

Intellectual property rights and contracts

A. Transfer vs. License

01. The difference

Contracts on IP rights or singular IP clauses in overarching framework agreements (e.g. M&A/SPA-agreements) are valuable tools to monetise and commercialise IP. Most contracts covering IP rights provide either for a rights transfer, or for a license grant.

The **transfer** of IP rights involves the assignment of an IP right from one parties' assets, to the assets of another, usually in return for a one-off lump-sum payment. As a consequence, the transferee becomes the new holder/owner of the IP right and the original owner loses his IP right. The transfer can therefore be compared to the *sale* of an IP right.

Granting a **license** on an IP right, on the other hand, involves the owner of an IP right to authorise a third party to perform certain actions regarding this IP right, which would otherwise be prohibited. In return, the licensee will pay the licensor – mostly periodically recurring – royalties. A license is comparable to the *rent* of an IP right. As a consequence, the original owner of the IP right remains the owner and does not transfer any ownership to the licensee.

A license can be **exclusive or non-exclusive**. With an exclusive license, only the licensee is authorised to use the IP right in the agreed manner. With a non-exclusive license, the licensor may also license the same rights to others, or still use the right himself (sole license). As a result, multiple parties are authorised to use the IP right in the agreed manner.

When granting a license, the licensor can decide/negotiate which acts the licensee is allowed to perform and which not. In some cases, the licensor wants to outsource the exploitation of the IP right completely. In other cases, a license is limited to one or more specific uses, or to a specific geographical area.

02. To transfer or to license? That's the question.

a. Transferring: pros and cons

There may be various reasons for transferring IP rights. For example, the owner may not have the time, resources or expertise to exploit his rights and prefer to leave this to a third party. It may also be the case that a certain creation was made upon request or instruction, and/or with the means of a third party, such as a principal or employer, who consecutively wishes to acquire all rights to that creation.

From the perspective of the original IP rights holder, there are both advantages and disadvantages to transferring IP rights:

The two main **advantages** of a transfer are:

- **Direct return:** In the case of a transfer, a one-off lump-sum payment is usually stipulated which is paid immediately or shortly after the conclusion of the transfer agreement. The transferor can therefore make use of the received remuneration quickly.
- **Transfer of risk:** After a transfer, the transferor is in essence relieved of any responsibility associated with the enjoyment (e.g. payment of renewal/maintenance costs/...), exploitation (e.g. finding markets, customers and commercial partners, such as licensees) and enforcement of the IP rights (e.g. monitoring and taking action against potential infringements of the rights, with the associated costs, ...).

The **disadvantages** of a transfer are more or less the mirror image of the aforementioned advantages:

- **No revenue from successful exploitation:** When a one-off lump-sum payment is stipulated, and unless the agreement or the law provides for a succession clause, the transferor will essentially not be able to enjoy any revenue from successful exploitation of the rights by the transferee.
- **Loss of rights:** The transfer involves not only the transfer of ownership of the IP rights

while excluding the transferor, but also entails excluding the transferor from any future use. The transferor who then uses the IP rights without the consent of the transferee, may be found guilty of infringement. Obviously, this disadvantage could be parried by contractual modifications (see *infra*).

b. Licensing: pros and cons

A license agreement allows the licensor to be rewarded for his intellectual efforts and accompanying costs. From the perspective of the original IP rights holder, there are both advantages and disadvantages to licensing IP rights:

Some of the **advantages** are:

- The licensor can **monetise** and **commercialise** his IP rights **while still** having **control** over them (contrary to a transfer).
- A **lack of skill to exploit the rights/manufacture products may be neutralised** by a license to a licensee with adequate production or exploitation capabilities in a particular market. Research institutions and universities develop a lot of knowledge without further commercialising it by launching a final product on the market. At the same time, the licensor avoids possible negative consequences related to a lack of exploitation of an IP right, such as the loss of a trade mark due to non-use.

An advantage for the licensee, on the other hand, consists of the fact that a license allows him to benefit from an IP right, without having to bear the intellectual or financial efforts for its creation.

