UNICO PRACTICAL GUIDES
Commercialisation Agreements

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consultancy agreements

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Foreword

Over recent years, the Knowledge Commercialisation profession has grown and matured, creating a huge wealth of knowledge, experience and best practice relating to University commercialisation contracts. The UNICO Practical Guides have been produced specifically to share this knowledge, experience and best practice within the profession.

The UNICO Practical Guides are practical guidebooks on University Contracts. They are designed primarily for use by people in the profession, both new and experienced, in order to tap into the collective learning of colleagues and peers.

The Practical Guides have been produced as a resource for Knowledge Commercialisation professionals in the UK. They are not designed to replace or compete with existing manuals or guides, but to provide a new and, we believe, vitally important set of support materials to those of us in the UK who deal with University commercialisation contracts on a daily basis.

We hope that you find the UNICO Practical Guides useful.

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The UNICO Practical Guides were prepared by UNICO in association with Anderson & Company, The Technology Law Practice™

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Chapter 1

General Introduction

In the university sector today, as in many other sectors, there is increasing recognition of the commercial value of the knowledge and skills of its workers. The provision of advice to commercial organisations, based on that knowledge and skill, is now an important goal for many universities. Such provision is often regulated through consultancy agreements ("consultancy agreements" in this Practical Guide).

The purpose of this Practical Guide is three fold:

1 to provide an introduction to consultancy agreements and their use, including legal, practical and negotiating issues;

2 to provide some suggested templates together with guidelines concerning their completion; and

3 to consider and discuss some of issues which are problematic or of particular concern to universities.

This Practical Guide attempts to provide information that is useful for both the beginner and the more experienced research contracts or technology transfer professional. The breadth of material covered may give the misleading impression that university contracts are fraught with legal and commercial difficulties. Usually, this is not the case. But sometimes differences of expectation, practice or legal culture can arise between the parties negotiating an agreement, particularly in international transactions. The beginner may wish to focus on the earlier chapters and to use the detailed discussion that appears in the Appendices as a reference source if a specific question or problem arises.

In addition to this Practical Guide, users can also access a password-protected page on the UNICO web site at www.unico.org.uk which (now or in the future) will contain:

a an electronic copy of this Practical Guide

b additional material as it becomes available, which may include additional precedent material and updates to the Practical Guides; and

an email discussion forum, where UNICO members can exchange information, ask questions, etc on issues concerning the subject matter of these Guides.

Abbreviations used in this Practical Guide

CA	Consultancy Agreement; the agreement that will be entered into between the university, the Consultancy Company or the Academic and the Client
Academic	A member of the academic staff, researcher/research assistant, a technical member of staff or a student. Most consultancy work is undertaken by Academics.
Advice	The types of consultancy service normally provided by an Academic. See Chapter 2
Consultancy Company	Consultancy Company, a company set up by a university to handle consultancy work, usually a subsidiary of the university.
Client	The organisation (or, more rarely, the individual) that commissions a university, Consultancy Company or Academic to provide Advice and other services.
Resources	The facilities, premises, staff, agents, sub-contractors, students and other resources of a university.
TTE	Technology Transfer Executive.
University IP	Intellectual property that is owned by, or licensed to, a university.

Chapter 2

Introduction to Consultancy Agreements

What is a consultancy agreement?

A consultancy agreement is a contract between a person or organisation willing to provide *advice* and *other related services*, and the recipient of those services (the Client), usually in return for a sum of money.

Unlike some other types of contracts that a university enters into, a consultancy agreement is usually seen by a university as a money-making exercise. As a result, certain negotiating issues which can be of major concern in university research contracts, are often conceded by universities in consultancy agreements, such as:

- retaining intellectual property rights in results;
- academic control over the work to be done; and
- the right to publish.

Who enters into the consultancy agreement – Academic or university?

Different arrangements are seen, including:

- *The university (or its consultancy company) contracts with the Client*, with the university agreeing to provide the services of one or more of its Academics to the Client. The university would normally retain a relatively small percentage of the fee and pass the remainder of the fee on to the Academic; or
- *The Academic contracts directly with the Client*. The university would not normally be involved in this contract or benefit from it, and the Academic would not usually be able to benefit from the university's insurance (e.g. its professional indemnity policy) in respect of private consultancy work. Some universities may also require that no university-owned Resources be used in private consultancy arrangements. But the university may still have an interest in controlling the Academic's consultancy activities, e.g:

- The university may wish to ensure that the Academic does not enter into commitments which might adversely affect the university, e.g. if the academic uses or makes available the university's intellectual property, or exposes the university to liability. Ways in which the universities address these issues are discussed later in this guide.
- The Academic would still be required to follow the rules and regulations guiding Academics providing consultancy services to third parties (e.g. number of days allowed, what is allowed and not allowed).

Some universities conduct their consultancy activities through a Consultancy Company, usually a wholly-owned subsidiary of the university. References to a university in this Guide should be understood as including the university's Consultancy Company, where appropriate.

What is meant by "advice" in a consultancy agreement?

The type of "advice" which 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;
- interpreting facts and situations using the skills and experience the Academic has.

Sometimes, parties use consultancy agreements to cover services that are not genuine consultancy (e.g. the provision of research services); some of the problems that this can create are discussed later in this guide.

What is meant by "other related services"

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

- making presentations;
- attending conferences or meetings

Why do universities enter into consultancy agreements?

The knowledge and skills of Academics are some of the main assets of a university. Many Academics feel that such assets should be freely exchanged with others to disseminate and increase knowledge.

However, many universities find themselves under pressure to raise revenue in more imaginative ways and keep their Academics motivated (despite the relatively low pay they receive). One way for a university to raise revenue and generate additional income for the Academic is to utilise these skills and knowledge through the provision of consultancy services.

However, increasing revenues may not be the only reason for entering into a consultancy agreement. Other reasons include:

- making the skills and knowledge of academic and technical staff and students available to third parties;
- developing the skills and knowledge of academic and technical staff and student in the "real world";
- testing ideas, inventions, practices, etc developed at the academic institution.

Why is a written consultancy agreement necessary?

Technically, there is no need for a university to enter into a written consultancy agreement. Like most other types of contract entered into in the United Kingdom, the consultancy agreement could be made entirely orally and still be legally binding. But a written consultancy agreement can be seen as the tool which

- enables the university to control how the skills and knowledge of Academic are provided to businesses and other sectors;
- protects the interests of the university as to ownership and use of intellectual property and exposure to liability.

Specifically, why a *written* consultancy agreement should always be entered into, include:

- *to define what Advice and Other Services are to be provided*. This will enable both the university and the Client to know what is being provided for the agreed fee;

- *to indicate the amount of time that should be spent and when to start and finish providing the Advice and Other Services.* Such written limits will assist the Academic to understand the amount of time and effort s/he needs or should put in. Without agreement on this, the Academic might continue to give Advice without a reasonable limit of time, and for which the Academic and/or the university might not be compensated;
- *to define the "field" of the consultancy.* This will set out which areas the Academic will be giving advice and indicate clearly the limits to the Advice that is provided;
- *to determine what rights, if any, the Client will have in respect of the university's (background) intellectual property.* Universities often own intellectual property which is, or is potentially, of economic value. If the intellectual property position is not defined clearly then the Client may (inadvertently) obtain rights to the university's intellectual property. Or at the very least the Client might assume that it has rights or access to such a portfolio;
- *to decide who is to own the intellectual property generated while the Academic is giving Advice.* If this is not stated, then the default position will normally be (for most forms of intellectual property) that the creator of the intellectual property will be the owner. For consultancy agreements between the university and a Client it would be the university. However, in a purely commercial transaction like a consultancy agreement, the Client will normally expect to own the intellectual property, and many standard consultancy agreements provide for this. The university may wish to limit this ownership to particular areas (i.e. with a "Field" definition) rather than giving the Client unlimited or wide ranging ownership;
- *to set out the limits of liability that the university is willing to accept.* Without wording limiting liability, the university and/or the Academic could face unlimited liability if the Advice provided by the Academic turned out to be bad, carried out negligently or did not meet an acceptable standard;
- *to set out any standards to which the Academic will work and the type of "guarantee" that the university will offer the work carried out by the Academic.*

Types of consultancy agreements seen in the university sector

The following are the main types of consultancy agreement usually seen in the university sector:

- *Agreement between university and Client*;
  Here the university contracts directly with the Client. The university provides the services of one or more Academic(s), either selected by the university, or more usually selected by the Client.

- *Agreement between Academic and Client*;
  Here the Academic contracts directly with the Client. In the UK, most Academics (particularly those who are academic members of staff rather than technical members of staff or students) are allowed a certain number of days a year in which to carry out private consultancy and other such activities.

  Unless the consultancy is negotiated by a university consultancy company or other agent, the Academic negotiates directly with the Client the terms on the terms of the consultancy agreement, and should arrange private insurance cover.

- *executive consultancy services provided by an Academic directly to a Client, as part of a "spin-out" transaction*;
  Where technology is spun-out of a university, 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. Recognition is often built into the consultancy agreement of the fact that the Academic continues as an academic with the university (e.g. the right to continue to research and publish).

  This is normally a variation of the agreement mentioned in the previous bullet point.

- *expert witness agreement.*
  Here the Academic is 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 (e.g. if a case involves whether some machinery is faulty).

1 Occasionally, one encounters "non-disclosure agreements" in the sense of an agreement in which a party agrees that it will not disclose any confidential information to the other party, and that any information that it does disclose will not be subject to confidentiality obligations. Usually such agreements are drafted by companies that do not wish to be "tainted" by knowledge of the other party's confidential information (perhaps because they are working in a similar field and wish to avoid claims that their products benefited from the other party's information). Sometimes, such agreements allow for the disclosure of information contained in a published patent application.

If all the parties to the case do not accept the opinion without question, the Academic may be required to provide evidence in a court room, and be asked questions in court about the opinion.

The expert witness normally enters into a contract with the firm of solicitors for a particular party, although in some cases the contract is between the university and the firm of solicitors. Sometimes, experts are appointed by the court itself rather than by one of the parties.

Unlike other types of consultancy, expert witnesses are required to follow rules prescribed by the courts (e.g. the Civil Procedure Rules) and are required to meet certain standards as laid down by those court rules. For example, the Academic is expected to provide an objective opinion and not to favour the party which is instructing the Academic; and to write the report in a way which complies with the specifications set down by court rules, etc.

Who should draft the consultancy agreement?

There is no set rule. But many universities wish to enter into a consultancy agreement based on their standard terms and conditions (see Template 1 for an example of such terms and conditions). This is especially true for routine, small-scale consultancy work, where the Advice involved may take a few hours and the fee will be relatively small, and it will not worthwhile to create an individually negotiated agreement.

Some Clients state that they have a policy that they will only enter into agreements based on their own terms and conditions. Although it is hard to generalise, such terms and conditions will sometimes include terms that are unacceptable to the university (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 or which seek to cover every remote eventuality). It may be difficult for the university to insist on using its own standard agreement, particularly if the academic is willing and able to enter into a private agreement with the Client and avoid using the university's services.

How long should a consultancy agreement be?

For routine Advice (such as Template 1 in this Practical Guide), the aim should be for a short agreement. Template 1 is especially tailored for this.

The greater the

- complexity of the Advice and Related Services to be provided; and/or
- value of the work to be undertaken; and/or
- complexity of intellectual property issues, or the greater risk of the university's intellectual property portfolio being accessed by the Client;

the greater the need to address particular issues thoroughly and in more detail than is the case in the Templates.

Format of a consultancy agreement

For the routine provision of Advice and Related Services the easiest way for a TTE to manage the contracting process is to use a standard form on which the essential details of the consultancy project are filled-in (e.g. name and contact details of the Client, the type and extent work, name of the Academic, number of days of work, price, and so on). Standard terms and conditions (which will usually not need changing) can be printed on the back of the form. Template 1 is an example of this approach.

Whether the consultancy agreement is in this format, or drafted as a letter or as a traditional agreement is a matter of style and convention. The key point is that the all essential information and agreed provisions should be included in the written agreement. Template 2 is an example of an agreement drafted in the style of a letter. This is often seen as more "user friendly" than a conventional agreement.

Why would an Academic want her/his university (or the Consultancy Company) to contract with the Client?

Unlike other types of contacts (research agreements, confidentiality agreements, option agreements and so forth) most Academics are in the fortunate position of being able to contract directly with a Client where consultancy services are

concerned. They do not have to allow their university or the Consultancy Company of the university to enter into a contract with the Client. In most cases it is the Academic who proposes that the university enter into a consultancy agreement with a Client, and they will have often have the final say in whether the consultancy agreement goes ahead.

If the Academic contracts directly with a Client, they are usually free to accept any terms and conditions, what work to do, when to do it and how to do it without being concerned about the interests or control of their employing university, as long as the university's interests are not affected.

Many universities do not give complete freedom to their Academics to enter into consultancy arrangements. Some of the restrictions that are encountered include the following:

- the consultancy work must be done within a defined number of days per annum;
- the approval of the Academic's head of department must be obtained before doing such work;
- the Client is required to sign an acknowledgment, waiver, agreement (or some other similar document) stating that the Academic is not able to access or use any Resources of the university, and that the Academic has no connection with the university while providing the consultancy services;
- the Academic must comply with any conflicts of interest policy.

Why

There are a number of reasons why an Academic would wish her/his university (or the Consultancy Company) to contract with the Client:

- all the negotiation, administration and chasing involved in providing Advice would be handled by someone other than the Academic;

  Such as negotiating the provisions of the contract, chasing unpaid fees, dealing with departments over the access to and use of Resources;
- the Academic would have the benefit of the university's professional indemnity and other insurance;

The Academic does not have the additional expense of obtaining such insurance, which can be expensive in certain fields or not available at all.

- if the Academic does not carry out the consultancy to the required standard or causes or responsible for a breach of contract, s/he will not be contractually liable. Any liability will fall on the university or the Consultancy Company.
- the university or Consultancy Company will have more experience entering into such deals than the Academic, and may obtain a higher fee than the Academic can.
- The Academic will have the benefit of using the name and reputation of the University in performing the consultancy work.

Why not

While an Academic might have an easier life if s/he allows the university or Consultancy Company to contract with Client there are advantages of not contracting through the university or Consultancy Company:

- The Academic does not have to comply with the administrative policy of the university or Consultancy Company of agreeing to certain things (as suggested in Chapter 6 of this Practical Guide);

  As suggested in Chapter 6, the Academic would need to sign an agreement with the university or Consultancy Company, fill in one or more forms for each piece of consultancy work, confirm specifically her/his agreement to certain matters, comply with procedures in order to get the fee, and may face greater scrutiny by the university or Consultancy Company that s/he is not using university Resources. Some or all may not occur if s/he contracts directly with a Client;
- the Academic will not have to share a percentage of his/her fee with the university or Consultancy Company;
- the Academic may be able to enter into a contract with a Client more quickly, i.e. does not have wait for the negotiating and administrative process of the university and Consultancy Company to take place.

Chapter 3

Summary of best practice

The following points are some indicators of possible "best practice" (on some points, readers may feel they are "ideal practice") in relation to the preparation of a consultancy agreement.

