABS contracts, then, it is essential to ensure that six core areas are addressed in the most concrete manner possible: (i) the resources accessed and its location (genetic resources and/or ATK), (ii) the user's rights and expectations, (iii) the provider's rights and expectations, (iv) the user's obligations, (v) the provider's obligations and (vi) the overall contract objective. The text of the contract must convey exactly what is included and what the parties have agreed to do, with the highest possible level of clarity and detail. It must be concrete about all aspects of each item, such as, for example, the deadline or due date for each action. The operative clauses of the contract must be linked in a practical way, closely tied to actual "on the ground" activities and events. This means that it is essential to specify the user's actions and options and, linked to this, the concrete consequences in terms for monetary/payment and other obligations that must be carried out when these actions have taken place.

It is also important to ensure that performances, triggers and requirements are "externally verifiable." If the contract solely relies on the user's report, for example, as the basis for determining whether an obligation has been triggered, it may not function well.

An important aspect of the development of concrete core provisions is the concrete specification of limits on those provisions. When formulating these limits, the contract should stipulate specific consequences if they are breached in a manner that could be decided by a court.

The parties can limit the contract in many ways. For example, they might simply include a clause clearly stating what is not permitted. Another option is to draft the provisions describing exactly what the particular user may or must do in a manner that tightly focuses the scope of the user's rights, to accord with that user's specific statements about his/its intended activities. As noted, however, such limitations may not function well without effective, external monitoring or oversight[4].

4 These issues are discussed in detail, and additional guidance is provided in Chapter 5 of the book Drafting Successful Access and Benefit Contracts.

4.3 Manage and Address Major Risks

Contracts are generally focused on risk. As noted above, provisions relating to the identification of parties and the identification of their core responsibilities and expectations are directly addressing the risk that the contract could not function due to disagreement or misunderstanding. This rule focuses on the need to make sure that a contract specifically addresses as many other types of risks as the parties can identify.

In explaining this rule to parties to ABS contracts, the book uses one particular well known risk as an example: the possibility that a user might seek to avoid its contractual obligations by transferring the genetic resources and/or traditional knowledge acquired to a third party, after the contract has been signed.

One step for managing and addressing major risks is to properly understand the business model of the user. Where the access and utilization clauses are limited, and particularly where the provider's receipt of benefits is tied to the user's successes, it will be important for him to understand the intended use. Such knowledge may help in drafting tailor-made clauses with respect to a range of issues, including third party transfer.

In practice, the implementation of ABS transactions nearly always includes one or more "third-party transfers." In addition to direct transfers of material, information or contractual rights, transfer might occur if a company participates in a merger, acquisition, division, restructure or even if it terminates or goes into bankruptcy. All these situations need to be resolved in the contract. Beyond this, in many companies that engage in research, the company's employees may have a long history of informally sharing specimens, samples, interim research results and other information with researchers in other companies or institutions. When a company obtains genetic resources or ATK under an ABS contract, its employees and other researchers might assume that they can share those resources in this way, without concern for the company's contractual responsibilities.

In the NP negotiations, many delegates were concerned that there was no practically effective legal protection against this risk. Many providers indicated their belief that a solution is urgently needed, in order for them to institute the proper in-house practices. In some other strata, however, ABS was roundly criticized for the opposite reasons. In the realm of botanical and zoological collections (including CGIAR collections), herbaria and genebanks, for example, primary complaints include the fact that any solution to the transfer problem "may prevent" post-collection transfers, block or reduce access and transfer of genetic resources for research and development purposes. They feel that these activities are their *raison d'être*, as institutions. Often the same Parties that established the collections are now imposing these restrictions.

Unless the contract is clear on this point, a transfer of genetic resources, ATK or research results to a third-party can mean that the person holding, and potentially utilizing those resources is not bound by the benefit-sharing obligations under the ABS contract. Thus, in negotiating and drafting an ABS contract, it is virtually always necessary to address in some way the possibility that a party may attempt to sell or otherwise transfer the genetic resources, ATK and/or rights or duties under the ABS contract. In addition to a specific clause regarding such transfer, negotiators and draftsmen should also carefully consider how such a transfer might affect other clauses of the contract.

At the same time, the value of GR and ATK to users is often tightly interconnected to their ability to transfer it. The contractual challenge in addressing post-access third-party transfers in ABS contracts is to find ways to control and oversee transfers that are reasonable and externally verifiable, and do not negatively affect the benefit-sharing and other rights and obligations in the contract. The external verification aspect is especially difficult, because the transferee may not be known or disclosed to the provider. This means that it is critical for the ABS regime to develop functional mechanisms that enable the users' post-access transfer, without eviscerating the providers' expectation of benefit-sharing.