There are obviously **disadvantages** to licensing as well:

- The **remuneration** on the basis of a license agreement (so-called "royalties") will **often** be **lower than** the **profits** that would have resulted from **own exploitation**. Thus, not only the risks, but also the opportunities usually fall to the licensee.
- In addition, the licensor also **partially loses control** over the IP right, since certain rights are shared with the licensee.

From the licensee's perspective, usually a part of the profit margin (from e.g. product sales) has to be shared with the licensor as well, which would not have been due if the IP rights were his own creation. The licensee is not independent and has to take into account the licensor and the licensing terms and conditions. Finally, the rights granted may also come to an end after a certain period of time.

Because of these restrictions on the freedom of action of both parties, it is important to always analyse and identify the ultimate objective of the license agreement in advance.

c. Conclusion

Depending on the situation, the IP rights holder will have to choose between licensing or transferring the said rights. It is therefore highly important to clearly establish both parties' intentions and balance their interests to make a decision.

The following **overview** briefly shows the advantages and disadvantages of both regimes from the perspective of the rights' holder:

	Transfer	License
Pros	<ul style="list-style-type: none"> ✓ Direct Return ✓ Transfer of risk 	<ul style="list-style-type: none"> ✓ Opportunity to benefit from exploitation without losing control ✓ Lack of skill or manufacturing capabilities may be neutralised
Cons	<ul style="list-style-type: none"> ✗ Loss of control ✗ Loss of exploitation revenue ✗ Loss of rights 	<ul style="list-style-type: none"> ✗ Costs for maintaining the right ✗ No transfer of risks

03. Contracting phases

a. Phase 1: Pre-contractual phase

a.1. Transfer

As already mentioned, it is important to analyse and identify in advance which rights you want to transfer or acquire and what your objectives are. A clear **definition** of the rights is essential, both for the transferor and the transferee.

Once a suitable partner has been found, negotiations can commence. During transfer negotiations, it is possible that the parties exchange confidential information with each other. In that case, it is advisable to conclude a **confidentiality/Non-Disclosure Agreement (NDA)** beforehand to avoid future disputes.

For the transferee, it is important to obtain as much information as possible about the existence, validity and title of the IP rights (**due diligence**). After all, a transfer only makes sense if the transferor is actually the owner of the rights. Therefore, the transferee should not hesitate to ask e.g. for proof of existence and ownership.

Tip: Given the complexity of intellectual property rights, it is highly recommended to call on the services of a lawyer or a specialised trade mark/design/patent attorney to conduct a preliminary investigation on the negotiated IP rights. Such due diligence is in any case common practice when the transfer is part of the merger or acquisition of a company (M&A).

The acquirer may also conduct its own **re-search** during this negotiation period, for instance in the relevant (online) registers. Examples of these registers are:

- Espacenet of the European Patent Office

(EPO) for patents (<https://worldwide.espacenet.com/>);

- Website of Benelux Office for IP (BOIP) for Benelux trade marks and designs (<https://www.boip.int/en/trademarks-register>);
- Website of European Union IP Office (EUIPO) for EU trade marks and designs (<https://euipo.europa.eu/eSearch/>).

In most cases, it is also appropriate to stipulate a **warranty clause** in this respect. This clause provides for a way out when the IP right turns out to be – in worst case – invalid in the future.

Another important element in the negotiations is the **valuation** of the IP rights, and accompanying consequences on the transfer remuneration. Since, as mentioned above, within the context of a transfer, often a one-off lump-sum payment is stipulated, the valorisation of this payment will often prove to be difficult. The specific methods to value IP rights will be discussed further below.

a.2. License

As already mentioned, it is important to analyse and identify in advance what you want to license and what your **objectives** are. Based on this, you start looking for suitable partners who are interested in your IP rights, taking into account your own objectives.

Once the objectives of both parties have been established, the **negotiations** commence. If the parties exchange confidential information, a prior confidentiality agreement is essential. The key characteristics and areas of concern as described above regarding transferring, also apply for licensing. With the proviso that choosing the right partner will be of even greater importance because of the (often) long licensing relationship that will be established, which is obviously less so the case with **transferring**.