Policy

The university should have a policy in place for consultancy agreements, which may cover matters such as:

- How consultancy projects are distinguished from research projects, to avoid sponsors getting work done "on the cheap" via the consultancy route;
- Any procedures that must be followed to approve consultancy projects (e.g. completion of a form, approval by head of department, etc). Is there a procedure for accessing, pricing, and contracting for the Resources and University IP?
- The legal relationships between the university, the Academic and the Client in relation to consultancy projects, including:
  - Is the Academic acting as an employee of the university or as a self-employed person?
  - If the university enters into consultancy agreements with the Client, does it do so as principal or as agent for the Academic?
- Does the Client pay consultancy fees to the Academic or to the university?
- What proportion of those fees does the Academic retain?
- Does the university deduct tax and national insurance contributions from the fees?
- Should the Academic charge VAT on any payments received from the university?

- What contractual arrangements are needed between the various parties to reflect the above (which may benefit from specialist tax and employment law advice, depending on the exact route that is taken)?
- Who is authorised to sign consultancy agreements on behalf of the university?
- The extent of the Academic's role in approving the consultancy agreement's provisions;
- Whether the Academic should be an additional party to a consultancy agreement (i.e. where the university is the "main" party) or should he sign the consultancy agreement to indicate that he has "read and understood" the consultancy agreement;
- In what circumstances will the university allow or require an Academic to enter into a consultancy agreement directly with a Client (i.e. without the university being a party); should any special procedures be followed (e.g. approval by head of department, completion of disclosure form stating that no university's resources are being used, inclusion of special terms in the consultancy agreement acknowledging that no university IP is being used or licensed, etc)?
- How will the intellectual property of the university be protected from leakage, use by a Client, or ("accidental") licensing to a Client?
- How the university's conflicts of interest policy (if it has one) applies to consultancy agreements?
- The procedures to be followed to determine whether, and to ensure that, the Academic complies with the provisions of a consultancy agreement (whether university-Client or Academic-Client), especially in regard to the amount of work to be undertaken, protecting the intellectual property position of the university, etc.

Templates

Have in place:

- Template consultancy agreements for routine consultancy work: e.g. a form with standard terms and conditions on the back;
- for where an Academic enters into a consultancy agreement directly with a

Client, a set of terms and conditions which can be provided to the Academic and which protects the university's interests, e.g. in relation to intellectual property. Although it is likely that the Client will have their own set of terms and conditions, the university having a set of provisions (or a few key clauses) for the Academic might indicate to the Academic the minimum or default provisions s/he should be agreeing to.

Negotiation

- Who has the responsibility for negotiating the provisions of CA—the academic or the university or both?
- What training does/should the TTE have in negotiating consultancy agreements?
- Is there a structured system in place for dealing with particularly difficult areas? I.e. where there is a problem with ownership or access to intellectual property of the university or giving of warranties, or where an Academic is not happy with a particular consultancy agreement, is there a particular level of supervisor or manager who would deal with this?
- What training and information is available to Academics entering into a consultancy agreement directly with a Client? E.g. minimum acceptable terms, procedures for dealing with obtaining necessary approvals, conflicts of interest policy, etc.
- Is there a procedure for determining which issues need the assistance of a specialist adviser (e.g. lawyer, or insurance broker)?

Bottom line provisions

Is there a policy concerning which provisions must, or cannot, be accepted in a CA? Possible key issues include:

- *Warranties and liability*: is the university providing any warranties other than it will use reasonable care and skill or will re-perform any work carried out negligently? Should there be a disclaimer against achieving a particular result? Does the university require an effective limit of liability in the CA? Is the university willing to give any indemnities?

- *Law and jurisdiction*: is the university willing to accept that a consultancy agreement is governed by a law other than that of England and Wales (or, for universities based there, Scotland or Northern Ireland)? Does the university have a policy on law and jurisdiction (sometimes in consultation with its insurers) where the consultancy work is to be done outside the United Kingdom?
- *University Intellectual property*: is the university willing for the Client to gain access to the university's (background) intellectual property during or after the termination of a CA? Can the Client obtain a licence to such intellectual property on payment and then with restrictions, i.e. for use only within a particular Field, limited in time, limited to certain uses, right for the university to have access to the Client's intellectual property for the university's own (internal) research?
- *Level of commitment*: is the university prepared to offer any greater level of commitment than that it will use reasonable endeavours to carry out the work within a particular period or by a particular completion date? I.e. are there any circumstances where the university would ever accept a higher level of commitment, such as making time of the essence?

Chapter 4

Key negotiating issues in Consultancy Agreements: introduction to frequently-encountered provisions

Key terms of a typical CA

Although the detailed provisions of consultancy agreements vary, they often included provisions covering the following:

- a general description of the consultancy work;
- details about when the consultancy work is to start and finish;
- ownership of intellectual property created during the consultancy work;
- rights to use background intellectual property;
- whether publication of the results of the consultancy work is allowed;
- the standard to which the consultant is expected to achieve and the amount of effort in carrying out the consultancy work;
- whether any particular result is to be achieved and whether there is an obligation to achieve it;
- methods of calculating payment;
- limitations of liability and indemnity provisions;
- Other miscellaneous provisions: confidentiality obligations, whether visits by the Client can take place, ownership and responsibility for property provided by the Client, requirements to provide reports.

Terms needing particular attention or critical review

Although consultancy agreements provided by Clients may "look" similar to each other and may include some or all of the provisions above, the provisions of each one received needs to be reviewed carefully. Some commercial organisations in particular:

- have a "one-size-fits-all" services agreement for types of consultancy or services agreements, which is not tailored to the requirements of obtaining consultancy services from a university;

- have agreements which are geared to the purchase of goods or general "procurement" activities. Many of the provisions will apply (or exclude) the law relating to goods and are not relevant or always appropriate to the provision of services;
- have agreements with excessively detailed provisions. The aim being to ensure that all possibilities are catered for (an example is given at the end of this chapter).

Such approaches to drafting agreements can mean that a lot of time is required to establish whether these types of agreements are acceptable or contain unacceptable provisions.

Some clauses need particular attention, especially clauses that:

- seek to make "time of the essence" in relation to providing the Advice;
- make the Academic attend numerous meetings about the progress of the consultancy work, often with requirements to travel to the Client's premises;
- make the Academic provide numerous reports, with overbearing requirements as to the number of copies and the format of the reports;
- seek to give the Client excessive ownership of intellectual property generated under, or used in, a consultancy agreement (e.g. own all intellectual property that the university generates);
- seek to provide a licence to the Client in regards to the background intellectual property of the university (and which may be used for any purpose);
- require the Academic not to undertake any work for other companies, either during or following termination of the consultancy work for the Client;
- impose financial penalties on the university (e.g. "liquidated damages" clauses);
- require the university to provide extensive warranties (such as that the university owns any intellectual property used or generated in the consultancy, that the results will not infringe third party intellectual property rights, that the advice will not cause harm any circumstances, that particular results will be obtained, etc.);
- require law and jurisdiction to be other than that of England and Wales.

What are the common areas of negotiation?

Most provisions encountered in most consultancy agreements are fairly standardised (although the precise wording may differ). Some Clients may prefer a few variations on the standard set of clauses (including onerous or unacceptable versions such as detailed in the previous section).

The areas that differ generally include one or more of the following:

- time-scales for carrying out the work;
- defining the outcomes from the consultancy work (e.g. reports, intellectual property etc);
- rights to publication;
- use of the name of the university and the Academic;
- the work that is to be done;
- payment;
- warranties given.

These topics, in some instances are considered in further detail in Appendix C and in the Practical Guide entitled General Legal Issues in University Contracts. The aim of this section is to provide an introductory overview.

Timescales

The Client may have specific requirements about when work is to start and finish. In some cases such dates can be critical for the Client (e.g. filings to obtain regulatory approvals, start manufacturing). The Client may wish to state that the time(s) for performance of the consultancy are "of the essence" (giving a right to terminate the agreement if a deadline is not met) . Commercially for the Client this can be seen as a sensible approach.

However, Academics may be unlikely (with their other commitments) to find such a high level of obligation acceptable or achievable.

If timing is critical for the Client, the best way forward is to negotiate on each element of the consultancy work to be carried out and define more precisely what needs to be done and when it needs to be done, and ensure that the Academic understands and agrees to the level of commitment required.

Outcomes

Some Clients require detailed information on what is produced from the Consultancy Work. For example, they may wish to see detailed reports on the work carried out and on the intellectual property that is generated. In some cases they might require that reports be produced on a regular basis to document progress, and also specify the format, number of copies, binding etc.

For routine consultancy work this is unlikely to be acceptable. Such reporting requirements can be very time consuming or expensive (even for non-routine consultancy work).

Most Academics will not be able to produce regular or detailed reports for such consultancy work. They may not have the administrative resources or time to do so. In many cases the Client will not wish to pay extra for detailed or regular reports to be produced.

Negotiations should take place to establish what exactly the Client is seeking from such reporting requirements. In many cases, the person on the Client's side responsible for dealings with the Academic may want some specific items of information.

A second outcome that Clients often require is that in addition to the normal default provision that they own the intellectual property arising from the consultancy work, they require such intellectual property to be described in detail. Such an undertaking can be time consuming and seen by the Academic as no more than a bureaucratic time wasting exercise. For Clients, who are very sensitive concerning the creation, protection and use of intellectual property generated, such requirements can be no more than good commercial sense - especially for those Clients whose whole business is the generation and commercial exploitation of intellectual property.

For routine work it may be hard to negotiate an acceptable compromise. But suggestions to put forward in negotiations can be: the Academic to identify all reports and other written material as the property of the Client, and perhaps in any written report at the end of the consultancy work to identify (briefly) the intellectual property generated.

Payment terms

Consultancy work is often carried out for (very) large commercial and non-commercial organisations. They will often have their own detailed method of calculating, approving and administering costs, invoicing and payment (and the timing of payments). Often such requirements can be very different to those of the universities.

In many cases it may not be possible to trade with the commercial organisation other than on their own payment terms. Their order processing and computer systems will be set up in a particular way.

In such cases, in the authors' experience, the university may feel obliged to accept the Client's payment terms.

Often such organisations will take a long time to pay invoices. Again there is often little that the university can do about this (even after negotiation). Like universities themselves, large organisations have particular procedures for dealing with invoices and for printing cheques (e.g. "cheque runs") and these can often extend the time taken for payment.

The university should normally ensure that in any agreement between the Academic and the university there is a provision stating the Academic will not be paid until the university receives funds from the Client.

Chapter 5

Checklist

The checklists provided below list (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. Most of these points are discussed further in the Appendices and in another Practical Guide, particularly:

Appendix B – notes on completion of template agreements;

Appendix C – in-depth discussion of commercial issues;

and in the Practical Guide entitled General Legal Issues in University Contracts.

Consultancy agreement between university and a Client
This checklist is based on Template 1.

Preliminary	
Parties	• Is the consultancy agreement between the university and the Client or between the Academic and the Client? • Are the parties to the consultancy agreement correctly described—are their full legal names and "official" addresses included? • Where the agreement is between the university and the Client—should the Academic sign to indicate that s/he has read and understood the provisions of the CA?
Authorised signatory	• Does the consultancy agreement need to be signed by a particular person or in a particular department? • Do you need to remind the "other side" re their authorised signatory?

Approvals, etc	• (where the university uses a master consultancy agreement with the Academic) is the appropriate agreement in place between the Academic and the university? • have various approvals/confirmations been obtained (head of department, confirmation that no conflicts of interest, etc)?
Access to Resources / University IP	• if these are required, is there a procedure for negotiating, specifying and contracting these? • has a check been carried out as to whether there will be any use of Background?
Work to be done	• has this been documented by the Client or the Academic, including any Advice that is to be given? • 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)?

Chapter 6

Administration of MTAs

Contract terms	
Date	• 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 • however, the date the last party signs the consultancy agreement may be different to the date when the Academic starts to provide Advice under the consultancy agreement (this is specifically addressed as the "Commencement Date" in the consultancy agreement

Definitions	
Background and Foreground IP	• 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 a clear distinction made 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)? • 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	
Naming	• the Academic who is to provide the Advice should be named together with the department, section and job details • If the Academic is to be a party to the consultancy agreement, their home address should be stated.
What is s/he doing?	• 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 s/he will only be providing services in relation to a specific Project?
Status	• has the Consultant's status *vis-à-vis* the university been specified, i.e. s/he is an employee or self-employed? • has the Consultant's status been specified in relation to the consultancy agreement, e.g. as a party to the consultancy agreement, or acting as an employee of the university (with the university entering into the CA) or as a self-employed sub-contractor of the university?

Availability	• what is to happen if the Consultant is not available? Does the university have a right to replace the Consultant with another individual? • will the agreement terminate automatically or on notice (subject to the Client paying outstanding sums?) • will the Client or university have the right to terminate early?
Duration and termination	
Commencement Date /Completion Date	• the commencement date that is inserted should be the date Advice is actually to commence not the date when the consultancy agreement is signed • if a date is given for when the Advice is to be completed, what happens if the Academic does not complete giving the Advice by that date? Is the university liable for breach? Is there a mechanism in place which allows the university to inform the other party that the Completion Date cannot be met and to stop work until a new date is agreed?

Consequences of termination	• what is to happen when the agreement terminates:
	  • that if required or agreed to, a (final) report is prepared subject to the receipt of any outstanding payments?
	  • that the university is to be paid for sums owing before the date of termination?
	  • that the university be paid for sums falling due after the date of termination which reflect work carried out before the date of termination but not invoiced until after the date of termination; and/or commitments which cannot be cancelled (or easily cancelled)

Price and payment	
Setting the price	• has the appropriate price calculation method been determined (fixed, by the hour, by the day etc)?

When is payment to occur	• when is payment by the Client to occur:
	  • in advance?
	  • after all the Advice has been provided?
	  • when some result has been achieved (milestone)?

Expenses	• can the university charge for the expenses it incurs? • 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 by the university?
Other	• 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 university charge for this?
Confidentiality	
One-way or two-way	• does the consultancy agreement include suitable confidentiality provisions? • do these provisions protect the university's interests?
Type of confidential information	• 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 against that such disclosure should not affect any (potential) patent applications? • is there a period by which confidentiality will survive termination? is the period long/short enough?
Effort	

	• Is the amount of effort to be made by the Academic and university 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 university willing to accept these commitments?

Visits	
Visits allowed	• is the Client allowed to make visits? • is there any point in the Client making a visit? e.g. no work is being done at the university

Conditions	• when can the Client make a visit?
	  • on reasonable notice (e.g. "on reasonable notice and at mutually agreed times")
	  • only on giving written notice
	  • only when mutually agreed between the parties
	  • only when the University gives permission
	  • when some stage has occurred in the Advice being given?

Purpose of visit	• is the purpose of the visit to be stated specifically (e.g. "inspect the progress of the Project") or in specific terms?

	• 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	
Is any provided	• will the Client be providing any equipment, hardware, computers, software, etc for the Consultant to carry out the Advice?
What is provided	• is it necessary to specify the equipment that is being provided, i.e. is what is 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)?
Consequences	• 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 university 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 university? Is the university to be responsible for damage if caused by its negligence (and this subject to any limits?)
Ownership of intellectual property	
Background IP	• is the background IP clearly identified as belonging the property of the party who owns or has rights to it?
Foreground IP	• is the Foreground IP to belong to the Client?

