Journal of Scientific & Industrial Research
Vol. 83, March 2024, pp. 292-299
DOI: 10.56042/jsir.v83i3.4610

The Code of Contract: A Primer for Academia

Vijayakumar Maleppillil Vavachan
National Centre for Cell Science, Ganeshkhind Post, Pune, Maharashtra 411 007, India

Received 04 August 2023; revised 12 January 2024; accepted 22 January 2024

A contract is an enforceable agreement in conformity with contract law. The business engagements of academia come under the purview of contract law, and it relies on the instruments of contract to secure its rights and economic benefits. Negotiation followed by drafting mutually beneficial agreement terms between contracting parties is critical to establish a strong business relationship. Drafting a legally correct agreement is quite daunting to scientists and engineers. Owing to scarcity of related literature in scientific journals and other public domains, the contract law and agreement drafts have all the more become abstruse to them. The present article addresses these gaps by unfolding the basics of contract law. It provides them an introduction of fundamental elements of a valid contract. This would help not only in deciphering the given agreement, but also equip them better for negotiation process and further drafting the agreements to shape valid contracts.

Keywords: Agreement, Funding, Intellectual property, Law, Science administration

Introduction

A contract is a legally binding agreement between parties.[1] In the form of a legal document, it spells out and administers the rights and duties of the parties to an agreement, in a codified manner. The details of the parties and the promise made between them, the rights and obligation born out of the promise, the value exchanged in the form of consideration and the time period to fulfil the promise, legal remedies in the event of a breach of an agreement or dispute, are some of the essential ingredients for a well-drafted agreement.[2]

The main objective of entering into a contract is to formalize a new relationship and frame the legal commitments of each party indebted to the other over a promise made between them. It facilitates the smooth transfer of goods, services, and money at once or at a future date for a cost agreed upon between parties to the contract. All these transactions follow common stages, and its sequential occurrence is fundamental in reaching a contract. The rules and guidelines for the formation of a contract and all activities arising out of the contract are governed by the contract laws of respective countries.

The purpose behind drafting an agreement is to pen down the terms of the promises exchanged between the parties to an agreement and also to set up remedies in the event of a breach of promise by one of the parties to a contract.[3] In simple terms, drafting an agreement provides certainty to the terms agreed upon by the parties. Though there exist no specific format to be followed for a written agreement, its essential contents must be in conformity with the principles and validity conditions set forth in the contract law. Thus, an agreement would become a contract only if its terms possess the assent of the contract law.

A number of activities in academia come under the purview of contract laws. Appointing staff, admission of students, procurements, approving Material Transfer Agreement (MTA) for sharing of resources, collaborations, outsourcing, signing a Memorandum of Understanding (MoU) or Non-Disclosure Agreements (NDA), licensing or assignment of intellectual property rights, availing grant, etc., involve the intervention of contract.[4–7] In fact, among the laws, contract law is the one we run into frequently even in a day to day life: paying a bill, buying a SIM card, making online purchases, ordering a meal, availing services by agreeing to terms and conditions, signing a business deal, buying a ticket for a movie, or transportation, taking up a job, etc. Thus, the knowledge of contract laws and agreement drafts is beneficial to the general public too.

Scientific contents often form a significant part of an agreement draft, where academia is one of the parties

Author for Correspondence
E-mail: vkumarv20@gmail.com; vijayk@nccs.res.in

to the contract.[5] Notwithstanding seeking the advice and service of professionals, researchers and faculties are now required to ensure that the interests of the organization as well as individuals are secured and not compromised while entering into a contract. Of late, their involvement has become an indispensable part of science administration activities that comprise drafting agreement terms or its proofreading, especially for commercialization of intellectual property (IP), academic engagement, consultancy, research collaboration, technical services, or obtaining funds from funding agencies, etc.[8–10] In addition, be it in academia or industry, many aspects of scientific research itself attract several legal concerns.[11–14] Yet, many research institutions and small industries lack personnel proficient in both law and science. In legal purviews, ignorance of the law is not deemed to be a defence to get away from retributions resulting from the breach of contract law; it might lead to costly and time-consuming litigation.[15,16]

Knowledge of the basics of contract laws is one of the most essential skills necessary for understanding a contract document. It makes interpreting the contents of the draft easy, and also helps to dig out loopholes, if any. It is of great utility to shield a contracting party against all the potential issues that might arise during the execution of the contract. It aids in the negotiation process towards a win-win agreement, conducting due diligence of the terms of an agreement and striking a balance between the interests and rights of the parties.