Tip: Bear in mind that your partner's objectives differ from your own. The best license agreements are characterised by reasonable rights and obligations for licensor and licensee. A good license agreement is the result of a **constructive and sustainable compromise**.

b. Phase 2: conclusion of the contract

b.1. Legal requirements for transfer and license

When drafting a contract, whether a transfer or a license agreement, it is important to check whether there are special requirements that need to be fulfilled for the transfer or license to be effective.

When it comes to the **transfer or license of patents**:

1. The main requirement is that it must be made in writing. Thus, a **written** contract signed by both parties will be necessary in

order for a valid transfer or license to take place. If the transfer or license is not made in writing the penalty is the nullity of the transfer or license.

2. Furthermore, the transfer or license will only be enforceable against third parties if the transfer or license is **registered** in the relevant register.
3. For **patents registered in the Belgian patent register**, the transfer or license must be notified to the Belgian IP Office.
4. For **patents registered in the European patent register**, the transfer or license must be registered in the European patent register. In this way, the transfer or license becomes enforceable against third parties in all countries where the patent is valid.

Regarding the **transfer of trade marks and designs**, the same principles apply:

1. The transfer of trade marks and designs must be **in writing**, otherwise the transfer is null and void.
2. In order for the transfer to be enforceable against third parties, the transfer must be **registered** in the relevant trade mark/design register (depending on whether it is a Benelux- or a EU-trade mark/design).

Regarding the **licensing of trade marks and designs**:

1. Must **not** be made in **writing**. Therefore, it is possible to license a trade mark or design right orally. However, in order to avoid ex post discussions, it is advisable to always conclude a written license agreement signed by the relevant parties.
2. When it comes to the enforceability of the license against third parties, the license needs to be **registered** into the trade mark or design register.

The **transfer and license of copyright**:

1. Transferring or licensing copyright does not, in principle, require a written agreement for it to be valid. However, a transfer or license must be **proven** in **writing**. It is therefore advisable to always conclude all transfers and licenses of copyright in a written agreement.
2. Moreover, the **content** of the agreement must meet **some requirements**. More specifically, both the object and scope must be specified (which rights on which works), the remuneration, as well as the duration and the territory must be clarified.
3. Furthermore, it is useful to note that only the economic rights arising from copyright can be transferred, **not** the **moral rights**. However, it is possible to waive the possibility of exercising the specific moral rights separately in strictly-defined situations.

When it comes to **databases**, there are two protection mechanisms: copyright protection and the *sui generis* database protection. For copyright protected databases, we refer to the previous paragraph. When it comes to drafting contracts regarding ***sui generis* database rights**, there are **no special requirements** that need to be fulfilled.

As mentioned earlier, **trade secrets** cannot strictly be considered IP rights *as such*. As a result, the owner of a trade secret does not obtain a monopoly with the corresponding exclusive rights. The main value of trade secrets lies precisely in their confidentiality. This means that the

owner of a trade secret must **ensure** that the **confidentiality** of the information is maintained during the negotiations for a possible agreement (e.g. by the use of NDA's). Besides ensuring that the information is kept confidential, there are no requirements to be met in order to transfer or license trade secrets.

b.2. Relevant clauses

Many clauses in transfer agreements and license agreements are very similar. However, in general, it can be assumed that a transfer agreement will be more concise than a license agreement as the mutual obligations of the parties are less complex. In both cases however, it is of vital importance to consult an intellectual property specialist to draft a watertight agreement, and to avoid any subsequent discussions or court proceedings.

04. Valuation of IP

a. In general

An important part of the transfer or licensing of IP is the **valuation** of the IP. The transferee or licensee will have to pay a certain price for the deal to be completed, and that price is more often than not a stumbling block during pre-contractual discussions.

In most cases, the value of the IP right is determined by **negotiation**. The seller obviously wants a higher price, the buyer wants a lower price. Nevertheless, an objective valuation can be very useful in situations where there is a big discrepancy between the asking price and the offered amount.