	• is such ownership limited to a Field? • if so, is there a clear statement that Foreground IP outside the Field belongs to the University?
Assistance in protecting Foreground IP	• is the university 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, liability and limitation, and exclusion, of liability	
Warranties	• what warranties is the university prepared to offer in regard to the Advice provided by the Academic? • should the university be prepared to offer anything higher as a warranty than it will use reasonable endeavours to perform the Advice? Is it prepared to warrant that it will carry out the work with reasonable care and skill? • Does the consultancy agreement clearly state that the university/Academic is NOT warranting that any result or objective will be achieved or that any time limit will be met?
What is the university to do if it breaches any warranty given	• should the university perform the work again? • should the university 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 university has?
Boilerplate provisions	
Contracts (Rights of Third Parties) Act 1999	• Should a third party be given any rights or benefits under the consultancy agreement? • Should the Academic be entitled to enforce any right or benefit under the consultancy agreement?

	• Is there any special circumstance why a third party should be able to enforce a right or benefit under the CA?
Law and jurisdiction	• Does the consultancy agreement state which law and jurisdiction should apply to the CA? • Does the chosen law and jurisdiction comply with the university's insurance policies and internal policies?

Consultancy agreement between an Academic and a Client

This checklist is based on Template 2. As Template 2 contains similar provisions to those in Template 1, this checklist focuses on those parts which are not covered in Template 1 or are covered in a significantly different way to Template 1.

Preliminary	
Letterhead/start Warranties	• as this is a template agreement provided by the Academic, the contact details of the Academic should be placed here • as the Academic will be providing her/his services separately from the university, all the contact details should not be of the university, but should include the Academic's home address, home telephone number, and private email address

Status	• the Academic will not be operating as an employee of the university or as one of the Client, this consultancy agreement will need to make it clear about this status. This is achieved in the following ways:
	  • explicit wording that s/he is not an employee of the Client
	  • that the Academic is responsible for paying her/his own income taxes, etc
	  • payments of fees are to be made to the Academic

	• that although the Academic holds a position in a university, s/he cannot use the resources etc. of the university
Schedule	• if a general description of what services the Academic is to provide in the first paragraph of the letter is not sufficient then a schedule is a convenient place for this • The fee (and how it is calculated) can also be specified in the Schedule
Non-use of Resources and University IP	• some universities have a policy indicating that the Academic needs to obtain the Client's agreement in writing that it is not obtaining any rights to the Resources and intellectual property of the university • one way is to include this in the standard terms and conditions of the Academic • an alternative way is for the Client to sign a separate document indicating their non-use/access to Resources and University IP. This is often called a "Waiver" or "Acknowledgement"
Access to Resources and University IP	• If Resources and University IP are required, who is to provide them to the Client: the Academic or the University? • Is the Academic the best person to do so? Does s/he have the time and resources to locate, negotiate the terms and price for these and then monitor their use? • If the Academic is to contract these, are there standard terms and conditions s/he should be using?

Chapter 6

Administration of CAs

Introduction

A university is likely to enter into many consultancy agreements, and keeping track of them (both at the review and negotiation stage and after signature) is important. Central administration of CAs is the ideal here.

Unlike other type of agreements, such as research agreements or confidentiality agreements where it is only likely the university itself will be entering into the agreements, with CAs an Academic is able also to enter into a CA directly.

Where the CAs are centrally administered it will be possible to check any existing CAs which have already been signed with the same party, and any other agreements, for potential conflicts with the CA under review. It is the experience of many universities, that there will be no requirement on the Academic informing a department responsible for the central administration of CAs for CAs entered into directly by an Academic.

Another difference between CAs and other types of agreements is that although an Academic may wish for the university to enter into a CA, s/he may contact, negotiate and arrange the key commercial terms rather than the university. This will be in addition to CAs where the university carries out these activities.

Once a there is a proposal for consultancy work then a number of administrative issues may need to be addressed, including the following.

Having a Standard Operating Procedure (SOP)

A written SOP for dealing with CAs can be useful to:

- establish the correct steps that must be followed by the Academic, the department where the Academic works, and the university department responsible for handling CAs; and

- guidelines regarding particular clauses/issues. It is particularly helpful if written guidance is also issued on non-negotiable provisions as it enables the negotiator to take a more confident stance. Guidance in this area needs to be updated to take account of practical issues experienced by the negotiators on a daily basis.

What should the SOP include?

A SOP serves a number of interests:

- makes it clear to Academics what they need to do to enter into CAs;
- provides the university with clear guidelines as to the steps to be followed to enter into a CA (such as ensuring there is an agreement in place between the Academic and conflicts of interest are avoided as far as possible);
- assist negotiators by emphasising which clauses should be referred to more senior staff or legal advisers.

A SOP can reduce the potential for errors or matters to be overlooked. An SOP might usefully include:

- a checklist of provisions that should (or should not) be included;
- guidance on when to refer particular issues upwards;
- reminders to enter certain details of a finalised CA on the relevant database and to send a copy to appropriate academics;
- a list of authorised signatories and the relevant procedures for holiday cover;
- a form for Academics to complete which indicates the necessary details about:
  - the consultancy work to be undertaken;
  - the contact details of the Client;
  - the facilities, resources, materials, staff and intellectual property that the Academic requires for the consultancy work;
  - whether the consultancy work falls into any risk or other particular factor;
  - the fee to be paid.

First step before ANY CA is signed between a university and a client

Just as the relationship between a university and the Client is governed by contract, the relationship between the university and the Academic should also be governed in this way. It is suggested that before any Academic can be allowed to provide consultancy services that an agreement be entered into between the Academic and the university. Appendix C covers in more detail what such an agreement will cover but at a minimum it should deal with:

- the quality standard that the Academic is expected to meet and what happens if s/he does not (e.g. right of the university to stop using the Academic);
- the Academic has not right and shall not use the intellectual property of the university in performing any consultancy services for a Client of the university;
- the amount the Academic will receive out of the total fee and how payment will be made;
- whether the Academic will have the benefit of any professional indemnity insurance policy the university has in place;
- that the Academic has obtained appropriate departmental approval and has complied with conflicts of interest approval.

Getting all the essential information for a new CA

Often it is the Academic who will hold the essential information which will enable the university department and the individual negotiator to understand the type of deal which is being contemplated, the (legal) issues involved and to establish a position that will best protect the interests of the institution (and the academic).

The best way to capture this information is the use of a form ("Approval Form"). It is suggested that the Approval Form should contain or confirm some or all of the following:

- contact details of the Client (such as the company name, contact person, email address, telephone etc.., reference and order numbers, VAT number);
- the Academic's contact details (including details where fees should be sent);
- the consultancy work to be undertaken;

- the start and finish dates for the consultancy;
- whether (and what) facilities, resources, staff and intellectual property of the university will be used (and the prices/costs involved);
- confirmation of approvals and authorisations;
- that the Academic has read and agrees to any conflicts of interest policy;
- that the Academic confirms there will be not conflicts of interest in the university entering the CA with a Client;
    - that the Academic confirms the consultancy work will or will not fall into a high risk category;
    - that the Academic confirms whether or not the consultancy work will involve the use of animals and/or human subjects;
    - where the consultancy work involves use of animals and/or human subjects the Academic confirms s/he has or will obtain all required consents and ethic committee approvals and will be carried out within any university and/or Department of Health Research Goverence Framework and policies.
    - the Academic confirms that any material or intellectual property which s/he is entitled to use for performing their duties will be used in the provision of the consultancy services under a CA;
    - the Academic confirms that any intellectual property generated during the provision of the consultancy services will not be subject to any third party rights and that the intellectual property will pass without any encumbrances to the Client;
    - the Academic confirms that s/he has passed over all the documents s/he has received from the Client and will do so with any further documents s/he receives;
    - enable the Academic to sign to confirm and agree to the points;
    - enable the Academic's head of department to confirm by signature that
        - s/he has given approval for the Academic to carry out the consultancy services;

- that there is no conflict of interest in the Academic carrying out the services.

Having an Approval Form which deals with all these points in one place, will mean that the information is not scattered of, say, several emails, notes of conversations or doubts whether the appropriate policy has been followed or approvals sought, or rely on the memory of the TTE that s/he has ensured that procedures have been followed.

Establishing the costs of the use of Resources and University IP

It is suggested that standard costs for each main type of Resource are established for where the Academic needs access to Resources. It is understood that some universities have on their intranet pages such information.

Maintaining records and other administrative procedures

As well as having:

- the Academic sign an agreement with the university or CC;
- the Academic complete a form containing information on what the consultancy work consists of and that s/he is agreeing to certain matters; and
- a signed copy of the CA

it may be helpful to request the Academic to provide a written report of the work s/he has undertaken under a CA (or progress reports if the consultancy work extends over a long period of time). Such a report could also include details of how long the Academic spent (where the fee is a fixed amount and not calculated by the time taken), observations about the Client, etc.. Some of this information can be useful contemporaneous evidence if there is a dispute about whether there has been a breach of contract by the university. Some of this information can be used by the university in the future when determining and negotiating the time taken for certain types of consultancy and the level of fee to charge.

Appointing a co-ordinator

Ideally, a university should appoint a person e.g., a senior secretary, TTE or research contracts officer, to make sure that all the steps outlined above are followed and documents (such as the agreement between the university and the Academic is signed, the Approval Form is completed properly and is signed by the relevant persons, etc., that the CA is completed properly and signed.. Other duties could include:

- monitor deadlines (i.e. completion dates in the CA);
- informing Academics new to consultancy on the procedure for entering into a CA;
- ensuring that the approvals and documentation relating to the Approval Form have been obtained (unless the responsibility of the Academic, but even then checking s/he has done so);
- monitor the policies of the university concerning Academics undertaking consultancy work and conflicts of interest, and where appropriate checking any conflicts of interest database;
- provide copies of documentation relating to the CA to the Academic;
- where a Client wishes to use its own agreement or amending the standard template of the university, noting provisions which are different or unusual to the standard template;
- record details of the agreement between the Academic and the university and the CA in a contracts database and file the original in a safe (or designated area).

Contracts databases

Many universities enter into large numbers of intellectual property contracts, including CAs, with many different organisations. It can be difficult to keep track of whether, if the university wants to enter into a CA,

- there is already a CA in place with another Client which could cause problems in entering into the new CA; or

- a potential or actual conflict of interest, which might prevent the Academic under the consultancy work.

Maintaining a general contracts database (or even better having a discrete database just for CAs) which includes brief details of the terms of each CA, and searchable fields, can be of invaluable assistance in situations such as the one outlined above.

When to involve the lawyers

Liability and indemnity provisions or where the Client is trying to get a licence to the intellectual property of the university are probably the main areas where more specialist legal advice is sought. However, unfamiliar phrasing within any clause is often worth checking. Some institutions may have a set policy that certain non-standard CAs are passed for a final legal review before signature. Whether or not this is the case, a legal review of a random selection of non-standard CAs every so often may also be useful as part of a due diligence exercise (or good practice).

Appendix A - Templates

Below are examples of:

1 **Template 1**: a template for use where *routine* consultancy work is involved—where the university or the Consultancy Company is providing the services of an Academic to a Client; and

2 **Template 2**: a template for use where *routine* consultancy work is involved, but the contractual relationship is between the Academic and the Client. The university or the Consultancy Company are not involved.

Note: the templates are shown in expanded form in the next few pages. They are intended to fit on to two sides of an A4 sheet of paper when properly formatted.

Template 1

Template for routine consultancy work between university (or Consultancy Company) and a Client

A		[*university*][*Consultancy Company*] ("X"), whose [*principal place of business*][*registered office*] is [*address*] will undertake the Project (as defined below) subject to the provisions set out below and overleaf for:
B	*Insert full legal name of Client* *Insert address of Client*	(the "Client")
	Insert the Client's contact person and their contact details	(the "Client Contact")
C	*Insert name of Consultant*	Name of individual [(and their department)] who will undertake the Project (the "Consultant")
D	*Describe the work and any deliverables*	*(if necessary attach detailed description)* X will provide the services of the Consultant to perform the following work: (the "Project")
E	*Insert details of the Field*	In respect of the following specific products, processes or services of the Client (the "Field")
F	*Insert start date*	Work on the Project will commence on (the "Commencement Date")
G	*Insert end date*	Work on the Project is estimated to finish on the (the "Completion Date")
H	*Insert payment and time of payment details and delete as applicable*	The Client shall pay to X the following amount(s) at the following intervals: 1. A fixed price of £ 2. A daily rate of ££ 3. An hourly rate of ££ (the "Price")

I	*Invoicing*	Invoices will be raised: 1. On the Completion Date [ ] 2. In advance [ ] 3. Monthly [ ] 4. Quarterly [ ] 5. Annually [ ] (Or) in accordance with the following milestones:
J	*Insert expense details*	X shall be entitled to charge the Client additionally for expenses reasonably incurred in the performance of the Project: Yes [ ] Yes, but not exceeding [ ] No [ ] (Expenses")
K	*Termination*	The Project can be terminated on: 1 week's notice [ ] 1 month's notice [ ] 3 months notice [ ] on completion of the Project [ ] ("Termination Period")
L	*Reports*	The following reports will be provided:

AGREED by the parties through their authorised signatories:

For and on behalf of	**For and on behalf of**
Signed	Signed
Print name	Print name
Job Title	Job Title
Date	Date

TERMS AND CONDITIONS

1. Definitions.

The following words shall have the following meanings:

'X', 'Completion Date', 'Commencement Date', 'Expenses', 'Field', 'Price' and 'Project'	shall have the meanings set out overleaf
'Agreement'	shall mean the contract formed by the Client's acceptance of this agreement on the terms set out and referred to on this page and overleaf
'Background IP'	shall mean all technical know-how and information known to either of the Parties at the date of this Agreement together with all intellectual property rights owned by or licensed to the Parties at the date of this Agreement, all technical know-how and information and intellectual property rights owned by or licensed to the Parties which is not Foreground IP
'Client'	shall mean the person or organisation that is to receive, and pay for, the services defined in the Project, the name of which is set out at clause B overleaf
'Confidential Information'	shall mean information provided directly or indirectly by one Party to the other Party in oral or documentary form or by way of models, biological or chemical materials or other tangible form or by demonstrations and whether before, on or after the date of this Agreement which in each case at the time of provision is marked or otherwise designated to show expressly or by necessary implication that it is imparted in confidence; and any copy of the foregoing
'Consultant'	shall mean the person named at clause C overleaf who will render part-time scientific, technical or other services in connection with the Project

'Foreground IP'	shall mean all information, know-how, results, designs, inventions and other matter capable of being the subject of intellectual property rights which is conceived, first reduced to practice or writing or developed in whole or in substantial part in the course of the Project
'Parties'	shall mean X and the Client, and 'Party' shall mean either of them

2. Duration and termination.

2.1. This Agreement shall commence on the Commencement Date and X shall use its reasonable endeavours to complete the work by the Completion Date, or such other date as the Parties may agree.

2.2. This Agreement may be terminated by either Party giving written notice to the other as specified overleaf at clause J.

2.3. If the Consultant is or becomes unavailable to work on the Project this Agreement may be terminated by either Party giving written notice to the other Party such notice to take effect either forthwith or as specified in the notice.

2.4. X may also terminate forthwith this Agreement if the Client (a) commits a material breach of the terms or conditions of this Agreement and in the case of a breach capable of remedy within 30 days, does not remedy the breach within 30 days of notice from X specifying the breach and requiring it to be remedied; or (b) compounds or makes arrangements with its creditors or goes into liquidation (voluntarily or otherwise) other than for the purpose of a *bona fide* reconstruction or a receiver, administrative receiver or administrator is appointed in respect of the whole or any part of its business or assets or if any similar or analogous event occurs.