Mostly, proofreading of the agreement drafts, in many research organizations, is limited to grammar and spelling corrections, and the signing of the document is done by the personnel lacking proficiency in law. At times, academia would find itself at the receiving end due to the poorly drafted contents that were deemed weak by the court.[17,18] Hence, it is advisable for researchers to be acquainted with the basics of contract laws. But, there exists a scarcity of contract law and agreement drafting-related literature in various public domains. To address this knowledge gap, the present article provides the basics of contract law and decodes the intricacies of contract and contract laws into simple and lucid components. It highlights the fundamental elements and stages in forming contracts, factors determining their validity, and enforceability. In addition, a description of an agreement draft structure is incorporated for a better understanding of the concept. Thus, even though this article only describes briefly the vast realms of contract, an attempt is made to familiarise the researchers with the contract law practice.

The Origin of Contract

The history of contract is traced back to ancient civilizations and trade.[19–21] It was evolved further by the Court of Chancery of England during medieval period. The development of modern contract law is linked to industrial revolution in nineteenth and twentieth century and it became a part of business.[22] Globalization and evolving of digital world only added its inevitable presence in trans-national transactions.

The Indian Contract Act, 1872

The fundamentals of contract laws are universal in nature.[23,24] In India, essential ingredients and stages in forming a contract stem from the Indian Contract Act (ICA). Enacted in 1872, ICA had 266 sections initially; sections 76–123 were replaced by the Indian Sale of Goods Act, 1930, and sections 239–266 were repealed by the Indian Partnership Act, 1932. Thus, ICA is a non-exhaustive law and does not cover contracts such as partnerships, the sale of goods and negotiable instruments, etc. The ICA provides, among other provisions, with the definition and essential elements of contracts: communication, acceptance, and revocation of proposals, its performance, consideration, and fallout in the event of its breach.[25,26] These factors aid in determining the conditions under which a promise becomes legally binding on the person making it.

Definition of Contract

Engaging in a formal and legally binding agreement is called a contract. From the legal point of view, it is a bilateral or multilateral agreement capable of being imposed by the prevailing law of the land. An agreement not enforceable by the law is not a contract, and is said to be void (not legally binding).[25,26] An agreement must meet the validity conditions set forth in the ICA so as to be enforceable. Thus, all contracts are agreements; all agreements are not necessarily contracts.

Object of Contract

Getting into a business relationship comes with risks and benefits. While such an association creates rights for one party, it simultaneously sets up obligations for the other party. Contract law does not lay down rights and duties. Rather, it is created

around the principles of the law by the parties themselves. It cannot be discounted that a party to a business may fall short in keeping the promises. Such shortcomings would put a party's rights at loggerheads against the unfulfilled obligations of the other party.[27–29] Under such circumstances, ICA comes in handy to enforce the agreement made between them. Thus contract brings certainty to business transactions.

The contract law has two major objectives: It ensures that the rights and obligations born out of a contract are appreciated. And, that legal remedies are made available to those affected due to the breach of contracting terms.[30] The law compels parties to adhere to its provisions, builds trust between them, and steers clear of conflicts; It ensures that their interests are not compromised or appropriated by either of them. A written contract lawfully entered into by parties is to express their resolve and ensure its smooth execution.[31] It also signifies the parties' intention to involve in a legal relationship.

Stages of Formation of Contract

A contract arises between a minimum of two parties. They are required to have a legal existence as a person (companies, academia, organizations, etc.) or be a natural person. Under contract laws, a foreign national is also considered as a natural person.