Three methods can be distinguished to determine the value of an IP right. Although this is referred to as an “objective” valuation method, it is important to realise that it is always an estimate, no matter how well-reasoned it may be:

1. The first method is the **market approach**. The IP right is valued based on the **current prices in the market** for a similar IP right. This method sounds very suitable at first glance, but there are some shortcomings. It requires an active and transparently functioning market for the IP right in question, which is never the case. On the contrary, if IP rights are traded, their price often remains secret and can, thus, not be used to determine the value of another similar IP right.
2. A second method is **cost-based approach**. It is the sum of the estimated R&D expenditure and the cost of obtaining (and retaining) the IP right. This method is relatively easy to implement. The main shortcoming is that the (additional) benefits that may result from the IP right, are not included in the valuation.
3. The most reliable but also the most complicated method is the third model: the **income approach**. There are several variations of the income approach and sometimes the variations are referred to as separate methods. This method is based

on the added value that the IP right has on the expected profit. For this, a lot of data is needed: both the current and expected market development/sales of the product and the expected profit margin, also in comparison to overall company return on revenue. In addition, the method is based on the assumption that the company will be able to generate a return on its investment, which is not necessarily always the case. Furthermore, it is necessary to consider how IP rights affect these data.

For example, for a patent it is necessary to check:

- How **strong** the patent is and whether there are other patents that offer the same benefit.
- Whether the patent is **valid** in the entire market or only in a part.
- How **likely** it is that the patent will **survive a court case**.

All answers read together lead to an **estimate** of the value. It is more of a “realistic estimate” than an objective determination because many of the data parameters cannot – objectively speaking – be accurate. Nevertheless, it is one of the better methods for determining an approximately objective value.

Tip: It is important to note that the **context** in which the valuation is carried out can have a great impact. Suppose a manufacturer can prevent a conflict with its IP right, then the value of the IP right in that conflict is many times greater than the objective value under normal market conditions. On the other hand, suppose a company in bankruptcy has an IP right that, if not transferred, will expire, then the price of this IP right will consequently be lower than its objective value.

b. Valuation of patents and trade secrets

b.1. Patents

The first step when valuing patents is the initial assessment in the **development** phase of the patent. This initial step takes place before even choosing a valuation method: how far has the patent been developed?

- Are we still in the **development stage**, or;
- Has the product covered by the patent already been **commercialised**?

The following **considerations** must be taken into account as well before choosing a valuation method:

- The uniqueness of the patent;
- The technical proficiency of the patent;
- Existence of competing technology;
- Time and effort to commercialise the technology;
- Ability to protect the patent (e.g. in litigation before courts);
- Size of the relevant market area and prospects for the future market share.

After having taken into account all these considerations, a **valuation method** must be chosen:

- The **market approach** can be used if there exists a market for similar technology. However, it can be very problematic to find appropriate comparable transactions as most of the deals involving IP rights remain confidential.
- Furthermore, the **cost-based approach** is very rarely used in order to value patented technology, unless the asset is in its very early stages of development.
- Lastly, the **income approach** is an appropriate method if the patent is fully developed.

b.2. Trade secrets

When valuing trade secrets, there is actually only one valuation method which is appropriate, namely the **income approach**. The cost-based approach is not appropriate given the complex nature of a trade secret. The market approach is also inappropriate as an active market for similar trade secrets rarely exists.

The only relevant approach that can be applied to the valuation of trade secrets is the income approach where the **net present value of future cash flows** is used. In order to determine the net present value, several inputs are required:

- Total amount of future cash flow;
- The discount rate/required rate of return;
- The probability that the cash flows will occur.

B. Collaborations

01. Introduction

Traditionally, joint development was more the exception than the rule. There was a kind of **go-it-alone** mentality about R&D. This meant that new products were totally developed in-house, one company controlled the whole development process, from idea till final development, production and commercialisation: all the knowledge and IP were concentrated within the company.