2.5. On termination of this Agreement, the Client will pay to X: (a) any payment which was due to X 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 X's actual expenditure on Project work prior to the date of termination and any non-cancellable commitments entered into by X.

2.6. On termination of this Agreement, if this Agreement states that X will prepare a report, it will be provided to the Client once X has received any payments due under clauses 2.5 above and 4 below.

3. Price

3.1. Where the Price is quoted on a daily rate basis, a day shall mean up to 7 hours work. Any hours worked beyond 7 hours in a day shall be charged pro-rata to the Client.

3.2. X retains the discretion to charge for any reasonable costs incurred in connection with any variation in or delay to the Project resulting from the Client's instructions or lack of instructions.

4. Payment

4.1. In consideration of the services to be provided under the Project by X to the Client, the Client shall pay the sums described in Clause H overleaf to X and in accordance with the payment provisions set out in that clause.

4.2. All sums due under this Agreement: (a) are exclusive of VAT which where applicable will be paid by the Client to X in addition to any amount or rate quoted; (b) shall be paid on the due date(s) by the Client to X as specified overleaf or no more than 30 days after receipt of X's invoice; (c) shall be made in Sterling by the Client in accordance with the instructions set out in X's invoice. All payments shall quote X's invoice reference.

5. Confidential Information

5.1. Each Party shall keep confidential and secret any and all Confidential Information that it may acquire in relation to the business or affairs of the other Party. Neither Party shall use the other Party's Confidential Information for any purpose other than to perform its obligations under this Agreement. Each Party shall be responsible for ensuring that its officers and employees comply with the provisions of this clause.

5.2. The obligations on a Party set out in clause 5.1 shall not apply to any information which: (a) was known by a Party before it was imparted by the other Party; or (b) is publicly available or becomes publicly available through no act or omission of that Party; or (c) is developed by or on behalf of that Party by any person(s) who have not had any direct or indirect access to, or use or knowledge of, the Confidential Information imparted by the other Party; or (d) a Party is required to disclose by order of a court of competent jurisdiction. The provisions of this clause 5 shall survive any termination of this Agreement for a period of 5 years from termination.

6. Intellectual property

6.1. All Background IP used in connection with the Project shall remain the property of the Party who introduces it. No licence is granted to either Party's intellectual property unless specifically agreed to in writing.

6.2. X will promptly disclose to the Client all Foreground IP.

6.3. All Foreground IP within the Field shall be the sole property of the Client who may use the same as it considers appropriate. At the request and expense of the Client, X shall execute such documents as may be necessary to transfer title to and apply for patents or other protections for such Foreground IP.

6.4. Foreground IP developed by X and not in the Field shall remain the property of X.

7. Visits and property

7.1. The Client may attend, on reasonable notice and at mutually agreed times at X's premises and inspect progress of the Project from time to time.

7.2. X shall not be liable for any loss, destruction of or damage to items or property provided by the Client to X on whatever terms in connection with the Project, except if caused by the negligence of X and always subject to clauses 10.3, 10.4 and 10.5.

8. Publication

8.1. X will not publish any Foreground IP within the Field except with the prior written consent of the Client.

8.2. X may publish by whatever means the Foreground IP outside of the Field.

9. Signature/amendment.

9.1. The Client acknowledges and agrees that no signature other than that of an authorised representative of X's contracts department shall make this Agreement binding on X.

9.2. No variation, amendment or addition to the terms of this Agreement can be made or agreed unless it is in writing and signed by an authorised representative of X's contracts department.

10. Warranties, liability and indemnities

10.1. 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 statue or common law are excluded from this Agreement to the fullest extent permitted by law. Nothing in this Agreement excludes liability for fraud.

10.2. X undertakes that it will use reasonable endeavours to perform the Project and if any part of the Project is performed negligently or in breach of contract then, at the request of the Client given within 6 months of the Completion Date, X will re-perform the relevant part of the Project, always subject to 10.3 and 10.4 below.

10.3. X 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.

10.4. Except in the case of death or personal injury caused by X's negligence, X's liability under or in connection with this Agreement whether arising in contract, tort, negligence, breach of statutory duty or otherwise, shall not exceed the contract Price paid to X under this Agreement.

10.5. Neither Party shall be liable to the other Party in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by that other Party of an indirect or consequential nature including without limitation any economic loss or other loss of turnover, profits, business or goodwill.

10.6. The Client shall indemnify and hold harmless X from and against all Claims and Losses arising from loss, damage, liability, injury to X's employees and third parties, infringement of third party intellectual property, or third party losses by reason of or arising out of any information, device or product supplied to the Client by X its employees or consultants, or supplied to X by the Client within or without the scope of this Agreement. 'Claims' shall mean all demands, claims, proceedings, penalties, fines and liability (whether criminal or civil, in contract, tort or otherwise); and 'Losses' shall mean all losses including without limitation financial losses, damages, legal costs and other expenses of any nature whatsoever.

11. **Notices.**

Any notices required to be given under this Agreement shall be in writing and sent by first class mail only to the addresses specified at clauses A and B overleaf or to such other addresses as the Parties may specify from time to time in writing. They will be deemed to have been received 3 working days after posting.

12. **Non-assignment**

Neither Party may assign, delegate, sub-contract or otherwise transfer any or all of its rights and obligations under this Agreement without the prior written agreement of the other Party.

13. **Force majeure.**

X shall not be liable under or be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement which result from circumstances beyond its reasonable control, including without limitation any delays or failures by the Client to give adequate instructions or approvals.

14. **Assistance and delay by the Client.**

The Client shall provide all information and materials sufficient in the reasonable opinion of X to enable X to proceed with the Project on or after the Commencement Date. If at any time in the reasonable opinion of X such information and/or materials are not provided in a timely fashion then X may alter the Commencement Date or the Completion Date or terminate the Agreement as provided for in this Agreement.

15. **Jurisdiction.**

The validity, construction and performance of this Agreement shall be governed by English law and shall be subject to the non-exclusive jurisdiction of the English courts to which the Parties hereby submit.

16. **Third parties.**

This Agreement does not create any right enforceable by any person not a party to it.

Template 2

Template for routine consultancy work between an Academic and a Client

[*Letterhead of Academic*-e.g. Name, Address, Telephone/Mobile telephone and email address]

[Date]

[Your reference number [ ]]
[Our reference number[ ]]

[Contact name]
[Contact job title]
[Department]
[Company]
[Address]
[Address2]
[Town]
[County], [Postcode]

Dear [Contact name]

[Consultancy work]

I have pleasure in confirming the following terms and conditions under which I will provide consultancy services as described below[and in the attached Schedule 1] (the "Services") to [*name of company*] (the "Company").

1. **Start and finish dates.**
   This Agreement will commence [as of [*date*]][on [*date*] and I will use reasonable endeavours to complete the Services by [*date*] or such later date as we may agree in writing.

2. **Duties.**
   During the consultancy I will give the Company advice and information, carry out studies and make reports as specified in Schedule 1 and in accordance with any reasonable instructions of the Company. The Company's representative(s) for the purpose of giving any instructions and approvals under this Agreement shall be [*name of Company representative fulfilling this role*] and such other persons as the Company may nominate in writing.

3. Compensation.

In consideration of the Services the Company will pay me the fees described in Schedule 1.

4. Expenses.

In addition, the Company will reimburse all reasonable expenses properly and necessarily incurred by me in the proper performance of the Services [provided that all air travel will be undertaken at [the most economic rates reasonably available] and in any event any item of expense which may exceed £[ ] will be agreed with the Company in advance].

5. Invoicing.

5.1. I will raise invoices on the Company (and send them to the above address marked for my attention) showing the fees due and expenses claimed with documentary evidence of such expenses. Schedule 1 indicates when I shall be able to invoice the Company. [*If the Academic is registered for VAT*: All sums due under this Agreement: (a) are exclusive of VAT which where applicable will be paid by the Client to X in addition to any amount or rate quoted; (b) shall be paid on the due date(s) by the Client to X as specified overleaf or no more than 30 days after receipt of X's invoice; (c) shall be made in Sterling by the Client in accordance with the instructions set out in X's invoice.

6. Taxes.

6.1. I will be responsible for the payment of any income tax, insurance contributions or other taxes, revenues or duties arising as a result of the performance of the Services or otherwise under this Agreement.

7. Academic status.

The Company acknowledges that:

7.1. I hold the position of [specify what Academic does] at [specify the Academic's educational institution] (the "University");

7.2. I shall retain the right to publish [scientific][academic] papers, participate at conferences, and collaborate with other [scientists][academics] so long as such activities do not materially interfere with the Services under this Agreement. I shall use good judgment to avoid disclosing confidential information of the Company (including Results), but unless my activities indicate reckless disregard of the Company's, I shall be entitled to disclose such information in exercising such rights as specified in the first sentence of this Clause 7.2.

8. **Independent status.**

For the avoidance of doubt neither I nor any person engaged by me in the performance of the Services will be an employee of the Company in performing the Services.

9. **Results and confidentiality.**

I will promptly communicate in confidence to the Company all ideas generated, work done, results produced and inventions made in the performance of the Services ("Results"). I will not, without the written consent of the Company, use or disclose to any other person or organisation either during or after termination of this Agreement any confidential information of the Company which may come into your possession. For this purpose all Results shall be treated as the confidential information of the Company.

10. **Return of documents, etc.**

On any termination of this Agreement I will return to the Company all documents, records (on any media) and other property belonging to the Company which are in my possession and are capable of delivery and I will retain no copies thereof in any form.

11. **Ownership of Results.**

All copyright, design right, rights to apply for patents, patents and other intellectual property in the Results shall belong to the Company. I agree when asked by the Company to assign to the Company all intellectual property in the Results at any time after their coming into existence. At the Company's request and expense I will use all reasonable endeavours to enable the Company at its discretion to make formal application anywhere in the world to obtain and maintain intellectual property in the Results.

12. **Warranties and liabilities.**

12.1. 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 statue or common law are excluded from this Agreement to the fullest extent permitted by law.

12.2. I will use reasonable endeavours to perform the Service and if any part of the Project is performed negligently or in breach of contract then, at the request of the Client given within 6 months of the completion of the Services I will re-perform the relevant part of the Services always subject to Clauses 12.3 and 12.4 below.

12.3. I do not warrant that any result or objective whether stated in this Agreement (or Schedule) or not shall be achieved, be achievable or be attained at all or by a given completion date or any other date.

12.4. Except in the case of death or personal injury caused by my negligence, my liability under or in connection with this Agreement whether arising in contract, tort, negligence, breach of statutory duty or otherwise, shall not exceed the fee paid to me under this Agreement.

13. Termination.

Either Party can terminate this Agreement at any time by giving [*specify period*] days written notice to the other Party.

14. No access to university resources and intellectual property.

14.1. I will have no access to, or use of, the resources, facilities, premises staff, agents, sub-contractors or students ("Resources") in my performance of the Services unless specifically agreed to in writing by the University. Similarly, the Company will have no access, or use of, the Resources during the existence of this Agreement;

14.2. I will have no access to, or use of, or licence to the intellectual property owned by the university or which the University has rights to ("University IP") unless specifically agreed to in writing by the University. Similarly, the Company will have no access or use of, or licence to the University IP during the existence or after termination of this Agreement.

15. Access to Resources and University IP.

If the Company wishes me to have access to Resources and University IP to [perform the Services][to assist in the performance of the Service], then the Company will need to enter into a separate agreement between [the university and the Company][myself and the Company]. [The Company will need to contact [*insert contact details of department*].[*Assuming that the University has sub-contracted the Resources and University IP to the Academic who is in turn sub-contracting them to the Company*: We have agreed that the Company shall have access to the Resources [and the University IP] as specified in Schedule 2. In consideration of my provision of the Resources and the University IP to the Company, the Company shall pay me the fee specified in Schedule 2.][*Assuming that the University has directly sub-contracted the Resources and University IP to the Company*: The University and the Company have agreed that the University shall provide the Resources [and University IP] to the Company in a separate agreement to this Agreement.]

16. Law and jurisdiction.

This Agreement is made under English law and the Company and I submit to the non-exclusive jurisdiction of the English courts.

17. Third Parties.

[Except as provided in clause [number],]this Agreement does not create any right enforceable by any person who is not a party to it ('Third Party') under the Contracts (Rights of Third Parties) Act 1999, but this clause does not affect any right or remedy of a Third Party which exists or is available apart from that Act.

I would be obliged if you would indicate the Company's agreement to the provisions of this Agreement by signing and returning to me the enclosed copy of this letter.

Yours faithfully,

[*name of Academic*]

[*on second copy of letter*]

Acknowledged and agreed on behalf of [*name of Company*]

Signed

Print name

Title

Date

SCHEDULE 1

[description of Services to be performed by the Consultant and the fees for those services]

Appendix B

Completing the Template Agreements

Introduction

This appendix provides a step-by-step list of the points to be noted or filled in when completing the templates included in this Practical Guide.

The two templates are drafted in different ways. The first template is drafted so that all the information that needs entering is placed on the front page, with the detailed terms and conditions on the back or following pages. The second template is drafted in a more conventional fashion (albeit as a letter) with details being entered throughout the template and in a schedule.

Template 1

Purpose

This template is geared towards the provision of routine consultancy work by a university (or its Consultancy Company) to a Client. Such work will be of the smaller scale, such as providing limited advice and assistance over a short period of time or in small amounts of advice and assistance over longer periods of time.

The template is not suitable where detailed provisions are required as to:

- what is to be delivered;
- the provision of reports;
- access and use of the university's background IP;
- the advice and assistance must be done within a time critical period; or
- the Client requires a higher standard of performance then for the university to use reasonable endeavours.

Summary of the mains provisions of template 1

Template 1 provides that:

- consultancy services are provided by the university through a named Academic (Consultant). The consultancy services are defined (Project), and can be limited to a particular field (Field). They start on a set date (Commencement Date) with an estimated completion date (Completion Date). The parties can choose a period for when the agreement is terminated;
- various methods of calculating the price for the consultancy service (Price) are offered together with different times when invoicing will occur;
- the amount of effort to complete the work: reasonable endeavours;
- the agreement can be terminated by either party if the Consultant is no longer available;
- if the agreement is terminated the Client is required to make due payments;
- there are basic two-way confidentiality provisions;
- the background IP of the parties shall remain their property, with no licence to it. All foreground IP within the Field is to belong to the client. But foreground IP outside the Field is to belong to the university.
- the Client can carry out inspections on reasonable notice;
- the amount of effort on the part of the university in carrying out the Project: reasonable endeavours. If it performs any part of the Project negligently or in breach of contract then it will re-perform that part of the Project if requested by the Client to do so within 6 months of the Completion Date;
- no warranty is given by the university that any result or objective will be achieved;
- the client provides an indemnity to the university.