Legally, there are few ways to control third-party transfers of this type effectively. Indeed, most countries' national legal systems are designed to encourage more transactions rather than limit them. For this reason, the ABS contract drafters must be careful to avoid any clause that is contrary to the country's general rules on unrestricted commerce. Obviously, these issues are both complex and important[5]. The challenges raised in "third-party transfers" will need tailor-made solutions to each contractual situation.

5 They are discussed in Chapter 6 of the book Drafting Successful Access and Benefit Contracts, which provides additional guidance and suggestions for addressing them.

4.4 Know the Possibilities and Limitations of Contract Law

Overall, as noted above, an ABS contract can only be enforceable, if it is drafted in a manner that applies basic contract law. A so-called "ABS contract" that repeats unenforceable language from the CBD, NP, ITPGRFA, national ABS legislation or even existing "ABS contracts" will probably not be legally enforceable. It must be recognized as "valid," "equitable" and enforceable under national contract law. If it is not, then the parties' only hope is to rely on the good will of other parties – hoping that they will consider themselves bound by a "gentlemen's agreement" and act as if it was binding. Given that most ABS contracts bring together parties that have no previous relationship of trust, it is generally risky to rely on good will in this way.

Although relevant contractual law varies from country to country, the basic standards that determine validity, equity and enforceability are generally similar enough that they can be summarized in this section. There are four key adjectives, which determine the legal status of any contract (in the following order): **"valid"** (a valid contract is one that a court would recognize as a legal instrument); **"binding"** (a binding contract imposes legally recognized obligations on the parties); **"implementable"** (an implementable contract can be performed according to its terms without the need to resort to courts or arbitration); and **"enforceable"** (an enforceable contract is one that a court or other authority could enforce, either by mandating compliance or by ordering a money judgment or penalty for non-compliance). If a contract is found to be invalid, impermissibly inequitable or illegal, it may be declared to be invalid and immediately voided or formally terminated. In many cases, such termination produces an inequitable result. In all cases, doubts about the validity, etc., of a contract lead to delay, uncertainty of performance and an unlikelihood that the contract will be fully implemented.

Here also, the challenges of proper negotiation and drafting of an ABS contract include far too many issues and concerns to be summarized in a pamphlet. Each of these issues, however, is very important and can seriously impact the success of an ABS contract. As such they must be addressed[6].

4.5 Expect the Best; Plan for the Worst

This rule reflects a primary reason that contracts exist, as well as the reason that they are used in ABS: Business and other relationships among people are rarely predictable. No matter how firmly the parties are committed to the ABS relationship or how similarly they describe it at its inception, they are very likely to reach a point of (major or minor) disagreement in future. As noted above, written contracts are one way that the parties attempt to identify possible future areas of uncertainty or disagreement, and to clarify them at the beginning, when all parties are motivated to find solutions. That is the manner in which contract drafters "expect the best."

The rest of the rule, however, calls on them to plan for the worst. Hence, to comply with this rule, the parties must decide what will happen if there is a disagreement in the future that cannot be handled by consensus or compromise. Up to now, this prospect has not been addressed in most ABS contracts. As a result, when the parties have reached an unresolvable disagreement, the injured party has had no option except to hope that the other party will "act like a gentleman" and fulfill the contract's terms.

In general, there are many options for addressing contractual enforceability. The most effective is to draft the contract in a way that motivates the parties to fulfill their responsibilities. As long as a party still has a right to receive some benefit or performance under the contract in future, that party will be more likely to comply with the contract. If a party has already received everything to which the contract applies, however, it may be more motivated to try to avoid its remaining responsibilities. This is often the case in ABS contracts, since access to the resources happen before benefits are created and could possibly be shared.

Practical motivation, however, may change over time, and is often difficult to predict. In the negotiation of any contract, the parties do not want or expect ever to find themselves in a position that requires them to undertake legal enforcement processes. Yet such situations arise very often. It is essential to the functionality of the contract, to do as much as possible to enable legal enforcement, just in case such a situation will arise. In practice, commercial entities and businessmen are much more likely to negotiate or compromise on contract disputes, if the other party is legally able to bring a case for formal enforcement, even when there is little chance that he would ever do so.

6 These issues are discussed in Chapter 7 of the book Drafting Successful Access and Benefit Contracts, which provides guidance and suggestions for addressing these challenges.

Many ABS contract drafters choose not to address enforcement, because they doubt that a foreign court would ever enforce the ABS contract. While these doubts are potentially justified, there are many other reasons that the contract should include enforcement provisions. For example, formal enforcement is not only possible but recommended where the user has assets and/or operations in the provider country. In addition, even if the provider would have to bring an action outside the provider country, it may be aided by contractual clauses on enforcement matters. (It is important to remember that, even if the provider does not have prosecution funds, an NGO or civil society group may be willing to bring action on behalf of the provider.)

