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Conducting a Technology Transfer Contract

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Abstract:

This Article addresses the phases of concluding technology transfer contract and mutual commitments between parties of contract the supplier and importer, how to complete the formalities conditions in technology transfer contracts and what are the reliable guarantees. The supplier depends on maintaining confidentiality of technical knowledge. The focus of this article is embodied in discussing the Pre-contract phase and the arising responsibilities and the post-contracting phase

Keywords: *technology transfer contract, responsibilities, contracting phase*

1. Introduction

A technology transfer contract is considered one of the international contracts; this contract doesn't differ in its elements and general characteristics from any other contracts.

Technology transfer contract is like sale, rent, mortgage and construction contracts, but this contract has its own nature in arranging between parties during concluding agreements to reach the phase of signing a contract within a specific conditions and obligations for the interests of these parties in order to reduce disputes that will arise when implementing the contract, so it is often, required in this contract to be in a written form and should be registered in an official body to refer to it when necessary.

2. Methodology

In order to shed lights on the formalities in technology transfer contracts and addressing the main objectives of this article, the descriptive and analytical method is approached.

2.1. Pre-contract Phase and the Arising Responsibilities

Technology is defined as an abstract chattel that is not included by special legal protection which agreed to be named as the knowledge right. This definition represents the legal significance of technology which is the knowledge right, it includes elements that is based upon scientific research.

Any technology transfer contract passes through a phase of negotiation and there may be an invitation to negotiate which has a frequent presence in the technology transfer contract, difficulty is always available due to the distance between the parties of the contract if it is found in the future. Negotiations are an exchange of views between the supplier and the importer regarding the composition of the contract, its validity and determining the generated liabilities and penalty breached.

2.1.1. Technology Transfer Contract Negotiations

There are general principles of the technology transfer contract negotiations gather a number of contracts in a technology transfer contract under their rules, whether they are technical assistance contract, license contract or marketing contract. These principles can be divided into two branches:

2.1.1.1. The Basics of the Negotiation Phase

Negotiation of any contract is a fact that hold no ambiguity for many types of contracts, it is considered a key element in modeling any contract in law, as it is a frame for the negotiation subjects to conclude the contract, and these agreements which will result from these discussions in terms of validity and the responsibility of the parties when it is not implemented it is consequent more moral responsibility.

Due to the modernity of negotiated contract about technology transfer contract, which is sometimes called the initial agreement and contract negotiation. The negotiation contract, a modern type of contracts that are not formulated in the comparative law, but the Court of Arbitration, which belongs to the International Chamber of Commerce, defined by one of its provisions is that " (A contract under which its parties undertake to negotiate or to continue negotiation in order to conclude a specific contract that its theme hasn't been set)¹ , as the technology transfer contract one of the international contracts, which has a great importance, the negotiations are precise, complex, and tedious of great deal of complexity.

The negotiations phase discusses many details that people of expertise cooperate with the help of jurists, the negotiations take a long time and it may take several months or may reach to more than two or three years in some cases. It is possibly that the negotiations phase may be barred of any value to limit the role of the importer to sign as a result of contractual strong status which the technology supplier enjoyed, and the negotiations are conducted on the important issues of the contract such as determining the content of technology needed by the recipient and what is required from the conclusion of contracts such as purchasing of equipment, machines, devices and raw materials as well. To determine the price of the needed technology and obligations of both parties, guarantees and the settlement of discrepancies has to be between two parties during the lifetime of the contract.

The supplier must disclose during the negotiations phase about dangers, which must be raised by using the technology, particularly with regard to the environment, public health, safety of people and money, as well as to inform him about what he knows to prevent these dangers, then that the technology is not new or valuable in itself, the supplier must disclose, during the negotiations phase, about the dangers that may arise from the use of technology, and the supplier must disclose to the importer about lawsuits and other obstacles that might impede the rights related to technology, especially with regard to patents, and if there is a legal dispute concerning the validity of patents, the supplier, during the negotiation phase, is required to disclose taxes on exportⁱⁱ.

This is part of many things that needed to be discussed during the negotiations phase and the progress of negotiations. What has been agreed upon could be recorded after a period of time which may result in a renewal of the formula of conditions, the new condition must be provided to the second party.