Completing the agreement

Clause	What needs to be completed
A	Insert • the full legal name of the university and its principal place of business; or • the full legal name of the Consultancy Company, its company registration number and registered office Alternatively, for example, use the logo, contact details as they normally appear on a letterhead at the top of this page, and just put the name of the university or Consultancy Company in Clause A.
B	**Name:** Insert the full legal name of the Client: • *if the Client is a company*, check with the Client who it is. Some Clients are part of a group of companies and it may not always be apparent which one you are contracting with. If the company is English or Scottish, then in most cases it will be registered at the Registrar of Companies, and be given a unique number (which cannot change) even if the name of the company can. If a "limited" or "PLC" company, these words should appear in Clause B. Sample wording: RESEARCH COMPANY LIMITED, a company incorporated in England and Wales under company registration number 12345678; • *if the Client is another educational institute*. Educational institutes are usually incorporated either by a Royal charter (most universities) or as a form of company (usually a company limited by a guarantee—-similar to a "normal" company, but not for profit. Sample wording: THE UNIVERSITY OF HUNDERLAND, incorporated by Royal Charter THE RESEARCH INSTITUTE, a company limited by guarantee incorporated under company registration number 12345678

- *if the Client is an individual*. Ask the Client for her/his full name, e.g. if they are known as Jo Smith, but their proper name is Josephine Smith, the latter should be used.

Tip: for UK companies (limited, PLC, limited by guarantee, plus some others), their proper name, registered office and registration number can be found, without charge, on the Registrar of Companies web site: www.companieshouse.gov.uk

Address:

- *if the Client is a company*. Conventionally the registered office is used, but also if the company has many offices/departments, another can be used. But which one is being used should be stated. Sample wording:

  whose registered office is 12 The Square, Inner City, London, WX1 5QZ

- *if the Client is another educational institute*. The main (principal) address of the educational institute is normally chosen. However, correspondence sent to such an address may not find its ways to the relevant person or department. A second address may need to be inserted where correspondence needs to be sent.

C Insert the name of the Academic who is going to carry out the Project.

In some cases it may be appropriate to include her/his department and other contact details.

D A short description of what work is to be carried out should be entered for the Project. If there is a wide range of tasks, or the work is complex then it may be necessary to document these separately in a schedule and attach the schedule to this agreement. In such case a short description should be added here followed by wording such as "and as more fully set out in the Schedule attached to this Agreement."

E	The field in which the Project is to be undertaken should be set out. For some routine consultancy work or if the Client only carries out a limited variety of operations then having a field definition may not be an issue. However, without adding a field definition the intellectual property position of the university or Consultancy Company may be jeopardised. As drafted this agreement, assumes • that Foreground IP not in the Field will belong to the university or the Consultancy Company (see Clause 6.4); and • that the university or Consultancy Company is free to publish Foreground IP outside of the Field (Clause 8.2). If a Field definition is not to be used then this Row E needs to be deleted and Clauses 6.4 and 8.2, and the reference to "Field" in Clause 1 needs to be removed.
F	Insert the date on which work on the Project will commence. *Note*: the Commencement Date will often be different to the date on which the agreement is signed.
G	Insert the date on which work on the Project is expected to be completed.
H	Enter the price the university or the Consultancy Company is to be paid and choose the option for the method of calculating the price. If a daily rate is chosen, note that this assumes that the Consultant will be expected to work for 7 hours (see Clause 3.1).
I	Choose from the available options when the university or Consultancy Company can invoice the Client for the work carried out.
J	Choose whether the university or Consultancy Company is able to charge for expenses it incurs in performing the Project.
K	Choose the period in which either party can terminate the agreement.

Note: This notice period relates to Clause 2.2. This notice period is not for:

- where the Consultant becomes unavailable (Clause 2.3),
- where the agreement terminates forthwith or according to the period specified in the notice given under Clause 2.3; or
- where there is a breach of the agreement under Clause 2.4.

Signing *Who signs* For the university or Consultancy Company – the person who is authorised to sign such agreements on behalf of the university or Consultancy Company. Where the university or Consultancy Company has a written policy, the person(s) will be specified. A senior member of an academic department will not normally be an authorised person to sign such an agreement.

Dating the agreement The date that should be entered should be the date on which each party signs. Since it is likely that each party will be signing on a different date (i.e. one party signing the agreement and then sending it to the other will often mean some delay) there will be two dates. The date of the agreement in such circumstances will be the date when the last party signs.

Clauses needing attention before any agreement is entered into

Clause	Clauses needing consideration
2.4	This clause allows a party in breach of its obligation(s) to be given an opportunity to remedy the breach within a set period. This agreement sets that period at 30 days. In some cases it may be appropriate to set a longer or shorter period.
3.1	This sets the number of hours as constituting a day at 7 hours. In some cases this might be too long or not in accordance with some industry standards. It also does not account for such matters as • travel time; should travel time be included or excluded from that time;

- where the Consultant works less than the hours required making up a day if the daily rate is chosen in Clause H; this agreement does not get into the detail of where the Consultant does not work fully up to a day or an hour etc. It only deals with hours worked beyond 7 hours.

4.2 Payment of the university's or Consultancy Company's invoices are to be within 30 days of their receipt by the Client.

The period may be longer than the default for the university or Consultancy Company.

5.2 The period for the provisions of confidentiality is 5 years. An assessment needs to be made as to whether this period is too short or too long.

Possible additional clauses

Use of the university name

If the university is concerned about how a Client might use the name of the university, then it a clause can be added to control such use, such as:

> "The Client will not use the name of X, nor of any Consultant, in any publicity, advertising or news release without the prior written approval of X."

Template 2

Purpose

This template is geared towards the provision of routine consultancy work by an Academic directly to a Client. Such work will be of the smaller scale, such as providing limited advice and assistance over a short period of time or in small amounts of advice and assistance over longer periods of time.

The template is not suitable where detailed provisions are required as to:

- what is to be delivered;
- the provision of reports;
- the advice and assistance must be done within a time critical period;
- the Client requires a higher standard of performance than for the Academic to use reasonable endeavours; or
- the Client requires other than limited access or use of Resources or University IP.

Summary of the mains provisions of template 2

Template 2 provides that:

- the Academic is to provide consultancy services to a Client;
- what services are to be provided and the fee that the Academic is to charge is to be specified in Schedule 1;
- the Academic can claim expenses;
- the Academic is required to keep certain information of the Company confidential (including any intellectual property generated);
- the Academic has not right to use the facilities, resources, staff and intellectual property of the university in performing the services;
- if the Client wishes to use the facilities, resources, staff and intellectual property of the university it will have to enter into a separate agreement with the university or the academic;

- the amount of effort on the part of the academic in carrying out the Project: reasonable endeavours. If s/he performs any part of the Project negligently or in breach of contract then s/he will re-perform that part of the Project if requested by the Client to do so within 6 months of the academic completing the Services;
- no warranty is given by the academic that any result or objective will be achieved.

Use of Template 2

In many cases an Academic will be given the terms and conditions of a Client, and will be expected to sign up to those terms and conditions. Many Academics will have no commercial experience of entering into such consultancy agreements or negotiating the terms of such agreements. As they are dealing directly with the Client, they are very much on their own.

Why have these terms been proposed? In light of the previous paragraph there may seem to be little chance of Template 2 being used. However, if terms and conditions like Template 2 are suggested to Academics, they can serve a number of purposes:

- set a basic set of terms and conditions that an Academic should be signing up to;
- a set of terms and conditions indicating what is acceptable and not acceptable in those provided by the Client;
- a set of terms and conditions which protect the interests of the Academic (by limiting liability, ensuring that s/he does not commit to performing services with guaranteed results or a time for completing them, etc.) as well as of the university.

Completing the agreement

Clause	What needs to be completed
	The contact details of the Academic should be inserted here, including the:

	• title of the Academic (Ms, Mr, Doctor, Professor etc) • full name • recognised qualifications • home address • telephone and mobile telephone numbers • private (non-university) email address
Date	• insert the date on which the letter is written/sent. This is the not the same as the "date of the agreement" which will normally be the date on which the Client signs their second copy of this letter agreement (see below).
Reference number	• insert any reference or order number used by the Client; • insert any reference number that the Academic uses (only likely if the Academic enters into a large number of consultancies in a year).
Name of Contact person of Client	Enter name of the person that the Academic will be dealing with.
Client name	Insert the full legal name of the Client: • *if the Client is a company*, check with the Client what and who it is. Some Clients are part of a group of companies and it may not always be apparent which one you are contracting with. If the company is English or Scottish, then in most cases it will be registered at the Registrar of Companies, and be given a unique number (which cannot change) even if the name of the company can. If a "limited" or "PLC" company, these words should appear with the name of the Client; • *if the Client is another educational institute*. Educational institutes are usually incorporated either by a Royal charter (most universities) or as a form of

	company (usually a company limited by a guarantee- similar to a "normal" company, but not for profit).
Client address	• *if the Client is a company*. Conventionally the registered office is used, but also if the company has many offices/departments, another can be used. But which one is being used should be stated. • *if the Client is another educational institute*. The main (principal) address of the educational institute is normally chosen. However, correspondence sent to such an address may not find its way to the relevant person or department. A second address may need to be inserted where correspondence needs to be sent.
First paragraph	• if the Services that are to be provided require to be specified in more detail than found in Clause 2 below, remove the square brackets around [and in the attached Schedule 1], otherwise delete this phrase; • insert the name of the Company again.
Clause 1	• insert the date when work will commence on the Services. If the work has actually started before the agreement was signed, delete the square brackets for the phrase '[as of [*date*]' and delete '[on [*date*]]'. If the work is not to start until after the agreement signed, '[as of [*date*] and remove the square brackets for '[on [*date*]]'; • insert the date when the work on the Services is expected to be finished.
Clause 2	• insert the name of the person at the client who will be instructing the Academic; • in some cases it may be useful to add the Client's representative's contact details here as well

Clause 3	• this assumes there will be a Schedule 1. If there is not then the fee should stated here.
Clause 4	• if the Academic is expected to use air travel to reach the Client and/or the Client wishes to put a cap on the expenses that the Academic may incur, then the square brackets should be removed and the wording adapted as required, otherwise the wording should be deleted.
Clause 5	• this assumes there will be a Schedule 1. If not, the period(s) when the Academic will be able to invoice the Client should be stated here and the reference to Schedule 1 should be deleted; • some Academics carry out sufficient amounts of consultancy work they must be registered for VAT. There are also some who choose to register for VAT even though they have not reached the compulsory registration level (for example, if they need to buy in a lot of materials to carry out their consultancy work). If the Academic is registered for VAT then the square brackets should be removed or if s/he is not registered, then the wording should be removed.
Clause 7	• The purpose of this clause is for the Client to acknowledge the Academic has a position in an educational institution where certain freedoms (such as publishing information related to the Academic's work is allowed). • Clause 7(a) needs to indicate the position of the Academic (i.e. lecturer, professor, etc..) and the university s/he works in; • Clause 7(b) is not likely to be acceptable to all Clients especially those with highly developed procedures for protecting intellectual property developed. Clause 7(b) in some cases may need adaptation.

Another common "middle way" solution between a Client stopping all publication of the work carried out by an Academic in such circumstances and allowing the Academic (almost) complete freedom is to allow a period of time to pass during which the Academic cannot publish anything (allowing the client time to seek intellectual property protection were possible), but thereafter, allow the Academic

the freedom to publish.

Clause 13

- insert the number of days on which either the Academic or the Client can terminate this agreement.

Clause 15

- this clause is for whether the Client wishes to gain access to the facilities, staff and university intellectual property mentioned in Clause 14. Clause 14 makes clear that the Academic cannot use these and nor can the Client;
- this Clause 15 addresses two ways that the Client can gain access to them;
  - by the Client entering into a contractual relationship with the university; or
  - by the Client entering into a contractual relationship with the Academic, where the Academic sub-contracts to the university;
- if the Client does not require any access to such facilities, staff and university intellectual property then the wording from *"[Assuming that the University has?..."* can be deleted to the end of the Clause;
- otherwise, the appropriate choices need to be made as to who will be contracting with the Client for them. Also Schedule 2 will need to be drafted to outline what will be provided.

"Yours faithfully"

- the Academic should sign two copies of the letter;
- the second copy *only* should contain the signature block for the Client to sign. The full legal name of the Client should be inserted;
- both copies of the letter should be sent to the Client.

Schedule 1

- if the Services that are to be provided need to be specified they should be put in this Schedule;
- if the Academic's fee is not to be included in the Clause 3, it should be put here.

Tip: if this Schedule 1 is to be a separate document to the letter agreement, then the name of the Academic, the full legal name of the Client, the date letter agreement is written/sent and any reference numbers can be inserted at the top of the document to clearly reference the Schedule to the letter agreement.

Schedule 2

- if facilities, staff and/or the university's intellectual property are to be used, it should be identified in this Schedule 2.
- See also Tip for Schedule 1.

Possible additional clauses

Use of the university name

Template 2 places explicit restrictions on the use of Resources and University IP but does not expressly address whether the Company can use the name of the university. If the university is concerned about how a the company might use the name of the university, then a clause can be added to Template 2 to control such use, such as:

> "The Company will not use the name of the University, nor my name (nor the name of any person I may engage to perform the Services, in any publicity, advertising or news release without my prior written approval (for the use of my name), or without the prior written approval of the University (for the use of the name of the University)."

Appendix C

Key issues in consultancy agreements

Introduction

This appendix is divided into two sections. The first deals with some key commercial/legal issues encountered with consultancy agreements. The second section deals with some policy and practical issues concerning consultancy agreements.

Some key commercial and legal issues encountered with consultancy agreements

Intellectual property

For routine consultancy the creation of intellectual property is not the primary aim for an Academic. As discussed elsewhere, consultancy work, both for Academics and universities, is primarily a moneymaking activity.

Typically, it will be agreed that the Client will own any intellectual property generated under a consultancy agreement. Having written this, there are a number of issues with this statement:

- the type of intellectual property that is created;
- the extent of ownership;
- the rights to background intellectual property of the university;

which frequently arise when a consultancy agreement is being negotiated. Each of these will be briefly considered.

Type of intellectual property created

For routine consultancy work (the focus of this Practical Guide) the Academic will likely be producing written notes, reports, databases, or statistical analysis (possibly with charts). They will be (once they are in a permanent form) covered by copyright (and possibly the database right). Inventions or new discoveries

etc, (subject to patent protection) will not be normally be created or the focus of a consultancy agreement. There are no specific provisions in the templates which address the specific requirements for protecting, registering and maintaining patentable inventions. If specific wording was required then it is likely that the Client would seek to introduce it (as it would be in its interest).

The templates in broad terms do cover inventions made (see the definition of Foreground IP) but do not go further on in dealing with such matters.

Extent of ownership

The templates provide that the Client (after making payment) will own the Foreground Intellectual Property. For some Clients, this extent of ownership will not be sufficient. They will seek to claim ownership:

- of all IP generated by the Academic;
- of all IP generated by the university;
- of all IP generated by the university which relates to any Background IP of the university disclosed or used by the Academic;

during the existence of the consultancy agreement.

Such provisions are often routinely used in agreements provided by a Client, or routinely suggested as amendments to a university's standard terms and conditions. The Client's negotiation position is often that it needs to protect its intellectual property position or portfolio. Such provisions are often considered to be unacceptable for a university. Among the reasons are:

- a university is involved in the creation of a vast amount of intellectual property. Why should the Client have ownership of all this intellectual property which it has not paid for or which was contemplated in the CA?
- university created intellectual property in some cases is subject to 3rd party rights and the university would not be free to assign intellectual property to the Client.

The approach taken in the templates is:

- to cover only intellectual property created in the course of a defined Project (i.e. the work the Consultant is to carry out); and
- to restrict ownership by the Client of that intellectual property to a Field. Many Clients are involved in many activities in several industries. Without a Field definition they could use the intellectual property generated in one area of activity for other areas of activity – in effect, they would be getting Foreground intellectual property on the cheap.