A contract may include any provision the parties wish; however, a provision that does not give rise to a legal remedy may have little meaning or effectiveness. It is essential for ABS negotiators and contract draftsmen to focus on the manner in which a contract can support the parties' right to a "legal remedy." Chapter 8 of the book *Drafting Successful Access and Benefit Contracts* takes a step-by-step look at many elements of this rule, providing a brief and simplified look at various legal remedy concepts and giving tips and examples concerning the best way to address them in a contract.

Among the types of remedies that must be considered are the following: (i) contractual interpretation (*i.e.*, asking a court or arbitrator to issue a decision on the meaning and application of a particular clause in a particular situation); compensatory remedies (where a court or arbitrator orders one party to pay a specified amount of money ("damages") and "equitable remedies" (where a court or arbitrator is asked to issue an order, to address some specified unfairness in the contract or in the actions of one or more of its parties)

In this connection, it is also important to include provisions that specify whether arbitration will be required and if so, what procedures will apply. There are many factors that affect the determination regarding whether disputes should be subject to commercial arbitration and/or mediation.

4.6 Protect Contractual Rights/ Expectations

A contract could use guarantees and other tools to help ensuring that both parties behave in a contractually responsible manner and are protected against the other party's financial irresponsibility. The functionality challenge of ABS contracts, and indeed of the entire ABS regime, lies in the basic fact that formal contract enforcement (in courts or arbitration) of international contracts is so difficult and expensive that ABS providers normally would not attempt it without financial and other help. This raises a basic question: If the parties cannot enforce it in the courts, what could they *really* do in case of an unresolved conflict or breach of contract?

There are many types of contractual provisions that can be used to enable a party to compel another party to performance its contractual obligations or pay damages or other amounts without the need to bring a legal action in court. Among these mechanisms are guarantees, escrow arrangements, insurance, letters of credit, mortgages, deeds of trust and other security arrangements.

The inclusion of these mechanisms in an ABS contract can, if properly written, dramatically increase the possibility that the contract will achieve the parties' objectives[7].

7 These issues are discussed in Chapter 7 of the book Drafting Successful Access and Benefit Contracts, which provides guidance and suggestions for addressing these challenges.

4.7 Avoid Mistaken Legal Assumptions

It is important to remember that contract issues are legal issues. For this reason, the persons negotiating, drafting and implementing an ABS contract must have a basic understanding of the legal issues involved. It is important for every person to examine his or her assumptions about contracts, and make an attempt to determine if they are correct.

Although there are many such assumptions in contractual practice, there are three that are particularly problematic, because non-lawyers often do not recognize them as legal concepts, and therefore do not attempt to determine if they are incorrect. These three assumptions are very common in ABS negotiations and contracts:

1. Many parties mistakenly assume that their legal uncertainties about foreign contract law can be eliminated if that party insists that his own country's law must be designated as the "governing law" of the contract;

2. Parties often mistakenly assume that most legal concerns relating to international contracts can be easily resolved under "private international law" (PIL); and

3. Parties often mistakenly believe that there is a body of "international commercial law" to resolve problems in international contracts and their enforcement.

In fact, however, none of these assumptions is true. First, in many cases, the specification of a particular country's national law as "governing law of the contract" is only the first step in determining which law applies to a given contractual dispute.

Second, PIL is not a collection of agreed laws at all. It is rather a name for a very complicated area of academic study, which examines the rules, standards and exceptions that apply where a court is asked to determine which body of law applies to a particular lawsuit.

Third, although there are dozens of international instruments that have attempted to develop a unified body of international commercial law, only a few very narrow ones are in force. Some of them, including the UNIDROIT principles, are merely non-binding principles which may be used in contracts, if the parties agree to them. Others were adopted as binding instruments, but have only a few ratifications. Most of the commercial law conventions that are in force have very few Parties.

This last point is also important for another reason. None of the international instruments that exist, whether binding or non-binding, addresses any of the important open legal issues that affect ABS contracts. Virtually all of these instruments, however, include provisions that may have a very undesirable impact on the ABS contract, such as provisions that impose specific rights or alter the parties duties, depending on the manner in which the subject matter of the contract was transported from one country to another. Such provisions are written in a very unequivocal way, making them binding unless the contract specifically states otherwise. Those provisions are not practically relevant to ABS contracts. Unless the parties have carefully researched the content of that instrument, and sought independent legal advice about how it affects their proposed contract, however, they can face rather drastic consequences, if their ABS contract states that it will be governed by a specific international contractual instrument.