This model has come **under pressure** due to a number of factors including faster dissemination of information through the internet, the mobility of highly educated workers and the evolving commercial focus of the scientific community and universities. This led to a new paradigm which is called “**open innovation**”. This principle assumes that companies can and should use both external and internal ideas and input for advancing their technology. In open innovation, IP is used to facilitate collaboration, rather than to lock others out of the market.

Legally, open innovation can be organised at **two levels**: on a contractual level, or on a corporate level through the establishment of a new company. A contractual arrangement is more flexible and, thus, easy to undo, while a corporate arrangement is (more) permanent and complex because of all the requirements that need to be fulfilled in order to establish a new company.

Examples of **contractual arrangements** are:

- **Collaboration agreements**, which can have many names, e.g. joint or co-development agreement, R&D agreement, collaboration agreement, consortium agreement, etc.
- **Patent pools**, which can be defined as an agreement between two or more patent owners to license one or more of their patents to each other or to third parties. Often, patent pools are associated with complex technologies that require complementary patents in order to provide efficient technical solutions (e.g. **pharmaceuticals** or **chemical industry**).

Examples of **corporate arrangements** are:

- A **joint venture** is an arrangement between two or more people or companies to work together for a particular purpose or on a specific project.
- A **spin-off** is when a company or university turns a newly developed technology into a separate company for further exploitation of the newly developed technology, often by the engineers or startup team that was involved with the new developments. It is, thus, a technique to split off an early innovation hoping that it will become more successful on its own.

In what follows the focus will only be on the contractual arrangements, and more specifically on collaboration agreements.

02. Collaboration agreement

a. Three phases of collaboration

When collaborating, there are three main phases which are relevant:

- The introductory and **pre-contractual** phase;
- The **conclusion** of the collaboration contract;
- The **implementation** of the collaboration.

b. Phase 1: The introductory and pre-contractual phase

The first phase is the negotiation phase in which the parties will get to know each other and define their **(common) goals**. The aim of this phase is to reach a compromise acceptable to both parties.

Tip: Since a lot of information will be exchanged during this phase and this information is often confidential, it is also advisable to enter into an **NDA** beforehand. The scope of this NDA can be very broad and may include the content of certain documents, as well as the fact that negotiations are taking place.

The following **considerations** must be taken into account when drafting an NDA:

1. The main obligation that must be included in an NDA is the **obligation to keep all (pre-)contractual information confidential**. At the same time it is important to stipulate in the NDA that the exchanged documents and information must be returned to the respective party at the end of the discussions (or of the collaboration).
2. NDAs also set out how the parties must look after the confidential information, **what** they are (not) **allowed to do** with the information (use it only for the permitted purposes and only share on a need-to-know basis).
3. They generally specify **how long** the information must be kept secret, e.g. as long as the secret information will give the receiving party a market advantage, plus a little bit of additional leeway.
4. Sometimes an NDA can also include **non-compete clauses**, however this is not standard practice.
5. Finally, an NDA must include a clause on **applicable law and jurisdiction**.

It is important to note that the information flow is often **two-way**, with both parties disclosing confidential information to each other, especially for collaborations. The NDA must then reflect this arrangement by clearly specifying the confidential information that has been shared.

Sometimes parties want to sign a **Memorandum of Understanding (MoU)** in this stage of negotiation. The MoU is intended to make a roadmap until the conclusion of the contract. It specifies the intentions more detailed, but is not a legally binding document *as such*. Important to note is that the aim of an MoU is to capture the “spirit of the collaboration” and only expresses an intention, but no binding obligations.

In this phase, it is also relevant to **consider exclusivity** in order to prevent the other party from starting parallel negotiations with third parties, and to protect the time and money spent to reach a collaboration agreement.

After the negotiations are completed and the parties have reached a compromise regarding the collaboration, it is time to **conclude** the collaboration agreement and to implement that agreement in practice. In what follows, we will discuss the main considerations that must be taken into account when concluding the collaboration agreement.

c. Phase 2: The conclusion of a collaboration agreement

MAIN CONSIDERATIONS IN EVERY COLLABORATION AGREEMENT

In order to conclude a thorough collaboration agreement, it is important to always keep the following **four questions** in mind:

1. What is the existing intellectual property situation of the parties at the commencement?
2. What are the rights and obligations of the parties during the collaboration?
3. How will the parties deal with the exploitation of the results of the collaboration?
4. What are the rights and obligations of the parties following any termination of the collaboration?