Rights to background intellectual property of the university

Another common requirement of some Clients is that they claim that they:

- require access to the Background IP of the university during and after termination of the consultancy agreement; and/or
- require a licence to Background IP to ensure that the Client can exploit the Foreground IP generated by the Academic under the consultancy agreement.

Such provisions are again like in the previous section unnecessary for the routine provision of Advice. Such terms are normally seen in agreements where intellectual property is being generated and is intended to be exploited. In the context where universities are involved, and where Background IP is required, it is normally licensed in return for a fixed sum or for a share of future royalties. Neither of these situations is likely to arise where routine consultancy services are provided.

The templates are drafted to specifically exclude such access to the university's Background IP.

For less routine consultancy agreements in some cases it may be necessary for the Client to have access to or to use the university's Background IP. In such cases the following needs to be specifically established and negotiated:

- what University Background IP is required? This would be normally established with the Academic involved. In some cases, because the consultancy work to be undertaken, other than in general terms, is not clear, what exactly in terms of Background IP is required will be difficult to be defined;

- what uses the Client requires the university Background IP. E.g. for further internal research, to be used in a commercial product, for onward licensing to a third party;
- once the above two are determined, negotiations can take place on the commercial terms for the access to and licensing of the university Background IP.

Warranties

The inclusion of warranties in a consultancy agreement can be a major area of negotiation, misunderstanding and difficulty for a university. Many commercial Clients (and some statutory, governmental and EU bodies) routinely seek to insert a whole (and wide) range of warranties into a consultancy agreement. Many are either unacceptable *at all* or might be only acceptable only after substantial modification and reduction in their scope and effect.

What is a warranty?

In simple terms a warranty is a statement that a fact is true, with that statement being a contractual provision of a consultancy agreement.

For example, a consultancy agreement might contain a warranty that an Academic holds the qualification of a chartered accountant. The warrantor is promising that the particular Academic has that qualification. Even though the services of the Academic may have been performed adequately and the Client may not have any problem with those services, if it emerges that the Academic was not a chartered accountant, the university could be held to have breached the agreement by stating something as a fact when it was not. This could lead to damages being claimed.

By providing the warranty, the university could be liable whether or not it is the "fault" of the university. For example, the Academic could have entered incorrect information about qualifications when applying for her position at the university, s/he may have let her qualification lapse, or there could be a clerical error by the human resources department of the university (e.g. recording "chartered accountant" when it should have been "certified accountant".

Why are warranties a problem?

Many warranties (typical examples are given below) ask the university to state that a fact is true, or some state of affairs exist, or that some right or interest of the university is free from interference by third parties. As indicated above, many warranties which are suggested or required by Clients are often inappropriate for a university (or for a consultancy agreement in particular) because:

- universities are large and complex organisations. They are not run as businesses, with a hierarchy and/or a structure of (managerial) control over the working of all its staff. Decision-making or a requirement by one department to control the activity of another department or that department's staff can be only achieved through a complex system of committees making decisions. The department (or the Consultancy Company) responsible for negotiating and agreeing consultancy agreement will usually have no control or influence on the activities of the academic departments or Academics;
- Academics are not normally subject to university control when carrying out consultancy work and certainly not of the department or Consultancy Company involved in negotiating and agreeing consultancy agreements) when carrying out the consultancy work. Also, undertaking consultancy work is only one of their activities, which normally has to be fitted into between teaching, supervising students, research work, administrative duties etc;
- they are irrelevant to the type of deal that a consultancy agreement is (i.e. the warranties sought may not relate to consultancy work at all (they relate to the sale of goods) or seek to warrant facts which are not relevant or occurring in the deal in question);
- the insurance policy(ies) of the university will not permit the university (or the Consultancy Company) to enter into such commitments.

Particular types of warranties that are a problem

The following example wording is a fairly typical set of warranties that a Client may require a university to provide:

> The Consultant warrants, represents and undertakes that:
>
> (a) it will carry out the work by the Completion Date, and that time is of the essence;
>
> (b) it will use best endeavours to carry out the Consultancy Services and with all due skill and diligence and in a good and workmanlike manner, and in accordance with the best practice within the industry of the Consultant;
>
> (c) is aware of the purposes for which the Consultancy Services are required and acknowledges that the Client is reliant upon the Consultant's expertise and knowledge in the provision of the Consultancy Services;
>
> (d) it will [use its best endeavours to]achieve the Outcomes and that the Outcomes will be in accordance [in all material respects] with the Document Specification;
>
> (e) the Outcomes will be fit for the purposes set out in the Document Specification;
>
> (f) the Consultant is aware of the needs and special interests of the Client and shall continue to be so aware during the term of this Agreement;
>
> (g) The Consultant's employees and agents will have the necessary skills, professional qualifications and experience to perform the Consultancy Services in accordance with the Specification Document and Best Practice. The Consultant shall be responsible for all costs, fees, expenses and charges for training necessary or required for the Consultant's employee and agents to perform the Consultancy Services;
>
> (h) [the Consultancy Services, Reports and Document Specification shall not infringe any third-party intellectual property rights]*or*[all documents, drawings computer software and any other work prepared or developed by the Consultant or supplied to the Client under the Agreement shall not infringe any Intellectual Property rights or any other or equitable right of any person];
>
> (I) the user by the Client of any services, products, goods, software or

equipment supplied by the Consultant to the Client will not knowingly infringe upon or knowing violate any intellectual property rights of any third party and there are no claims, pending or threatened against the Consultant with regard to such matters which the Consultant is or ought reasonably to be aware at the Commencement Date;

(j) it has full capacity and authority and all necessary licences, permits, permissions and consents (including, where its procedures so require, the consent of its holding company as defined in Section 736 of the Companies Act 1985) to enter and to perform the Agreement;

(k) it has obtained all necessary and required licences, consents and permits to perform the Consultancy Services;

(l) the Consultant has no contracts or other commitments which would conflict with or otherwise prevent the Consultant from fulfilling its obligations under or as anticipated by this Agreement.

Although it is not likely that a Client would require all of these types of clauses, they are a fairly representative sample of what many Clients appear to require of universities.

Some agreements also have wording (which is sometimes expressed as warranties and sometimes not) which is particularly used by governmental and statutory bodies. These often involve governmental or statutory bodies stating that they are required to have and implement policies concerning harassment racial, sexual and other forms of discrimination and also policies on environmental and safety matters, for example. The wording will go on to indicate that the university will be committed to such policies, will co-operate with the governmental or statutory bodies in implementing them, and will further state that the university has or will implement them at the university, and also require the university will be in compliance with such policies (and as they are updated from time-to-time). The wording will often state that having the policies stem from statutory requirements. Often the cost of compliance will be borne by the university. Such wording often runs on for several pages and makes reference to various statutory provisions.

In practice, it is difficult to amend such wording without a knowledge of the

statutory requirements, understanding of the policies developed by the Client, etc all of which takes time and adds to the cost of the university. Also it may not be feasible in the time available to undertake such an exercise. For routine consultancy work involving a few hours of Advice, such requirements are disproportionate. Some universities will seek to have provisions excluded from any consultancy agreement or will have a set of words which reduce the scope and effect (i.e. where the university is required to know or implement such a policy then it has to be at the cost of the Client, that where an Academic has to comply with such a policy then the Client has to provide instruction and information, which the university can charge for, that the policy will apply only to the Academic, or that limit the effect of some or all of the policies to when the Academic is on the premises of the Client, etc).

It is possible to go through each one and indicate in detail why they are not acceptable for a university, but for most universities most will be unacceptable for one of the reasons stated under "*Why are warranties a problem?*". However, the following are some bullet points as to particular problems:

- the use of "best endeavours" or "best efforts" requirements for the work to be carried out or the standard to be achieved, or to work according "best industry standard" or "highest professional standards", or guaranteeing or using best endeavours that certain outcomes or results will be achieved.

  Comment: These are generally all unacceptable because the standard being expected is very high and may require that other work of the Academic and possibly the university be set aside to achieve any of these, and in some cases what is expected to be achieved cannot be objectively measured. For many universities the use of "best endeavours" and "best efforts" or guaranteeing outcome or results clauses is a "deal-breaker". A university's insurer will often find such clauses unacceptable.

  In regard to "best industry standard" or "highest professional standards" the position is sometimes not so clear-cut. Sometimes alterative wording is used by some universities such as "generally accepted industry standards", "generally accepted professional standards". Such alternative wording tries to take a middle way between the interests of the Client and that of the university.

- infringement of third party rights.

  Comment: As indicated in other parts of this Practical Guide the creation of intellectual property is not the main focus, and usually no analysis or due diligence will be undertaken as to what university intellectual property will be used and the degree to which it is subject to any third party rights. Such tasks can require considerable effort on the part of the university.

- requirements to be aware of the purposes for which the consultancies are to be provided and for purposes for which any results are to be used;

  Comment: Warranties like these are open ended and a university may be aware of the purposes to which the consultancy work is needed or will be used. This is especially true where the Client is a large organisation, based in several places or countries.

What is to be done with warranties?

The following is suggested as an outline strategy for dealing with warranties suggested or required by Clients:

- compile a list of warranties which
  - are always unacceptable (i.e. "deal breakers");
  - while normally are unacceptable, can be made acceptable with suitable modifications;
  - are acceptable but would not be included in the university's own precedent;
- put in place a negotiation strategy where a warranty is suggested or required by a Client:
  - require an explanation of what a Client is trying to achieve or what concern they are trying to address with the warranty (i.e. a Client may say "we always have these in agreements" is unlikely to be unacceptable as an explanation);
  - have a proper explanation of why a warranty is unacceptable to the university (like for the previous bullet point, a blanket statement that the university does not accept such warranties is unlikely to be acceptable to

a Client as a reason, but a statement that a best endeavours clause is not acceptable because the university's insurers will not provide insurance cover for contracts entered with such a provision may);

- create and maintain a database of alternative wording to unacceptable warranties;
- where there is deadlock over a particular warranty that a Client wishes to see in a consultancy agreement ensure that there is a clear policy of referral to a manager and/or the university's insurer to resolve the deadlock quickly and efficiently;
- where a Client insists on a warranty is it possible to impose some limits on the extent of liability the university will face if there is a breach of the warranty, e.g. time limits for bringing a claim, financial limits, limiting the warranty to matters within the actual knowledge of certain individuals and/or excluding certain matters from the warranty by disclosing them to the Client.

Types of warranties which are normally always unacceptable

Although it is hard to generalise for all universities, the experience of the authors and from comments provided by some universities are that the following types of warranties are normally always unacceptable:

- use of best endeavours or best efforts;
- making time of the essence;
- guaranteeing the results or outcomes of the consultancy services;
- guaranteeing that a certain outcome will be achieved;
- meeting the highest professional or industry standards.

Type of wording that can be used to modify or limit the scope and effect of a Client's warranty

Although the ideal is often to not include a Client's warranty, commercial reality often requires the university to accept that a particular type of warranty must be included. Attention then can turn to how it might be modified to be acceptable to the university:

- limiting the warranty to the knowledge of the university, e.g.

> the university 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;

Such wording makes it clear the extent of its knowledge (very little has been done). Wording such as:

> the university warrants to the best of its knowledge, information and belief it has obtained all necessary and required licences, and consents and permits to perform the consultancy services;

should generally be avoided, as it might imply that the university has taken reasonable steps to establish the whether the required licences etc in this case have been obtained.

Confidentiality

Approach taken in the Templates

The approach taken in the templates is a "light touch" to the extent of the provisions found and also to provide a fairly balanced approach between the interests of the university and the Client. The wording provides that both parties are subject to obligations of confidentiality;

- that confidential information is to be used only to perform a party's obligations under the agreement;
- that the meaning of confidential information is to include both oral and written information;
- that there is no requirement for information to be confidential unless it has been reduced to writing (only that the information is imparted in confidence, as a minimum);
- that the "usual" exceptions to confidentiality apply;
- that there are no excessive or strict requirements for the handling, security or use of the confidential information.

Particular types of confidentiality provisions that are a problem

Some organisations have developed extensive and onerous obligations of confidentiality. Organisations whose primary aim is the creation of intellectual property which will be patented need to be particularly vigilant that there is no leakage before they have made a patent application. However, not all the activities of such organisations or other types of organisation require that level of sensitivity or control. For example, such an organisation as mentioned in the previous sentence may ask an Academic to comment on intellectual property which is subject to a published patent application. Having extreme or onerous obligations of confidentiality may not be appropriate in this situation.

The following are the types of confidentiality obligations that some Clients include which are often inappropriate or unacceptable to universities:

- make or insist that the confidentiality obligations are one-way – that only the confidential information of the Client is protected;

  Comment: unless an assessment has been made that the information an Academic is to provide to a Client is not confidential, a one-way confidentiality obligation is not likely to be acceptable. Practically, it is difficult to see a university having the time or resources to make such an assessment.
- exclusion of the exception from the obligations of confidentiality for

information independently developed. This exception is reflected in the Templates by the following wording:

> is developed by or on behalf of that Party by any person(s) who have not had any direct or indirect access to, or use or knowledge of, the Confidential Information imparted by the other Party.

Comment: Universities contain many (academic) departments, many which have little or no contact with each other (some of which are based on different sites). The likelihood that confidential information might be developed which is the same as that disclosed under a consultancy agreement can in some cases be high, but is unlikely to be known to the persons working directly in regard to the consultancy agreement. Unless the information to be disclosed by a Client is particularly sensitive the removal of this exception should be resisted.

- the Client requires the return of (confidential) material provided under the consultancy agreement and also that the university provides written confirmation of the return and in some cases exactly what has been returned. In more onerous clauses the confirmation has to be provided by a particular officer of the university.

  Comment: A requirement to return (confidential) materials is sometimes seen in some agreements on termination of the consultancy agreement. Sometimes this obligation is expressed in a more lax way: only where the Client requires this. Such obligations are generally acceptable. What are less acceptable are requirements to certify that all material has been returned, or that a particular officer certifies the return. Routine consultancy work (or even non-routine consultancy work) is usually undertaken by the Academic alone. S/he is unlikely to have the time or resources to maintain a log of the (confidential) materials received from the Client (nor is anyone else at the university). Undertaking such a task can be time-consuming and will not be budgeted for. The only way to make such a clause acceptable would be to impose an obligation on the Client to provide a log of all the (confidential) information/ material they have provided and then certify only that has been returned.

- That for information that is disclosed orally to be confidential it must be reduced to writing or confirmed in writing that it is confidential. Sometimes a clause like this also requires that the reduction to writing or confirmation in writing must be done within a specific time period (e.g. 30 days).

  Comment: Such an obligation will always be contentious, and especially for Academics whether as a general principle or for a particular consultancy agreement. Some Academics believe that confidentiality obligations hamper the free exchange of views and information, but such an obligation as this would require an Academic to be even more careful in what s/he says than "normal" confidentiality obligations. The Academic will have to maintain a high level of self discipline to ensure that s/he recognises what they are saying is confidential or not confidential, and then ensure that a careful record is kept of such disclosures and then ensure that such information is reduced to writing etc. Such level of requirement on an Academic is likely to be resisted by most Academics.

  The real danger of accepting such an obligation is that an Academic might disclose confidential information orally to a Client but fail to confirm it in writing as being confidential. If this occurs the Client would potentially not be subject to obligations of confidentiality. The university could also find that its ability to protect its intellectual property portfolio might be hampered, etc.