The lack of a body of law that establishes clear legal mechanisms and ensures their consistent application is a problem, especially for parties who assume that such law exists, or who assume that their "governing law clause" resolves the problem. The authors recommend that the drafters of ABS contracts avoid the use of any such clause or reference to any international instrument, if they do not have a clear understanding of its impact on their contract[8].

8 These issues are discussed in detail in Chapter 10 of the book Drafting Successful Access and Benefit Contracts.

5. Use Models and Standards

Another critical issue for those drafting ABS contracts relates to the development and use of model ABS contracts, model ABS provisions and international ABS standards. Although many user companies and other entities have published documents that they refer to as "model ABS contracts," none of those instruments sufficiently addresses the issues discussed in part 4 of this pamphlet. This is bad news for those negotiating ABS contracts, who wish that there were internationally agreed models and standards in the ABS regime.

It is, however, one of the areas in which there is still hope that the international ABS community will act. The adoption of models and model provisions is strongly recommended in the NP and, if done in a fair and balanced way, would be of benefit to all.

Even if formal adoption of models never happens, it is decidedly probable that international standards will grow out of ABS practices. Although this process takes time, if a large number of ABS contracts are adopted and their general provisions are made known, a "standard approach" for each of the ABS contracting challenges discussed in the book Drafting Successful Access and Benefit Contracts will slowly come to be recognized. As such recognition occurs, new ABS contracts can be streamlined, because the parties, courts and arbitrators will have certainty regarding the standards that will apply.

Until models and standards have reached this point, however, the authors suggest that drafters use caution if they feel that they must use another ABS contract as a template for their work. Remember that, to date, no ABS contract has proven to be effective in ensuring compliance/implementation by the parties. Using a pre-existing contract that did not provide benefits to the provider side as a template may often have the impact of giving up available possibilities to develop a workable, implementable contract. If a party or draftsman decides to base a new contract on an existing contract, then the existing contract should be treated as a "learning example" at most. The negotiators and draftsmen should obtain advice from a contract lawyer, who must carefully study it to ensure that no inappropriate clauses are incorporated into the new contract, and that old mistakes are not repeated.

In addition, like all other human innovations, contracts continuously evolve. Using an older contract, even if it was successful when used, does not guarantee that it will still function effectively, while using a new one is a gamble that the innovations it contains will be successful.

Finally, in using any contract, recall that contract negotiation is a series of compromises. If you start from the final compromise agreed by another transaction, you may find that your own compromises push the transaction rather far from your original objectives.

6. Lessons for ABS Contracts, Drawn From Contract Law and Practice

The following are some of the lessons that can be learned from general contractual practice and applied to the development and drafting of an ABS contract:

- Develop a strategy for the negotiation of a legally effective ABS contract.
- Ensure that every aspect of the contract is unambiguous and externally verifiable –use more precise terms than those used in international law.
- Be sure that the right parties are named in the contract, and that they are legal entities that can be bound by the contract.
- Draft certain key provisions of the contract so concretely that they are legally recognized as "enforceable".
- Address with the possibility of third-party transfers –stipulate clear paths that ensure that the parties' contract obligations are not lost in these situations.
- Understand the concepts of contractual validity and enforceability and apply them in your contract – be aware of the requirements of and limitations contract law when drafting the contract.
- Include provision that help the contract to maximize the parties' legal remedies.
- Include guarantees and other provisions that make it easier for the parties to ensure that the contract will be performed.
- Do not base your contract on misunderstandings and misuse of concepts such as "governing law," "private international law" and "international commercial law" – in most cases these concepts will not be able to help your contract as the contractual text must stand on its own.

7. Conclusion

All of the CBD Parties and NP Parties have agreed that contracts shall be the main tool for making ABS work. Although this is a matter of clear agreement, it did not simplify the ABS challenges. In order for an ABS contract to be successful, it must be more than a short document that restates terms, concepts and phrases from the CBD and NP. Although there is no quick fix that will ensure that an ABS contract will be successful, the proper application of basic contractual principles and practices can help you to tailor your ABS contracts in a way that maximizes their implementation and enforceability. Progress must be made in the years to come and then we need to gain experience from those experiences.

Contact

Dr. Hartmut Meyer
ABS Capacity Development Initiative

Deutsche Gesellschaft für
International Zusammenarbeit (GIZ) GmbH

Bonn & Eschborn
Dag-Hammarskjöld-Weg 1-5
65760 Eschborn
Germany

T +49 6196 793285
F +49 6196 79803285
E hartmut.meyer@giz.de
I www.abs-initiative.info, www.giz.de

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www.abs-initiative.info