The formation of a contract involves a sequence of events; a proposal (offer) by a party is the starting point for a contract. A proposal is made when one person brings to the attention of another his readiness to do or to refrain from doing anything.[2,25,26] Agreeing not to publish the research data till a patent is filed or know-how or trade secret is protected is an example for such abstinence under contract law. The proposal must be certain, definite, and lawful. The purpose of putting up the proposal is to get that other person's acceptance through communication and to get into a legally binding association. Communication of absolute and timely acceptance of a proposal converts it into a promise, is the second step.[2,25,26] As per the provisions of ICA, the approval can be communicated by speech, writing, or performing a desired action that comes to the knowledge of the proposer. However, if the acceptance mode is prescribed, then, it must be in that fashion only; often, a written disclosure is the preferred mode of communication. In the penultimate step, the promise becomes an agreement when the offer is accepted for a consideration, which is something of value accepted or agreed upon as a return for the promise made. When an agreement gets the backing of law for enforceability, it transforms into a contract in the final step.[2,25,26] Thus, a contract has two integral parts: first, an agreement, and second, its enforceability by law. It is the enforceability factor that distinguishes a contract from an agreement.

On the contrary, many business activities that draw a similarity with a promise are not a promise in legal sense. For example, a bid is not a promise. It is an offer that the auctioneer is free to accept or reject. Similarly, displaying items with a price tag is not an offer. It is purely an announcement to place an offer to buy it for a price. But, once the offer is accepted for a cost, a contract would be formed between the customer and the shopkeeper.

The intention of parties to create a legal relationship is one of the essential requirements in forming a contract. It is construed as the desire of parties to seek legal remedies in the event of a breach of a contract or dispute. The lack of such intention on the parties' side invalidates the contract's formation. For want of a legal relationship, an agreement of social or domestic nature does not culminate in a contract as such. For this reason, an agreement to take one for a movie or an invitation to any social function is not enforceable. Intriguingly, there is no provision in the ICA requiring that an offer or its acceptance should be made to create a legal relationship.[32] This is a classic example of judicial discretion and interpretation that put a law in motion.

Once a contract is concluded, it sets the stage for the execution of a promise. Contract comes to an end with the fulfilment of promise, and so does the liability of each party.

Enforceability of an Agreement

Enforceability presents an option to make something in legal purview operational by the court of law. Thus, when either of the parties to the contract is entitled to force the performance of the other, the agreement is said to be enforceable. Agreements are legally binding only if it meets the conditions specified in Sections 10–30 of ICA.[2,25,26] It requires that an agreement is to be made by competent parties out of their free consent. On top of this, it must be for a consideration with an object conforming to law.

The Competency section referred in the Act imposes three uncompromisable conditions for the enforceability of an agreement. Above all, it must be made by those who have attained the majority. In the second place, a contracting party is to have a sound mind to make rational judgments. Thirdly, neither of

them is disqualified from contracting by any law in force.[33–35] For a better perceptivity, it is to be understood that the age of majority is eighteen years for those having a natural guardian under the Indian Majority Act, and twenty-one for those having a guardian appointed by the court. Contract law regards a person who is able to understand and draw conclusion from facts in right perspective as having sound mind. A foreigner residing in India with which his nation is at war, and a bankrupt are disqualified from contracting. Hence, nationality, financial status, and other mandatory competency factors of the contracting parties are to be subjected to due diligence, before entering into a contract. The contract made contrary to these provisions is called a void contract, and no contract exists in the eyes of the law.

Free consent between parties is indispensable for the realization of a contract.[36] Consent is said to exist only if the minds of contracting parties meet in the same sense to achieve the object. As per the contract law provisions, free consent subsists only if it was not obtained by employing force or threats, influence, deception, or by giving false or misleading information. If the parties' consent is not free, then the validity of the contract becomes questionable. Such a contract will remain in force until the party, who has not given free consent, opts to rescind the contract; it is called a voidable contract.