(Exclusion of) liability

It is fairly routine for commercial organisations (and governmental and statutory organisations) either:

- to try to exclude liability for as much as possible where they fail to meet their obligations; and/or
- to try to expose the other party to as much liability as possible.

Often this approach is combined with requiring the university to agree onerous warranties (only some examples are given above). The following are examples of the types of "extra" liability that some Clients seek to impose on universities:

- *Liquidated damages clause*. The aim of this clause is as follows: if the university is in breach of consultancy agreement it must pay to the Client a

sum of money. The sum of money will normally be specified in the consultancy agreement, and will be a genuine pre-estimate of the Client's likely loss from the breach.

Comment: Often the figures put by Clients are high and might bear no relation to the actual loss suffered. Such wording would seek to overcome the overall cap on liability (in the standard Templates, limited to the contract price). In many cases it is not possible to determine how the Client arrived at such a figure (or the Client will not able to provide a convincing explanation for the economical rationale for the figure chosen). Often such wording is included to overcome the danger that a requirement to pay a sum by the party in breach is, in fact, a penalty (penalty clauses are generally void under English law).

The wording of such clauses often make the university liable to pay the liquidated damages for any breach of one or more of the obligations on the university. For example, there may be an obligation on the university to perform the services by a certain date. A failure to meet that date will trigger the liquidated damages even if the failure is minor, e.g. one day.

Such generic wording often has no reality to the specifics of a deal and certainly not to routine consultancy work often limited to providing small amounts of advice.

It can be difficult to make such wording acceptable even after redrafting. Some ways to limit the effect is by adding wording to state that liquidated damages are only payable after certain types or more serious types of breaches, e.g. a failure to meet a completion date by a significant amount. For many universities a liquidated penalty clause will be a "deal-breaker".

- *Right of the Client to get the work done elsewhere if the university is in breach* (and make the university responsible for the cost). This type of provision is routinely seen in consultancy agreements drafted by organisations seeking consultancy services.

  Comment: There are dangers for a university accepting such a clause without substantial modification. For example, such a clause might not stop a Client seeking the services of a very expensive alternative consultant, and/or getting the work done as a matter of urgency when it is not necessary to do so, or getting more consultancy work to be (re)performed then is

necessary. A clause like this could expose the university to unrestricted liability where a breach occurred. Such a clause would need to be heavily redrafted to provide sufficient control or review by the university over a right of the Client to go elsewhere.

- *Right of Client to get any defects in the consultancy work made good or re-performed by the university.*

  Comment: Such a clause can leave the university open to excessive liability. The time and effort (and expense) on making good defectively performed consultancy work can be considerable. The Templates provide a balanced approach between the interests of the Client and the university: allowing the Client to call for the consultancy services to be re-performed but only for a limited time and subject to a financial cap (value of the contract). Without these types of limitations, a university could be left with unlimited exposure to redo the consultancy work at any time. For example, if the Client discovered 2 years after the consultancy is performed there is an error, the Academic involved may no longer may be available or may not be interested in doing it again, or cannot re-do it within a reasonable time. The university may be required to purchase the services of a consultant elsewhere (if very specialist knowledge is required).

  If a Client insists on a more extensive provision than that provided for in the Templates, there should be wording to provide the university some right to control when the consultancy work is to re-performed (i.e. within the other commitments of the Academic) and right to specify or be consulted on the work to be re-performed.

- *Clauses which seek no limit on the liability of the university or allow the Client to recover for lost of profit, or set a high financial limit of liability.*

  Comment: A consultancy agreement without a limit of liability or with a provision allowing for loss of profit for the university will be unacceptable. Such clauses are also likely to be unacceptable to the university insurers. For many/most universities these will be "deal-breakers".

  With a clause setting liability at a higher level then "normal" (i.e. such as the value of the contract), the position is a little more complicated. The Templates have as their overall limit on (financial) liability set at the value of

the contract. This is a routinely set figure. However, this might not be always acceptable or legally defensible where more substantial consultancy work is involved. Another common financial cap is that of the amount of insurance cover available to the university (or some lower figure but higher than the value of the contract).

Practically, where a Client is requesting a high(er) level of financial liability, the Client needs to be asked why this value is being sought. Often such levels are routinely included in their standard agreements or suggested changes and bear no relation to the deal in question.

- *the university is to provide indemnity(ies) to the Client*. Many indemnities sought by Clients seek to cover all losses incurred by the university. The importance of an indemnity is that it is a separately enforceable provision to that of any other clause in an Agreement. Therefore any limitations of liability would not normally apply to an indemnity.

One typical clause in a Client's consultancy agreement read:

> The Supplier shall be responsible for and shall indemnify the Company, its employees and agents from and against all Losses suffered or incurred in respect of death or injury to any person, loss of or damage to property (including property belonging to the Company for which it is responsible) and any other Losses which may arise in connection with or in consequence of the performance of the Contract by the Supplier, any breach of the Contract by the Supplier or of the presence of the Supplier, its employees or agents on the Company's premises whether such Losses be caused by negligence or otherwise.

Comment: Such unlimited, separate, liability is usually seen as a deal-breaker for most universities. Sometimes a university's insurer may deem such a clause as unacceptable as well. Where a Client is insistent on a university providing an indemnity the following is suggested possible approach: Offer an indemnity limited to where the university causes loss or

damage caused by its wilful negligence only and make the indemnity two way. Such an indemnity should be also clearly drafted to exclude the consequential losses and loss of profit of the Client.

Non-competition/exclusivity

Some Clients wish to include a restriction that the university or Academic cannot following the consultancy agreement enter into other agreements:

- (of any type) with competitors the Client;
- (of any type) within the same industry as the Client;
- to provide similar services to others;
- to use the university's intellectual property or knowledge used in the provision of the consultancy services under the consultancy agreement to others;
- for a certain period of time with competitors.

Universities enter into many different types of agreements with many different types of organisations. Many of the organisations will be competing with each other. If a university accepted any of the above restrictions it would severely limit the ability to carry out its activities. Some universities will simply not countenance such a clause, but some will be prepared to accept some form of restriction but with several limitations:

- that the restriction will only apply to the Academic;
- that the restriction will be within a tightly defined Field (i.e. that which is defined in the consultancy agreement or even more tightly defined);
- the restriction will be limited in time;
- that the Client will have to pay a fee for such a restriction.

Publication

The Templates do not allow the Academic or the university to publish the results of the consultancy work carried out under the consultancy agreement. This is on the basis that the consultancy work is purely a financial transaction. This is unlike other types of agreements that universities enter into (such as research agreements or materials transfer agreements) where the right to

publish is normally preserved (whether publication is entirely at the discretion of the university, or following review or the right to stop publication for a period by the other party). As indicated elsewhere in this Practical Guide, publication is often a component in a university maintaining its charitable status.

In some consultancy agreements the work of the Academic raises beyond the routine and the Academic may wish to have the right to publish the results of the consultancy work. In such a case an appropriate clause will need to be inserted into the consultancy agreement, such as:

> The Client recognises that by charity law and under the University's policy, the results of the Project shall be publishable.

Where appropriate, additional wording can be added to allow the Client time to review any proposed wording to allow for it to make patent applications.

What standard of quality must an Academic achieve in performing his/her services?

"Reasonable care and skill" etc

If an agreement does not state what quality standard an Academic should achieve in carrying out the Advice, the price to be paid or the time to be taken, the following standards would be implied into an Agreement by law:

- the work will be carried out with reasonable care and skill;
- a reasonable price will be paid;
- the work will be done within a reasonable time.

What "reasonable care and skill", "reasonable price" and "reasonable time" mean can vary according to the type of service that is provided.

The Templates do not mention the *quality* of the work to be performed by the Academic *as such*. They state that "reasonable endeavours" will be taken to perform the work. Such a statement can be taken as to mean the amount effort that will be used in doing the work. That is:

- a statement concerning the physical effort and direction in doing the work (e.g. ensuring the Academic turns up at the correct address, ensures s/he schedules the work correctly in among his/her other commitments, remembers to have the right reference material available, etc); and
- a statement concerning the quality of the work to be done.

Therefore the standard that would be implied into a signed consultancy agreement would that of reasonable care and skill.

What does "reasonable care and skill" actually mean

When dealing with a consultancy agreement it is important to know that a term like "reasonable care and skill" has a particular meaning which has been developed through several court cases, in particular the following:

- an Academic will be using "reasonable care and skill" when s/he is carrying out his/her services to the same standard as a reasonably competent member of the trade or profession relevant to that Academic.

  For example, if an Academic is a lecturer in surgery, and is a qualified and practising surgeon s/he might be asked to provide advice on whether a particular surgical procedure is safe.

  The standard s/he would be expected to meet in providing Advice would be that s/he would provide Advice which most surgeons who are up-to-date in their knowledge, and have the full range of skills and abilities expected of a practising surgeon and are following the accepted and well-known knowledge of the profession of a surgeon.

  To modify the example: Assuming that the Academic had allowed her skills to lapse and had not kept up-to-date with current knowledge and developments and s/he was still contracted to provide advice on whether a particular surgical procedure is safe. She would still be expected to meet the standard described in the previous paragraph.
- whether or not the Academic is achieving that standard is tested objectively. This means that it is not the Academic, or the parties to an Agreement, which determine what the standard of "reasonable care and skill" has been met if there a dispute. Whether the standard had been met would be judged as if a neutral third party was looking at the facts of the case from the outside.

- for most services, an Academic in carrying out her services will not be guaranteeing that s/he will achieve a result.

  But for some services the person carrying out a service is assumed that s/he is warranting that s/he will achieve a particular result.

The problem with services is that above bullets points have all been derived from a number of court cases. That is for one type of service, for example, the courts may state that the person performing the service is guaranteeing s/he will achieve a particular result while for another type of service, the person performing it is not guaranteeing s/he will achieve a result.

All the above must be considered in the context of the following proposition: what are stated are the default provisions, unless the parties choose to agree something different. This is what Templates 1 and 2 seek to do, that is modify the default provisions.

Is it possible to exclude from a consultancy agreement that the service will be performed with "reasonable care and skill"?

It is possible to state in an agreement that the services to be performed by an Academic:

- will not be performed with reasonable care and skill; and also
- that a particular result will not be achieved (in case the courts were to hold that the particular service to be performed by the Academic was one that guaranteed that a particular result is to be achieved.)

This might be an initially attractive view and there would nothing to prevent a university including such wording in their standard agreement or requiring the provisions of a consultancy agreement provided by a Client to be so modified. However, the obvious question here for a Client is why would they wish to purchase services from an educational institute which is not prepared even to say that the work carried out by its Academics will be performed competently?

Another point here, is that if "reasonable care and skill" is not to be the standard in a consultancy agreement, then it is necessary to use very clear and very explicit words to exclude that standard. Such stark and explicit wording is

unlikely to be (commercially) acceptable to most Clients.

The suggested way to deal with such matters (and the way taken in Templates 1 and 2) is to control the university's exposure to liability if the Academic does not perform the services with reasonable care and skill. Templates 1 and 2 recognise that the Academics will be expected to use reasonable care and skill, but limit the potentially far-reaching consequences by limiting the liability of the university (or the Academic), by:

- offering a remedy for negligently performed work (or other breaches of contract), by re-performing some or all of the work;
- limiting liability to the contract price;
- otherwise accepting no liability for any loss.

Some policy and practical issues concerning consultancy agreements

Can an Academic undertake consultancy work?

Academic members of staff (lecturers, professors, etc)

Many universities have policies regarding whether academics have a *right* to undertake consultancy work. Such policies will be either incorporated directly into an academic's contract of employment or may be contained in a booklet which lays down a series of policies (e.g. covering such matters as disciplinary policies, grievance procedures, employment practices etc). A TTE may have difficulty in locating such documentation in some cases.

It is likely that most universities which carry out a significant amount of scientific research and investigation will have developed policies in this area.

A policy is likely to include the following items:

- whether the academic has a right to undertake consultancy work;
- the number of days within any period s/he is allowed to undertake such activity;
- a reference to when the period starts and finishes (etc the academic year, the financial year of the university);

- whether the consultancy work can be done within the academic's normal working hours;
- state whether the academic needs to be obtain permission (such as from the academic's department head);
- deal with such matters as conflicts of interest, not to bring the university into disrepute, scheduling conflicts (i.e. that the academic cannot have time to undertake consultancy work when s/he is supposed to be teaching a class);
- how the academic is to be paid and what tax schedule consultancy work payments will be placed. In some cases such payments may be classified as additional salary and would be taxed in the normal way and paid as part of the academic's salary. Some universities require that sums due to academics for consultancy work is paid directly to the academic and leave it to the academic to account for tax and national insurance (i.e. Schedule D), VAT etc.

Non-academic staff

Research assistants, research fellows, non-permanent academic staff, technical (computer support, technicians, etc) and administrative staff (i.e. from senior management through to clerical assistants) normally have no entitlement to undertake consultancy work during their normal working hours. Also their contract of employment may also place restrictions on what they can and cannot do outside of normal working hours.

In many cases where consultancy work is being undertaken, such staff as these will normally be in a support position, helping and assisting an academic carry out the consultancy work rather than being the "consultant".

It is only likely that such a member of staff will undertake consultancy work themselves where they possess highly specialist or technical skills. In most cases they will need to obtain permission from their department heads or line management. Where a TTE wishes to use a non-academic member of staff, they should normally check that the non-academic member of staff has obtained permission from their department head.

Another distinction is that any fees that the non-academic member of staff earns will automatically accrue to the university rather than the member of staff.

Students

For students, it is highly unlikely that a student will be engaged as a consultant. But in certain circumstances a student will be asked to participate in consultancy work. A university is unlikely to have a "policy" on students and consultancy work as such. As a student is not employed by his/her university, the university cannot control the student in terms of the work s/he undertakes in the same way as a member of staff (academic or not academic). This applies not only in matters of control over the work carried out, but also such matters as keeping to the university's policies on confidentiality, etc.

Also as students are not employees of the university, ownership of intellectual property generated by the student (alone or collaboration with others) may belong to the student.

It will be good practice where a student is asked to participate in a consultancy project for the student to sign a simple agreement which deals with such matters as:

- the student agreeing to keep information relating to the consultancy project confidential; and
- that any intellectual property generated by the student (whether alone or with others) will belong either to the Client or the university; and
- the student will co-operate (without charge) to ensure that the Client and/or university will get title to the intellectual property.

Who decides whether a consultancy agreement is entered into with a Client: the Consultancy Company, the university or the Academic?

For most universities, it appears that the Academic usually has the final say on whether a consultancy agreement is entered into. Even though this is true, it is still sensible for the university and the Consultancy Company to develop a policy which deals with what type consultancy work the university or Consultancy Company is willing to enter into (and that sensibly reflects the different priorities of different interests involved). Such a policy might cover such matters:

- whether it is always for the Academic (and/or the university, usually through the head of department) to decide whether s/he wishes to undertake particular consultancy work;

- that for "routine" consultancy work the Consultancy Company would have the operational freedom to enter into agreements. Categories of work which would fall within this definition would be set out. For work of the type within this definition, the Consultancy Company would have operational freedom to decide on:
  - who the Consultancy Company gets consultancy work from;
  - the type of work the Consultancy Company obtains;
  - the terms and conditions on which the Consultancy Company obtains such work;
  - the amount that the Consultancy Company charges for such work.
- that a defined or problem category would require a consultation with nominated (senior) representatives of the university;
- that where there is a dispute between the Consultancy Company and the nominated representative of the university the matter would be referred to the board of directors of the Consultancy Company for a decision;
- that if there is dispute between the Academic and the university or Consultancy Company over whether to enter into a consultancy agreement, or the provisions of the consultancy agreement, the amount of the fee, there should be an "escalation" procedure comprising increasingly senior managers.

