

Legal Considerations for International Collaborative Research Contract

D.S. Lee, K.B. Oh, H.J. Kim, J.H. Lee

*Department of Nuclear Policy Research Division, Korea Atomic Energy Research Institute, P.O. Box 105 Yuseong,
Daejeon 305-600, Korea, dslee@kaeri.re.kr*

1. Introduction

Though collaborative research is pure academic activity the research plan and resource allocation for the research are shaped under foam of contract. Thus, legal binding effect and compulsive instrument is adopted at the research contract. This paper aimed at guiding equal collaborative research contract in legal aspect. To reach the goal (1).enforceability and elements of international collaborative contract, (2).Damage calculation and related issues with those topics shall be discussed in each section.

2. When does the contract enforceable?

International collaborative nuclear research under contract foam shall be matched to requirement of contract. Thus, this chapter will treat elements of the contract and then enforceability after signing the contract will be discussed.

Contract's basic elements are intent, offer, acceptance, and consideration, so, if those elements are satisfied the contract is enforceable to each other and third party as well.¹ Intent is planning and desire to act or contract. In academic research study, intent is unclear because its genuine character is not like a commercial transaction and getting a profit is not a first purpose in most of research case. Thus, intent of research contract is drawn by communication of each side such as email, talk, context of circumstances. If some legal issue is arisen in research contract and the contract does not clearly expect the issue, intent of the contract is the first evidence to prove who is right and lawful. For the reason, all communication before signing contract should be considered seriously and clear expression of purpose and legal character of the study should be defined.

Second element of contract is offer. Offer is that asking or invite acceptance for accomplish intent. The Offer is a kind of package type, so it includes all of duty and right of contract and way to realize mutual interest. Period between offer and acceptance is called negotiation stage which shall be discussed later. Usually, one side generate sample contract package and offer it to the other side for negotiation. The generating sample contract is surely big advantage to the party in negotiation because the sample contract equipped all instrument of protecting the party's interest, receiving party's screening disadvantage point in the package is really time consuming work, and risk of failure of the work is assumed to the receiving party. As long as you

can, it is suggested that becoming a party generate contract package. Korea is a receiving party in most of international collaborative nuclear research contract because of disregarding of it or lack of experience.

Third element is acceptances which means favorable or positive reception of something or offer. Signing is a traditional symbol of acceptance. It means that signing party follow all of duty of contract and has a right to enjoy interest reserved under contract. However mood of process of offer and acceptance is not smooth or cool. Pressure and tension is become higher and higher because all of conditions of contract shall be debate and allocated in this stage. All clauses of contract are discussed and screened by each party. Draft of contract is revised again and again. All of issues in contract include money, intellectual property right, and exemption of contractual duty. Western culture regards this battle as a regular and ordinary process and is used to handle it notwithstanding oriental culture dislikes the battle and understands it rude and immoral. Thus, there is tendency that Asian scholars disregard this process and easily yield in negotiation stage. So, get courage and patience before entering into contract is prerequisite. Consideration is something to give and take. In order to meet consideration's requirements, a contract must fulfill three elements. First, there must be a bargain regarding terms of an exchange. Second, there must be a mutual exchange. In other words, both parties must get something out of the contract. Third, the exchange must have some of value.²Not only money or resource but also some kind of forbearance is enough to be regard as a consideration. Technology and investment is usual consideration in International collaborative research.

Contract includes all of elements such as intent, offer, acceptance, and consideration become enforceable to each other. If one of these elements is missing, the contract is unenforceable and does not have legally meaning power. Thus lack of contract elements is one of traditional defense.

3. Measuring damage of the contract?

Language is an instrument of transferring intent or mind of human being. Performing the same work is also expected to legal language and term. In research contract, legal notions of basic contract term are very helpful to understand and perform research contract. Especially understanding and estimating damage are the most important as a safeguard of the contract.

Lay meaning of Damage is harm or injury resulted from the contractual default situation. Legal mean of the term is that work of calculation and classification of

damage. There are several types of damages such as expectancy damage, reliance damage, and restitution.

Expectancy damage is to compensation of future interest if the contract is performed successfully. Injured party's insisting this damage is most effective compensational safeguard because calculation of the damage includes all of future interest of the contract if the contract performs well even though burden of proof of the damage is up to injured party. Reliance damage is that damage incurred to the injured party for performing his duty or obligation under the contract. Invested resource or technology, and all consumed expense are included to the damage compensation. Restitution is to seek return of an object or system to its original shape or position. Especially, research contract plan to construct some lab or architecture, factory bring restitution damage.

If contract fixed amount of total damage, it is easy to calculate damage. However, in beginning of contract, each party would not want to expect breach of contract situation, so damage clause of the contract is usually missed and disregard. One big concern in collaborative research contract is compensation of Intellectual property abuse because most of contract's defaulting situation or disagreement is arise in the matter. Each party insists that new invent is his exclusive property. Developed country's argument is that the invention of origin is from his prior resource on the other side the other party's argument; the invention is only outcome of research. Thus, before entering into contract, list up of IP as proprietary information is necessary process to prevent this.

One of Special damage theories is specific performance. If it is explained, one does not think it is damage because it is not an estimation of injury but order to perform contractual duty. Traditionally law can be divided into two types; civil and criminal. Contract is surely civil area. Court's attitude to civil side is to give freedom of breach of contract and court only to protect the injured party's interest. However, some case damage estimation is not easy or enough to the severely injured party in some case. In that situation, court order breaching party to perform contractual duty compulsorily. That is specific performance and usually court dose not like to use this instrument. In nuclear research contract, this mandatory enforcement of performance does not be accepted to court.

4. Conclusion

Actually, elements of contract and enforceability are huge academic and practical area to be explained. When these are applied to real contract practice, evidences for prove these and moment of enforceability are main job to lawyer. Basic understanding of these notions is really important to researcher especially in Korea because legal service is not easy to get, so researcher by herself enter into contract without legal aid. Damage calculation is the next process to recuperate injured party's interest. Measuring damage in research contract

case is one of hardest field of damage estimation. The stage requires measuring out and weighing academic purpose of the research and expected outcome of it. legal service before entering into global collaborative research contract is important more and more.

Reference

¹ Gilbert, *Contract* 46 (2003).

² <http://en.wikipedia.org/wiki/Consideration>