

APPLICABILITY OF ARVODI-18 AND IP PROVISIONS

Drafted: November 2020, updated August 2023

Reason for this note:

It has been noted that the General Government Conditions (ARVODI-2018) that generally apply to contracts for the provision of services awarded by the central government – which may also include research activities – cannot simply be reconciled with policy rules that apply to agreements concluded on behalf of VU Amsterdam. Depending on the details of a specific agreement, it may be necessary or desirable to agree upon (additional) provisions relating to confidentiality and publication.

This memorandum outlines the legal framework and provides instructions for the conclusion of agreements to which the ARVODI-2018 conditions apply.

General Government Conditions (ARVODI-2018) and Model Agreements.

As a rule, the General Government Conditions for the provision of contracts for the provision of services (ARVODI-2018) apply to assignments by or agreements about cooperation with (parts of) the central government. In this context, ARVODI Model Agreements are also used, e.g. in case of generic service contracts or for agreements for research services. In the event processing and/or transfer of personal data are part of the services, it may also be necessary to conclude separate data processing or transfer agreements (or to include provisions addressing these topics in the research agreement).

The ARVODI-2018 contains provisions regarding, among other things, confidentiality (Art. 13) and intellectual property rights (Art. 24). The Model Agreements also contain provisions on these subjects.

In short, Art. 13 ARVODI-2018 (Confidentiality) stipulates that the Contractor (and its employees) is (are) not permitted to share confidential knowledge with third parties without the consent of the Client (13.1-3), in some cases under penalty of a fine (13.5). After completion or termination of the assignment, the Contractor is obliged to make all data available to the Client (13.4).

Art. 24 ARVODI-2018 (Intellectual Property Rights) stipulates that copyright and other IP rights are in principle vested in or are transferred entirely to the Client (24.1-2 and 4-6). The Contractor has, among other things, the obligation to grant the Contractor a (broadly defined) right of use to all IP rights, whether already existing or arising during and after the assignment, that are necessary for the service and the use of the result (24.3 and 9) and indemnifies the Client against claims from third parties (24.7).

With regard to the possibility of publishing the results of the research, the Model Research Agreement states, among other things, that only the Client is authorized to publish the results, but that the Client cannot delay or stop publication because the results of the study are unwelcome to him¹ (11.4). The Contractor is permitted to use the results, with the exception of privacy-sensitive data (11.5).

ARVODI-2018 and VU policy on publication and knowledge exploitation

For (research) services provided by VU Amsterdam and its employees, the provisions regarding Confidentiality (Art. 13 ARVODI-2018) and Intellectual Property Rights (Art. 24 ARVODI-2018) may be

¹ It seems to be contradictory that, on the one hand, only the Client is authorised to publish and, on the other hand, the same Client cannot stop publication.

problematic. The restriction of the freedom to disseminate the knowledge resulting from (research) activities of VU employees is in principle contrary to VU Amsterdam's policy with regard to publications and intellectual property and possibly to general principles of academic freedom.

The *Regeling Kennisexploitatie* (Regulation on Exploitation of Knowledge)² stipulates how knowledge resulting from (research) activities of VU employees should be handled. The starting point is that (the rights to) that knowledge vest in VU Amsterdam. It is possible to transfer the (rights to) knowledge, but this must be done in accordance with the principles of the *Regeling Kennisexploitatie*.³ Simply accepting the ARVODI-2018 terms and conditions and the provisions of the Model Agreements may conflict with this starting point.

The general research terms and conditions used by VU Amsterdam are also relevant in this context. It provides, inter alia, for the availability of research results:

5. Results and Deliverables. All rights, title and interest with respect to the results of the Research, including intellectual property, know-how, data, objects and software, are vested in VU ("Results"). Upon completion of the Research, VU will make available to the Client any report, material or other tangible result that is specifically provided to be made available in the Research Offer ("Deliverables") and VU will grant Client the non-exclusive right to use the Deliverables within its own organization for evaluation purposes only. Following completion of the Research and during a period of two months, the Client will have the right to request a licence to use the Results and/or a license to use the Deliverables for other purposes, such as internal use that may result in commercial advantage or external commercial use. VU will grant such a licence at arm's length conditions, which are to be negotiated in good faith between the parties. In the event of the grant of an exclusive licence, VU will remain entitled to use the Results (including the Deliverables) for scientific or educational purposes. For the purpose of the Research Contract intellectual property is understood to mean patents, including reissues, divisions, continuations and extensions thereof, utility models, registered and unregistered designs, mask works, copyrights, database rights, trademarks, and any other form of protection afforded by law to inventions, models, designs, software, trade secrets, confidential information or technical information in any form, and applications thereof.

On the right to publish about research, these terms and conditions state:

10. Publication. VU is entitled to publish, present and disclose any information in relation to the Research. In the event that a publication or presentation concerns the Deliverables, VU will submit a copy of such publication or presentation to Client no later than 30 days prior to such an event.