When the negotiations succeeded, the conditions are prepared in a final draft; this draft is not considered as a contract but an agreement to the drafting phase of the contract. The negotiations of technology contract are distinguished by the complete confidentiality in technology itself, not in the secrecy of the negotiations which two parties are often to preserved. Management during negotiating must be correct and not marred by any defect of satisfaction or any symptoms related to madness, dementia and extravagance. In the case of the continuation of the negotiations they do not have any value or impact for the contract.

2.1.1.2. Guarantees for the Negotiation Phase

The technology transfer contract is distinguished by the place of contracting, which focuses on technical knowledge which has a particular nature of being confidential and general rule of withdrawal from the negotiations. For the negotiator if he wants, it can be lead to reveal this secrecy, the exposure of these secret, then can get the scientific knowledge and leave the negotiations under the pretext of not wanting to enter into the contract after taking what benefit him. The technology about the place of contracting, importer then, according to the general rules, can't sue the relevance of this secret.

Therefore, the confidentiality of the subject of negotiations will be the place of the contract which is technical knowledge: the performances, which will be the elements of this place, as the problem of the secret technical knowledge which is placed in this contract and to overcome it, these methods has to be restored, which guarantees the supplier to non-disclosure of the secrets of the technology:

1. A prior written pledge: Negotiators agree, in this case, that the person who wants the technical knowledge should provide a pledge to maintain the confidentiality of the information that he will be able to get the phase of negotiations, and not to disclose it, or to use a third party. Each party is trying to reserve for himself, fearing the failure of negotiations, therefore it become necessary to get them or get to know about them during the negotiations, it is usually the recipient sign. This papers are sent by the supplier in the preliminary phases of the negotiations, the recipient omission leads to stop the negotiations before they begin, it is a contract that evidences commitments from one side and expresses the agreement to protect the owner of technical knowledge.ⁱⁱⁱ
2. Paying a sum of money (a bail): The negotiators, sometimes, agree that, the person who need technical knowledge should pay a sum of money to know the secrets of this knowledge, this money is considered as a guarantee to not disclosure the confidential information or to use it in the case of conclusion of the contract, so, this amount of money is considered from the financial value that they agree on. In the case of non-agreement, the amount of paid money should either returned to its owner or lose it on the basis of compensation to the owner of the technical knowledge as he briefed himself about the secrets of the technical knowledge, the issue of refunding or losing the money is to be agreed upon in advance by the negotiators.^{iv}
3. A pledge based on confidence is a written declaration signed by the negotiator who demand knowledge, during his visit with some other technicians to the institution of the knowledge owner. This pledge has no great importance from the side of the knowledge owner and at the same time, it is not considered a source of concern for his demander of knowledge due to weak commitment to be established upon himself.
4. Letter of Intent: Letter of intent or letter of understanding, is not easy to define or determine their legal status. The scientific reality suggests that the letters of intent have different forms and deal with various topics it is not easy to link them together, in order to draw a subject that they centered around it, however, there are some definitions for the letter of intent:(A written document before the final contract that reflects the agreements or the initial understanding for one or more parties of the commercial contract with a view to enter a futures contract), they are considered from the phases of the primary contracts that may be required by one of the parties at the beginning of the negotiations on technology transfer contracts, so as to ensure not to leave contracted by the other party after a brief about some of the secrets related to the technical knowledge.^v

2.1.2. The Responsibility Arising in the Negotiation Phase

Technology transfer contract is considered from type of contracts which have different commitments on sides, the technology supplier, recipient, and importer. These commitments are binding in the event of conclusion of the contract, the supplier will comply

to technology transfer for the importer with its hardware and equipment which used to operate the technology or to develop, while the importer commitment is to pay the technology, whether on one payment or several payments.

2.1.2.1. The Obligation of Good Intent in the Negotiations Phase

During the negotiations phase, a set of commitments arise upon the negotiating parties which revolve around two main pillars: commitment good intent and commitment to the confidentiality of the negotiations.

All legislation reaffirms on the commitment to principle of good intention before the recognition of the contractual nature of the negotiation process. Despite the general agreement for various contracts on the principle of good intention, but it doesn't mean more than a moral obligation, because good intention has no legal meaning such as not knowing certain legal incident or absence of complicity for the damage of others.

The principle of good intention raises the principle of compelling the contractors in the negotiation phase and also compelling them as they concluding the contract, in the interpretation of the contract and its conditions, is to bind for judges and arbitrators^{vi}, the principle of good intention is not limited to previous negotiations on the contract to compel the contractor to execute a contract according to which included in it, in a manner consistent and dictated to goodwill, because the principle of good intention is a general principle in all contracts and it is related to the implementation of the obligations arising out of the contract, but what is meant here the principle of good intention in the negotiations phase.