The lawfulness of the object and consideration are also necessary to create a valid contract.[2,25,26] The consideration and objects are not lawful if it is prohibited, or of such a kind that approval of it would nullify the provision of any law, or involves fraud, or cause harm to the person, or property of another, or the court perceives it as unethical or in conflict with the public policy. In this context, cloning of a human embryo, generation of a new class of pathogen or unauthorised genetic modification of organisms, production of narcotic agents, selling organs or tissues for a sum, unauthorized dealing of natural resources, etc., lack the backing of the law. An agreement is not legally binding if it is made contrary to the provisions of prevailing laws. Therefore, researchers are to be mindful of the lawfulness of the object of the contract that they intend to be realized.

Anatomy of an Agreement Draft

ICA does not specify any particular form of agreement. Hence, oral, written, or even electronically (WhatsApp, SMS, or email) executed contract (e-contract) forms are valid in India.[37] While several agreements work well on trust, at times, the terms agreed upon orally can be ambiguous. Therefore, it is in the parties' best interest that an oral contract is avoided and that the agreement is to be in writing, signed by the parties, attested by the witness, and duly registered.[31]

Types of Agreements

The type, structure, and construction of terms of an agreement vary according to the scope, parties, purpose, territory, and law. Agreements, mostly, being used in academia are:

i. **MTA**: This agreement is used to transfer research materials for the purpose of research and development, or commercialization (38). Research materials comprise cell lines, nucleic acids, proteins, experimental devices and equipments, animals, plants, microorganisms, chemicals and data. Terms in the agreement would determine its use, in restricted or expansive mode, for further development and eventual IP claim over it.

ii. **NDA**: It is employed to check the flow of vital information by restricting a contracting party from disclosing it (39). It identifies the scope and nature of confidential information to protect the business or academic interests of respective parties, and serves to set the terms for regulating the disclosure of confidential information. Business plan, trade secrets, know-how, details of customers or collaborators, proprietary research materials and procedures are some of the information often classified as confidential, and being protected through NDA. Signing NDA between parties facilitates smooth discussion between the parties on the execution of a proposal based on their expertise. This is also known as a confidentiality disclosure agreement (CDA). It is signed well before a formal interaction is initiated between parties.

iii. **MoU**: It is the preferred instrument to define the common area of interest between parties towards a mutually beneficial collaboration with no obligation of monetary transaction or action; it merely lays down direction to execute a research programme.[40] Though categorized as an agreement, it requires incorporation of scope, specific roles, tenure of project and financial commitments in subsequent agreements so as to be materialized as a contract. It serves as a symbolic beginning towards a business or academic relationship.

iv. **License agreement**: It is used to grant IP rights and transfer technology to a party for commercialization. It is a complex document containing licensing terms such as ownership and reserved rights, know-how, exclusivity, publication rights, milestone, upfront fee and royalties, and payment schedule etc.[41,42] Most of these terms are decided following extensive discussion and negotiation.

v. **Assignment agreement**: Its utility lies in the outright sale of IP rights and technology.[43]

vi. **Collaboration agreement**: It is put to use to share infrastructure, expertise, and risk towards the execution of a defined research project within a predetermined period. Rights and obligations are dependent on the extent of contribution of parties. Scientific content often forms a major part of this agreement with representation and warranties.[44,45]

vii. **Letter of agreement:** It is a legally valid document and is drafted in the form of a formal letter; it is used in low risk transactions that do not involve extensive negotiations. It contains terms and conditions, payment and timeline towards the fulfilment of a promise.

The mentioned agreements do contain many common clauses. To avoid ambiguity and for easy comprehension, the terms agreed upon between the parties are to be written in a simple, lucid, and clear language. It is the content of the draft that determines the outcome of litigation in the event of a dispute between parties.[29,30] Hence, errors, be it in grammar, punctuation, or words and terms, in the draft are to be avoided to safeguard the interests of a party to the contract.