² <https://www.ix.nl/content/uploads/2019/06/Regeling-Kennisexploitatie-VU-per-09-04-2019.pdf>

³ Art. 2.1.c of the *Regeling* states: An institution may transfer its claims to Knowledge to (a) third party(s). This is done, among other things, by concluding collaboration agreements, grant agreements or (other) research agreements. These agreements contain provisions which are as close as possible to the principles laid down in this Regulation.

Client may suggest amendments to the publication or presentation, but VU shall be under no obligation to include such suggestions from Client.

These conditions are not compatible with ARVODI-2018. It will not always be possible for the VU terms and conditions to apply to an agreement. For work carried out for the central government, the applicability of ARVODI-2018 will often be a given.

In order to ensure that VU Amsterdam and its employees can (continue to) make use of the research data and results, additional agreements, which amount to a deviation from ARVODI-2018, may be necessary when entering into agreements with government bodies or agencies.

Deviation from ARVODI-2018 is only possible by written agreement

How to conclude these additional agreements most practically will depend on the way in which a collaboration or research agreement is reached. For situations to which ARVODI-2018 applies, the parties must in any case agree in writing that agreements that deviate from ARVODI-2018 apply between them (cf. art. 2.1 ARVODI-2018).

When determining the content and practical implementation of an assignment, for which prior consultations will usually take place between the parties, the desired deviation from ARVODI-2018 will also have to be discussed. In general this will not be a problem, provided if the parties agree on the purpose of that addition/deviation. It is advisable to raise this issue at an early stage, e.g. when subscribing to a tender.

Standard provisions in Model Agreements

A number of Model Agreements provide for the possibility to deviate from ARVODI-2018. For example, the Research Model Agreement has the following general provision:

7.2 <OPTIONEEL> *In afwijking van het bepaalde in artikel .. van de ARVODI-2018 geldt met betrekking tot het volgende.*

7.2 <OPTIONAL> *Contrary to the provisions of article .. of the ARVODI-2018, with regard to the following applies.*

This Model Agreement also contains various options for further detailed deviations from ARVODI-2018, but these do not cover the potentially problematic conditions in this memorandum in the field of confidentiality, intellectual property rights and publication of research results. The desired derogation will therefore have to be subject to the option given in Article 7.2.

This provision will have to be completed in the light of the scope and purpose of the research on which additional agreements are required and in view of the foreseeable use of the knowledge obtained. The above-mentioned provisions from the VU terms and conditions can serve as an example. Below is an example of for Article 7.2:

7.2 *In afwijking van het bepaalde in de artikelen 13 en 24 van de ARVODI-2018 geldt met betrekking tot het gebruikmaken van de kennis die wordt verkregen bij het verrichten van de werkzaamheden door (medewerkers van) Opdrachtnemer het volgende.*

Het staat Opdrachtnemer vrij om deze kennis te gebruiken voor onderwijs- en onderzoeksdoeleinden en voor (wetenschappelijke) publicaties [eventueel met inachtneming van bijvoorbeeld bepaalde waarborgen ten aanzien van de omgang met vertrouwelijke gegevens of een periode die Opdrachtgever de gelegenheid geeft bepaalde maatregelen te treffen].

7.2 Contrary to the provisions of articles 13 and 24 of the ARVODI-2018, the following applies with regard to the use of the knowledge obtained when performing the work by (employees of) the Contractor.

The Contractor is free to use this knowledge for educational and research purposes and for (scientific) publications [possibly taking into account, for example, certain guarantees with regard to the handling of confidential data or a period that gives the Client the opportunity to take certain measures].

When using the Model Agreement for Research, one should also take into account the restrictions (for VU Amsterdam and its employees) that arise from the provisions on Intellectual Property Rights (Article 8) and Publication (Article 11). In particular, 11.4 and 11.5 limit the Contractor's ability to publish. If these topics are of interest to the researchers and the research in question, consideration should be given to not agree to this Model Agreement, but to draw up an agreement that is better aligned with the principles of the *Regeling Kennisexploitatie* and the VU policy rules in general.

Include a derogation from ARVODI-2018 in other agreements

If there is another agreement, for example a document laying down the organization, budget and planning of the project, it is advisable to include in that document a provision to the effect suggested above. For such agreements, it may be proposed that the VU terms and conditions apply.

If there is a possibility that ARVODI-2018 applies to the relationship between parties, the parties must expressly agree to the agreements contained in such a document, in order to prevent the restrictions of ARVODI-2018 from taking precedence.

Even if there is a more informal form of cooperation, in which all agreements are laid down in general terms, it is wise to also mention this subject, for example by including a passage in a quotation, project proposal or description in which it is stated that VU Amsterdam and its employees are free to use the acquired knowledge for educational and research purposes and for (scientific) publications.