CONSIDERATIONS AT THE COMMENCEMENT OF THE COLLABORATION

At the start of every collaboration it is important to identify **which IP rights both parties own**, and which of them are **relevant** to bring into the collaboration. After all, in a collaboration, often both parties will have certain IP that is necessary for the collaboration to be successful and is even the very reason why both parties want to cooperate. This type of IP is IP that is already in possession of the parties individually before the start of collaboration, and is called **“background IP”**.

1. The first step that both parties have to take is **identifying** and **selecting** their existing IP that they are willing to bring to the table, meaning IP that is relevant to the collaboration project. At the same time they will have to verify the protection and validity (cf. formalities) of these IP rights.
2. Secondly, both parties will **map** the other party's knowledge and **identify** the IP they expect their **partners** to bring into the collaboration. This will form the basis for collaboration, as by bringing the two together, new IP and consecutive products may be developed.
3. Thirdly, the parties will have to **determine whether consent of third parties is necessary** to bring IP rights into the collaboration. Sometimes, certain IP rights have more than one owner. If the other owner is not a party to the collaboration, his consent will have to be obtained in order to bring the IP into the collaboration. Similarly, it is possible that rather than being the owner of the IP, the parties are licensees of the IP. In that case, it is necessary to check whether the license agreement allows for sublicensing. If not, that relevant background IP right cannot be brought into the collaboration.
4. Furthermore, the **terms of access** to the background IP rights during and after the collaboration will have to be determined. Both parties will have to agree on whether they will grant the other party a license during and after the collaboration and on what terms.
5. Lastly and maybe most importantly, once both parties have decided which background IP they will bring into the collaboration, they will have to draft a **clear general definition** to identify it and distinguish it from IP developed later on in the collaboration. It is important that this is done very accurately to avoid future disputes.

d. Phase 3: Implementation of the collaboration

CONSIDERATIONS DURING THE COLLABORATION

Since the purpose of collaborating is to create something new (e.g. R&D, products, manufacturing processes...), new IP rights will often result from this as well. These IP rights are referred to as “**foreground IP**”. In such case it is extremely important to determine beforehand who will own this foreground IP, or at least how it will be divided.

There are **two options** on how to decide who will own the foreground IP:

- According to which party developed the IP
- According to which party is best placed for the exploitation of the IP.

When it comes to the **first option**, there are two possibilities:

- The foreground IP is owned individually by one party;
- The foreground IP is owned jointly by both parties. In this situation it must be determined whether it is severable or not. If it is not severable, both parties will be co-owners.

For joint ownership of the foreground IP, the parties will have to agree on a certain **contribution threshold** that each party will have to reach. For example, it can be agreed that in order to obtain ownership of an IxP right, the party must have made a significant creative/material contribution to the creation of the object of the IP right.

It is also possible that, although there has been a creative/material contribution by both parties, one party does **not want** to have any ownership of the foreground IP (e.g. because of the additional maintenance costs). In that case, there will be an assignment of rights to the other party who will gain full individual ownership. Since the whole collaboration is on a contractual basis, it is clear that a high level of flexibility is at the parties’ disposal.

Regarding the **second option**, the ownership of the foreground IP will be granted to the party who is best suited to exploit that IP. Since the exploitation of IP requires certain formalities that need to be fulfilled and is quite time-consuming, not every party of the collaboration is willing to exploit the foreground IP. Therefore, it is best to grant ownership to the party who wants to exploit it and bear the additional costs.