The relationship between the Consultancy Company or the university and the Academic

The relationship between the Consultancy Company and an academic needs to be regulated and normally by an agreement. But if the university has decided not to set up a Consultancy Company to handle consultancy work, the relationship between it and the academic also needs to be managed. But in this latter case, especially where the university does not enter into significant consultancy work, this may not be formalised in an agreement.

The relationship should determine clearly who does what, and who is responsible for, the various aspects of:

- obtaining work from new and existing Clients;
- negotiating the terms of the contract with a new or existing Client;

- agreeing a contract with the Client;
- administering the contract with a Client;
- providing the contracted services;
- dealing with disputes with a Client;
- who is responsible for obtaining access to Resources and University IP.

Over time a Consultancy Company or the university will enter into many consultancy work agreements and will have to deal with many Academics. Whether or not there is an agreement between the university/Consultancy Company and the academic, having set terms will help to educate and govern the expectations of the academic as to what s/he can expect from the university/Consultancy Company when consultancy work is obtained, including:

Obtaining clients	Whether the academic or Consultancy Company will be responsible for securing Clients; agreeing what work is to be carried out for the Client; and determining how the Academic will perform his work.
Obligation to discuss	An obligation on the Consultancy Company and the Academic to discuss with each other any proposed new work, including what work is involved, the price, timing and the academic availability to do the work.
Obligation to use the academic	Whether there is an obligation on the Consultancy Company to provide work for the Academic.
Responsibility for the contract	Whether the Consultancy Company is to have responsibility for all administrative, contractual and financial matters.
Obligation on the academic to comply	Whether there are obligations on the academic: • to comply with the provisions of each consultancy agreement entered into between the Consultancy Company and a Client; • to perform his/her services to an adequate standard and within the relevant timings in the consultancy

agreement.

Approval	• whether it is for the academic to obtain any necessary approval from his/her departmental head to carry out the consultancy work. • whose responsibility it will be to obtain approval to use the facilities, resources and staff of the university to carry out the consultancy work. • also there may be a provision to indicate that the academic will not sign up to perform consultancy work which will exceed any time allowance s/he may have.
If the academic breaches obligation	Does the Consultancy Company have the right to stop the academic working on the consultancy work where s/he is in breach of her/his obligations? Can the Consultancy Company reduce the amount to be paid to the academic in such circumstances.
Payment	• what percentage of the fees will the Consultancy Company or university be able to keep?; • will the Academic still be paid if the Consultancy Company or university does not receive payment from the client? • how will payment be made to the Academic (direct to her; to the finance department of the university, etc); • who will be responsible for the income tax and national insurance contributions and VAT etc on the fee paid to the Academic?

- where required by the university or the Consultancy Company, will the academic be required to registered for VAT?

Intellectual Property

- that University IP is the property of the university when used in performing consultancy services;
- that no licence is granted by the university to use the University IP when performing the consultancy services;
- that the Academic will not provide University IP to a Client where the university does not have a right to do so (e.g. because of 3rd party rights);
- that the Academic will not use or incorporate 3rd party intellectual property while providing the consultancy services unless s/he has obtained necessary licences etc;
- that the intellectual property generated during the consultancy services is to belong to the Client.

If an academic wishes to enter into a contract independently of the university

As discussed in Chapter 2 of this Practical Guide, within certain limits, many Academics have the freedom to enter into consultancy agreements, independently of the wishes or permission of their university (other than, usually, a head of department). The university may have policies or views on whether an academic can enter undertake freelance consultancy work, whether at all or in particular cases. Where the Academic is free to do so, s/he may face certain restrictions such as:

- the circumstances in which, s/he must seek the approval of her/his head of department;
- that the Academic cannot use the university name;
- that the Academic cannot use any of the facilities (such as email, photocopying, computer, internet, office etc), resources or staff of the university in performing the consultancy work except by special

arrangement;

- the Academic not being able to access, use or have a licence to any pre-existing intellectual property of the university except by special arrangement;
- that client of the Academic signing a document indicating that they acknowledge and agree to the above bullet points;
- that if the academic wishes to use the facilities, resources, staff or intellectual property of the university s/he must enter into a specific contract with the university to do so;
- that the Academic needs to undertake such consultancy work within the time limits available for consultancy work.

Students and intellectual property

Although it is unlikely that many students will be carry out consultancy work in their own name, however they may assist academics in such work. The position of students differs significantly and fundamentally to academics. They are not employees of a university. Any intellectual property a student creates, generates or conceives, whether on her own or jointly with others will belong to that student (on her own or jointly with others). An Academic, as an employee, will have the intellectual property they create, conceive or generate during the course of their employment belong to their employing university.

Some universities include in their student enrolment form provisions (or a cross-reference to provisions in a student guide) which deal with the ownership of intellectual property created by a student. However, this is not yet, it appears, a common practice. Also, a blanket policy that a student must give over ownership of any intellectual property s/he creates as a student is not free from controversy. Some universities find that a blanket policy of this sort would be unacceptable. Also such a practice might amount to an "unfair" term in the contract between the student and the university (although this proposition is untested as of yet, students are likely to be seen as "consumers").

Whether or not a student has already signed over her ownership of intellectual property, the only safe course for a university or a Consultancy Company is to get the student to sign an agreement which specifically addresses the issue of

intellectual property ownership. For some universities this is a common practice where students are asked to participate in research agreements.

Use of the university name in consultancy work

The name of a university, like its premises, intellectual property and staff, e.g., is a valuable asset. Also, the use of the name of a university also implies a certain level of quality or association by reputation.

Many universities also protect their name (and variations or reductions of their name) by the use of registered trademarks. A university will not wish a Client to be able to use the name of the university without restriction. Whether it is thought important to include such a restriction in a consultancy agreement is probably a matter of judgment in each case.

As a default, Templates 1 and 2 do not include such wording to restrict the use of the name of a university. This type of clause has been omitted (like many others) because the Template is for small-scale routine short consultancy work where the Client is unlikely to publicise that it is obtaining consultancy services from a university. But sample wording is provided in relevant parts of Appendix B to address this issue.

Charitable status and doing work for profit

The aim of a consultancy agreement in most cases is to raise revenue. The consultancy agreements usually provide that the Client will own intellectual property generated under a consultancy agreement and there will be no right for the university to publish the results of the consultancy work undertaken.

Such a restriction may conflict with the charitable status of the university. An activity of a charity must be for the "public benefit". One way (or the principle way) for a university to demonstrate that its activities are for the public benefit is to "disseminate" (directly or indirectly) the results of its activities. Dissemination can take place in many ways (e.g. publication in the traditional sense, or when a patent application is published, etc.).

Most consultancy agreements would not meet this requirement, and a Client is

unlikely to agree to publication. A university will have essentially three choices if it entering into too many consultancy agreements:

- hive-off such "trading" activities to a separate company such as a Consultancy Company;
- require the Academic to enter in to the consultancy agreement with the Client;
- unlikely to arise in most situations, but technically possible where the situation arises: enter in consultancy agreements only:
  - where the university can show it has an interest in the work carried out under a consultancy agreement which relates to other work carried out by the university; or
  - an interest in the acquisition of more general knowledge or other benefit to the fundamental research interests of the university.

Insurance

As discussed in Chapter 2 one of the advantages for Academic to contract through the university for consultancy is to take advantage of the university's insurance policy. Where the university has a Consultancy Company, there is often, as part of the contractual arrangement between the university and Consultancy Company, provision made that contracts entered into by the Consultancy Company will have the benefit of the university's insurance policy.

The following are a few notes concerning this topic:

- *type of insurance*: The type of insurance is usually known as "professional indemnity insurance", and which would cover negligence claims;
- *awareness by insurer of university or Consultancy Company undertaking consultancy agreements*: the insurers or, more likely, the insurance brokers must be made aware that such contracts are being undertaken (under the special area of law relating to insurance contracts, which requires the insured to show "utmost good faith")*;*
- *provisions of the CA: sample or standard wording are often provided to the insurers; however, there may be difficulties if the insurers may expect all consultancy agreements be entered into on those terms;*

- *common exclusions found in insurance contracts: common exclusions from professional indemnity insurance contracts include*
    - consultancy agreements which specify US or Canadian law or jurisdiction;
    - consultancy agreements which have "contractually-assumed risks". This phrase appears to mean that a risk has arisen under a contractual provision in a consultancy agreement which goes beyond the liability which would be incurred if that contractual provision had not been included in the consultancy agreement. E.g. Template 1 at Clause 10.2 indicates the consequences if the Project is performed negligently (i.e. on request and within 6 months of the Completion Date, the Project will be performed again). However, if there was a contractual provision indicating a heavy liability for the university for such negligence (such as an onerous indemnity clause), that contractual provision may go beyond the liability found under the general law.
- *provisions in a consultancy agreement which are significantly different to the standard terms and conditions previous notified to the insurers*: For many consultancy agreements entered into the Client will insist that their own terms and conditions are used. An assessment will need to be made how unacceptable they are even after negotiation. The university will always have the option not to enter into a consultancy agreement with too unacceptable provisions or require the Academic to enter into the contract directly.

However, these are likely to be only the last steps in the process of entering (or not entering) a CA. The ideal should be that there is a clear procedure:

- for identifying problem provisions;
- referral to an appropriate person (such as a line manager);
- onward referral to the department/section dealing with insurance matters in the university and subsequent referral to the university's insurance brokers in the first instance.

Such a procedure should include such some of the following matters as well:

- a description of the clauses and liabilities which are excluded or need

particular attention under the insurance policy;

- obtaining a copy of the provisions of the insurance policy each year, to become familiar with the provisions but also to be aware of provisions in Client's consultancy agreement that can be avoided. For example, if a Client proposes a consultancy agreement with a provision which is clearly caught by an exclusion in the insurance policy, it can be argued during negotiations that the provision is unacceptable because of the insurance policy, or an acceptable amendment can be drafted to be take account of the specific wording of the exclusion found in the insurance policy.
- particular types of consultancy agreements that need referral, e.g. those worth over a certain value or with certain types of Clients (e.g. working in certain "high" industry sectors);
- which types of provisions need referral. In practice those that expose the university to increased liability, impose indemnities, restrict the liability or exposure to liability of the Client, or have non English (or Scottish) law and/or jurisdiction clauses;
- what information is to be provided to the insurance brokers where there is a query to be made;
- *who handles insurance matters at the university*: There may be a special section in the finance department, company secretary's department or a completely separate department handling all insurance matters for the university. Professional indemnity insurance is likely to be only of a number of insurance policies that are handled. The correct contact person should be identified so that urgent queries can be quickly notified to the insurance brokers and if appropriate to the insurers.

Payment to the Academic and tax

Where the university or consultancy company contracts with a Client (and the Client pays all the fees to the university or consultancy company), the payment of fees due to the Academic normally takes two forms, after any permitted deductions:

- the fees are paid into the "account" of the Academic where it is added to his/her salary and taxed in the normal way as other parts of his/her salary.

In this circumstance, whether it is the university or consultancy company who is legally responsible for payment, it is usually the university's accounts department which handle this;

- the fees are paid directly to the Academic, with the Academic being responsible for payment of income tax and National Insurance contributions and for charging the university VAT, where applicable.

The tax issues surrounding consultancy can be problematic, depending in part upon the extent to which the university or consultancy company is involved in arranging consultancy agreements, whether the Academic enters into each agreement in his own name, and how and by whom the Academic is paid. In the past, some universities may have made assumptions about the tax treatment of consultancy payments, which did not always stand up to close scrutiny. Increasingly, the tax authorities are looking closely at the approach taken by universities. Whilst such matters are usually the province of the university's finance department, if a TTE is considering proposing changes to the arrangements that are in place with Academics (e.g. by setting up a consultancy company) it is recommended that specialist tax advice be obtained on the tax implications of any change that is proposed.

Expert witnesses

An Academic acting as an expert witness performs a similar set of tasks as when performing consultancy services under a CA. However there are significant (and critical) differences. The purpose of this part of this chapter is to briefly set out those differences.

What is an expert witness?

An expert witness is a person who is instructed to prepare or give evidence for the purpose of court proceedings.

How is an Academic acting as expert witness different to an Academic providing consultancy services?

- The Academic will be instructed by one party to a court case or by a firm of solicitors. The Academic will not normally be instructed by the party itself

(unless the party is not legally represented);

- Although the Academic is instructed by one party to the court case, the Academic duty when carrying out his tasks is not to that party but to the court (although the Academic will receive her instructions from the party instructing her as well as payment);
- There are detailed court rules which the Academic must obey and follow;
- Correspondingly to the above bullet point, the Academic role and duty is to be objective and independent. I.e. s/he is not supposed to favour or be biased in favour of the party instructed the Academic;
- The Academic will almost invariably be required to prepare a written report. The report will be prepared for the court, and copies will be provided to all the parties involved in the litigation and the court;
- The content, format and structure of the Academic's report is set out in the court rules;
- The Academic must verify her report with a "statement of truth". This confirms that those facts which are stated in the report and which are within the Academic's own knowledge are true. Also that the stated opinions are the Academic's true and complete professional opinion. If the Academic's report contains a false statement and that statement has been made without an honest belief in its truth then proceedings for contempt of court might be brought against that Academic. If the proceedings are successful then the Academic could be fined and/or imprisoned (but only in the most serious cases of contempt).
- Where the Academic evidence is disputed, s/he will need to attend court and give some or all of his evidence in court, and then be asked questions by the other parties (and sometimes by the judge);
- Where there is more than one expert witness, the Academic may/will be required to meet with the other expert witnesses;
- There are court rules (and guidance provided by professional bodies such as the Law Society) concerning an Academic avoiding conflicts of interest while acting as an expert witness.

Further information

What is set out above is no more than the briefest of summaries. Where a university or Consultancy Company has entered into or is willing to enter into agreements for its Academics to be expert witnesses then the following are the essential steps to be taken:

- become familiar with the specific court rules applicable to expert witnesses.

  The court rules regarding most civil proceedings are called the Civil Procedure Rules. The specific rule is Part 35 (the text of this Part can be found at http://www.dca.gov.uk/civil/procrules_fin/contents/ parts/part35.htm). There are also further rules in addition to Part 35, the Practice Direction to Part 35 (the text of the Practice Direction can be found at http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm). These are regularly updated, so the links should be checked from time-to-time; and

- become familiar with the *Protocol for the Instruction of Experts to give Evidence in Civil Courts* (this will replace two existing sets of protocol prepared by the Academy of Experts and the Expert Witness Institute, and will come into force on 5 September 2005). The Protocol is available from: http://www.civiljusticecouncil.gov.uk/914.htm.

If your university enters into a significant number of expert witness agreements, you may wish to consider instructing your solicitors to prepare a version of your standard consultancy agreement that is tailored to the specific requirements of expert witnesses, including those set out in the above documents. Unfortunately, this topic is too specialised to discuss further in this Practical Guide.

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