That is why the principle of good intention imposes a positive obligation to cooperate and not to be constant with unjustified rejection for the submitted suggestions by the other part and to be committed to honesty and trust towards the other contractor by informing him with all details of the contract. To be concluded by replaced passive neutrality which was represented by the lack of fraud, deception or dishonesty.

Thus, the principle of good intention in negotiations wouldn't bring a legal basis for responsibility arising out of the transactions should be based on honesty, loyalty and contractual trust. Applying the principle of good intention in the negotiation phase on the technology transfer contract is a binding demand for negotiations on both sides, the supplier and the recipient, in an earnest and sincere desire to complete the contract with fair and satisfactory conditions for both parties and not to exploit the need of the importer for the technology and impose. Conditions and obligations do not fit the principle of good intention.

Thus, the principle of good intention, which is made by the legislation a fundamental obligation that controls the execution of the contract must be present in the formation phase of the contract, if the contractor violates this principle will be in the negotiations phase, that makes the conclusion of the contract faces a serious error with the importance of occurring civil liability.^{vii}

Egyptian legislature adhered to the need, when conducting negotiations on the technology transfer contracts, it has to be with good intention, the same with the French law through what is known (Dubin law) in 1986, by declaring the commitment of the supplier to announce the information related to the element of technical knowledge before conclusion of the contract. One of the French courts has issued a rule in this regard, when a businessman negotiated with a distributor for American equipment in France in order to purchase the equipment and worked to meet all the distributor requests, he visited the factory in the United States on his own expense, and after the arrival of the negotiations to the final phases, the distributor suddenly amended and unjustifiably terminated the negotiations, the French Court of Cassation ruled that this arbitrary use of the right is obligatory for responsibility and it is contradict with to the principle of good intention. The French court has turned to the need for certain obligations of honesty and good intention in order to start the negotiations and error availability requires responsibility, as it was in the case cutting negotiations which reached an advanced phase without legal justification, and this violates the seriousness in negotiations, so it violates the principle of good intention.^{viii}

2.1.2.2. Commitment to Confidential Negotiations

International contracts, in general, have a phase of preceding the conclusion, technology transfer contract doesn't differ in that except of the problem encountered by the two parties at this phase, which is the problem of secret technical knowledge as a place of contract. Therefore, the difficult phase preceding the conclusion of the contract is called the procedure phase, performed by each party against the other party, and this phase is affected by the secrecy problem as a result of its sensitivity between the parties which is the owner of technical knowledge fears to meet the demands of the other negotiator to inform the confidential information before making sure of the other party's commitment to sign the contract.

Each technology has a secret part of the importer trying to get by different means, this secret is, usually, the design of the machine or the device, or how it is used or any other industrial secrets, but often conflicts arise between the parties of negotiation in this regard, as the supplier tends to maintain a maximum degree of secrecy of the technology he owns and seeks to unravel the mystery of the technology unless he will get a high price for it.

The concept of confidentiality in technology transfer contracts have two sides, in one side, it means the secrecy of negotiations and discussions that held between the parties in terms of the conditions of the deal and other details, on the other side, it means technology secretes, the subject of the contract, which has a great importance as the technology is kind of technical knowledge.

However, this phase is difficult. As the technical knowledge owner is usually cautious and seeks for safeguards to ensure maintaining the confidentiality of the information that will be presented by him, as a means of awakening of a desire for those who negotiate with him. Most laws did not address the issue of confidentiality in negotiations, with the exception of the Egyptian Trade Act No. 17 of 1999 as Article (83) stated that, in the first paragraph about "The Importer shall maintain the confidentiality of the technology that he obtained and keep the improvements confidential " the obligation of maintaining secrecy in the negotiations phase is regarded as a moral obligation, as the importer sees some of the technical secrets then he can balance between those secrets with the economic and

technical needs, but he is committed to the supplier in a moral obligation not to disclose what he saw without having to sign on a pledge as long as good intention between the parties which are available.

The supplier, may take prudence during the negotiation phase, because he doesn't want to disclose the secrets to the importer, but he can reveal some of the secrets to a certain amount that is necessary to estimate the value of technology and this is usually the results of using technology without mentioning the elements of the technology.