Format of an Agreement

The format of the agreement may be standard or tailored. The nature of terms in standard agreements is generic with non-negotiable terms. It is suited for low-risk business transactions. MTA is an example of a standard agreement. In contrast, custom-made agreements are more suited for a specific transaction that involves risk. It is complex in nature. It is used in licensing and assignment.

Clauses in a Written Agreement

An agreement deed is a multipage document; the first page is the cover page. The subject matter is written as clauses that are numbered. Essential clauses are the preamble, parties, recitals, effective date, operative part, representation and warranty, confidentiality, restrictions, damages, indemnification, duration, and termination of the agreement, and boilerplate clauses.[46]

Cover Page

The cover page contains the title of the agreement. It identifies business transactions intended through the agreement. Venture Agreement, Collaboration Agreement, Material Transfer Agreement, License or Assignment Agreement, Non-Disclosure Agreement, etc., are some examples of titles used in the contract initiated by academia. Optionally, the date of agreement and name of the parties finds its mention on this page.

Preamble

The first sentence of the document is regarded as the preamble of the agreement. It contains the title of the agreement, date, and place of execution. It serves as the introductory statement of the document and sets out the guiding principles, purpose, and intention.

Parties

The preamble is followed by a description and authentication of the parties' identity and address. If the party is a company, then its name, address of registered office, registration, and goods and service tax number are to be included. Subsequently, the party's name is defined either by their true name or abbreviated name or in the sequence they appear in the document (party of the first part or second part) or by the role under the agreement (licensor and licensee; vendor vendee; employer and employee, etc.). This clause begins with the word "BETWEEN" in capital letters.

Recitals

It starts with the word "WHEREAS" and provides the background of the transaction with history. This part of the agreement introduces the party with their respective business, followed by the subject matter of the agreement in detail. It also highlights the offer and acceptance and identifies the party who makes the offer and the party who has accepted it. Since the agreement is a result of a lengthy discussion and negotiation, a description and document executed, if any, in this regard would also find its mention in this part. Parties' understanding of the subject matter, duties, and common goals are to be mentioned to ascertain that agreement is reached following a consensus.

From the scientific point of view, this section would contain the research project undertaken and its scope, amount and distribution of funds, principal investigator and co-principal investigators, etc. It may also comprise scientific logistics and strategic decisions considered during negotiations.

Effective Date

It denotes as to when the agreement comes into effect. In the absence of an effective date, the date of execution of the agreement would be presumed to be effecting from the execution date. The time period to get approval from regulatory agencies (eg. approvals from the Biodiversity authority, clinical trial approval) is also to be considered so as to complete the task within the pre-decided duration.

Definition of Terms

Definition of terms, wherein it has multiple dictionary meanings, removes ambiguity and restricts its meaning specific to the intended transaction. It makes the agreement draft comprehensive and reading easy; it aids in understanding the gist of the agreement. Scientific terms that are to be defined in the draft include collaborative research, disclosing party, effective date, IP, Cells or research model, if any, know-how, etc. Defined terms shorten the length of a clause and aid in correlating with the central theme of the draft.

Operative Part

It describes the effect of the document, and the rights and obligations so created. It mentions the milestones to be achieved, the transaction, and the amount as consideration to be paid by one party to the other. It provides frequency, timing, mode, and currency for any payments, penalties, etc. Mostly, penal liabilities are estimated in terms of interest rate or amount. The agreement should indicate whether the charges specified under the agreement are inclusive of taxes or not. Utmost care is to be taken in drafting this clause as taxes, generally, fall on the payee under tax laws. In addition, authorship and publication rights, ownership of inventions, pre-existing rights, patent prosecution, expenses, licensing strategies, etc., are often included in this section.

Representation and Warranty

Mostly, these clauses are used in commercial agreements. A representation is a statement of facts put up to testify a party's credentials and ability to fulfil the obligations and to convince the other party to enter into an agreement. A warranty on the other hand is a party's pledge to compensate the aggrieved party, in the event of representation was found to be false later.