Just like background IP, once the ownership of the foreground IP has been determined, the parties need to decide on the **terms of access** to the foreground IP during and after the collaboration. Furthermore, some foreground IP rights will need to be registered in order for protection to take place, for example:

- When the foreground IP is owned individually, the other party will need to offer reasonable assistance where needed in order to register the relevant IP.
- On the other hand, when the foreground IP is owned jointly, both parties will work together in order to register the IP. This also means that they will share the costs and taxes (“fees”) necessary for the registration. It is, furthermore, advisable in this case to both work with the same trade mark/design/patent attorney in order to avoid unnecessary discussions.

EXPLOITATION AND TERMINATION OF COLLABORATION

The **end** of the collaboration can result from two possible causes. On the one hand, due to the achievement of the intended result. But on the other hand, due to the failure of the collaboration and not achieving the intended result.

If the collaboration was **successful** and the intended result has been achieved, the exploitation of the IP will depend on how the parties agreed upon who will own the foreground IP – as set out above.

In order to exploit the foreground IP, access to the background IP will sometimes be indispensable. This will not create any issues as long as the owner of the foreground IP is the same as the owner of the background IP. However, when

this is not the case, the owner of the foreground IP will need to have access to the background IP. Such access is achieved through the grant of licenses.

Tip: The exploitation itself of the IP right is done through licenses and transfers. In this sense, it is therefore extremely important to **properly draft** the agreements in which these licenses and transfers are laid down in **writing**. It is therefore highly recommended – and in many cases indispensable – to call on a specialised intellectual property lawyer.

Another possibility of how the collaboration can come to an end is due to its **failure**. In that case, there are two options regarding the further course of the collaboration project. Either both parties accept the failure and move on each in their own way, or one party decides to continue the collaboration project while the other leaves the collaboration.

It is important to anticipate this second situation while drafting the collaboration agreement, and to make clear **written arrangements** about it. After all, it may be that the collaboration is already in an advanced stage and both parties already contributed a great deal of input. In such a case, it may be useful for the party that withdraws from the project to demand that the party that continues alone with the project puts together a completely new team which has not yet worked on the project. Some sort of compensation for the leaving party will often be in place, given the lack of profit margin sharing in the future.

e. Other important considerations

Besides the important considerations regarding IP, a collaboration agreement should also provide for considerations regarding the organisation, duration and termination, as well as some

other general clauses. When it comes to the **organisation** of the collaboration, the following subjects need to be taken into account:

- regular meetings & reporting/audits;
- objective/measurable targets;
- clear distribution of tasks: who decides/pays what;
- time schedule and milestones;
- secondments & access to facilities.

It can also be relevant to create a **steering committee** with representatives of the parties which will be in charge of overseeing the organisational side of the collaboration, and make sure that the collaboration runs as smoothly as possible.

Other important clauses include considerations regarding the **duration** and **termination** of the collaboration.

- It is important to agree whether early termination is possible and on which conditions.
- It is possible that during the collaboration one of the parties undergoes a change of control (e.g. **through merger**). It is necessary that the collaboration agreement defines what will happen with the collaboration in that scenario.
- One should always be aware of the fact that the collaboration agreement can cause certain competition law and tax issues.

03. Conclusion

To conclude, it is clear that more and more businesses want to collaborate one way or another to keep innovating, and to stay ahead of the curve. There are **three fundamental pillars** that need to be taken into account in order for these collaborations to be a success: speed, flexibility and trust.

1. When it comes to the first pillar, **speed**, getting first market access is necessary. The slower the collaboration goes, the more value it loses. Businesses stress the importance of getting access to the market first: if the collaboration is slow, it loses value. After all, companies that focus on efficiency, rather than perfection, are commercially rewarded in the end.
2. Secondly, **flexibility** is important. At the beginning of every project it is not clear whether the collaboration will be successful or not. An important key to this success is the flexibility each party demonstrates. Rather than being stubborn and wasting time on details which are not important, it is sometimes necessary to move away from these original thoughts in order to take the project forward and reach success.
3. Lastly, **trust** is a major factor to reach a successful collaboration. Collaboration partners need to trust each other, rather than to perceive each other as competitors. This means that there has to be an open conversation surrounding the indications and targets of both partners, and the way this can be achieved most efficiently.



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