Confidentiality

Parties to the agreement require to maintain transparency and hence, share a myriad of information among them, before deciding to reach an agreement. It comprises highly sensitive information that can compromise the business interests if it falls into the hands of a third party. A confidentiality or non-disclosure clause in the agreement obliges the receiving party to keep all information confidential, and not to disclose it in any manner otherwise than agreed to. The confidentiality clause should, among other things, contain the definition of confidential information, duration of non-disclosure, exclusion, if any, and remedies for breach. Alternatively, confidential information may be covered in NDA as a separate document and with reference of the same in appropriate clause of the subsequent agreement deed.

Restrictions

The purpose of this clause is to restrict the party to the contract from operating in the same or allied field, particularly in joint ventures, with third parties. Appropriate clauses are to be added to restrict either party from entering any other agreement, or assignment of rights that might impede their performance of an obligation.

Damages

A party is obliged to fulfil the contracting terms in letter and spirit. Therefore, the damage clause serves to dissuade a party from deliberately breaching the contracting terms and causing monetary loss to the other party. It imposes punitive or compensative measures on defaulting party to provide feasible remedy to the affected party.

Indemnification

This term has its origin in the Latin word *indemnus*, which means free from loss. This clause is incorporated in an agreement as an assurance to compensate the other party for any unanticipated liability or loss arising out of the agreement. It is also used to absolve a party from any responsibility for a claim in court, generally stemming from third-party claims for damage, loss, or penalty. It, in effect, serves as an interparty insurance policy.

Duration of an Agreement

The duration of the agreement finds its mention in this clause. Alternatively, the agreement would come to an end when the obligations of the parties are completed. If required, specific provisions are to be incorporated into the agreement for an extension or renewal.

It can be terminated either mutually agreed by all parties or due to impossibility of performance, or by

initiation by one or more parties to the agreement as per the terms of the agreement. However, some clauses may survive (e.g., confidential information clauses) well beyond the duration of the agreement.

Boilerplate Clauses

These are standard clauses that focus on contingency, if any, arising during the contract. The most prominent clauses are *force majeure*, notice, dispute resolution, governing law and jurisdiction, etc.

At times, one or more parties to an agreement may become incapacitated to fulfil their respective obligations due to war, earthquake, flood, pandemic, etc. *The force majeure* clause is served as a buffer to meet extraordinary contingencies. It frees the affected party from fulfilling its obligation. However, the affected party is required to give notice in this regard. Notice clause provides for the mode of serving notices to inform the party upon fulfilling their obligations or to enforce right under the agreement.

A clause is earmarked for adjudication and fees in case of a dispute between parties. Negotiation, arbitration, and mediation are the preferred means to settle a dispute. If the party to the contract are transnational, then they must agree as to which place, state or country's law shall govern the right and obligations of parties and which court and authorities would have jurisdiction over any dispute arising out of the agreement.

Each page is to be signed with initials to prevent replacement of pages of agreement and to be signed with full official signature in the presence of witnesses, on the last page. The name of each party, designation, date, and place of execution should be mentioned. Generally, agreement drafts are made in duplicates.

Conclusions

Establishing business relationships with industry and obtaining funds through the instruments of the contract are of undoubted interest to academia. By introducing researchers and faculties to the basics of contract laws, this article enlightens them in conducting due diligence of agreement clauses and safeguarding the interests of their organization. It also aids them in the negotiation process towards materializing an agreement. However, the scope of this article is limited primarily at two fronts: Firstly, it focuses only on ICA. Being a non-exhaustive law, it does not cover all forms of contracts; Inclusion of every facet of the contract is well beyond the ambit of this article. Secondly, it does not present case laws. Being a substantive law, many sections of ICA are subjected to judicial interpretations and precedence. Referring to the related case laws and practice of law are necessary to achieve mastery in legal knowledge.

With the ever-changing funding policies of the government, the contractual engagements of academia with external funding sources are likely to go up in the future. The author proposes for personnel, preferably with proficiency in both law and science, for vetting legal documents and secure loopholes, if any, in the science administration cell of academia and industries.

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