2.2. *The Post-contracting Phase and How to Formulate the Contract*

After the end of the negotiation process and the two parties are assured to negotiate with a good intent, and with their agreement on the confidentiality of the information that will be the main focus in the discussions, they begin to embody what they want in the subject of the contract and this is evident in the preliminary agreement or more or in any different patterns, these patterns agree on principle of negotiation, in which they agree upon the important issues of the contract, or on the pattern of promising from one side of the parties, if the parties felt that the opportunity has become favorable for the conclusion of the contract, while the other does not see that, the two parties agree to postpone the negotiations on the promise of one to conclude the contract in the light of what they have agreed upon.

At this phase of negotiations, the right of refusal is legitimate if negotiations are objected by any obstacles between the negotiators, after the announcement of the intent letter of approval and after the offer of acceptance, the negotiators resort to formulate the technology transfer contract and show it in a certain formula in light of what has been agreed upon.

2.2.1. Formal Requirements in Technology Transfer Contracts

Technology transfer contract is an agreement under which the technology exporter pledges is delivered. Being paid for that service is technically to information the importer of technology to be used in a technical way to produce, to develop a particular commodity, to install, operate a machinery or any equipment to provide services. The transfer of technology is not considered to buy, sell, lease, rental of goods, sale signs, trade names or license use unless it is stated as part of the technology transfer contract or associated with it.^{ix}

The form is very important in this type of contracts which are added to the presence of the objective conditions of compromising, place and reason. As for the technology transfer contract and result of the nature of the place in this contract, which is the technical knowledge well as the other properties.

2.2.1.1. The required formalities for concluding the contract is different from the rest of the civil contracts, with regard to the contract form.

the Formality Contracts divides into:

- a. The official contracts: means editing the contract by an employee (private entity). The country is a special entity that interfere with the contract conclusion for its International dimension. Formality is a must in this contract pattern, and this is what was taken by the Egyptian legislature who added the formality to the technology transfer contract and did not require the registration of the contract. That's what we'll explain in the second section of this subject.
- b. Writing: Writing a contract is one of the most important formal requirements in a technology transfer contract and for that reason, this formulation must be free of errors and uncertainty fraud. The task of editing a contract is a difficult issue unless legislator's care about it in light of the initial agreements, which had a great role in clarifying technical matters. Each party seeks to determine the rights and duties in precise way to be characterized in a special form which is the technical knowledge.^x

Article (74/1) of the Egyptian Trade Act in force No. 17 for the year of 1999 (Technology transfer contract must be written in a form or it is considered null and void). The writing process of technology transfer contract is almost taken for granted without even stipulated in the law because these contracts extends for a long period of time, so all parties need to assert their rights and obligations so that they can be invoked when an argument erupted, and they are an essential means of proof.

In drafting international technology transfer contracts, it usually follows the Anglo-Saxon method in drafting, as the contract includes preamble which is a long elegant style, describes the objectives of the contract and the joint desire between the parties to cooperate referring to the ownership of the supplier for the technology to be transferred to the importer, then followed by a section with a list of key definitions for terms that are repeated in the contract.^{xi}

The preamble is the source for interpretation of parties obligations in case of disputes, because it shows the intention of the contractors in the ambiguity of the wording, the source of possession for the supplier of technology is usually mentioned in the preamble, or whether it is innovative or that he has received a contract as a sale contract, assignment or holding a license, if it was based on a patent, they shall present some more data, such as obtaining the patent and the country of registration and duration.

With regard to language of editing the contract, the parties have the right to choose the contract language, and there is no reason writing the contract with each language for the parties, and considering the two languages certified, they shall also use suitable words which must be equivalent to each other, and to allocate an item of definitions and key terms as aforementioned.^{xii}

2.2.1.2. it is worth mentioning that there are contracts that require a certain formality however it would not be considered as an exception to the principle of consensual as it is smoothed for it.

These formalities do not entail the invalidity of the contract as stated in the formal contracts, but it also, lead to block some of the contract's effects or the strengthen of its implementation, the most important formalities are the registration.

2.2.2. Technology Transfer Contract Registration

The registration of a technology transfer contract is one of the disputed formalities between countries that had organized such kind of contracts, including the Egyptian legislator.

The Egyptian legislator has taken this formality clearly under the project of the Scientific Research Academy to organize the transfer of technology for the year 1987, where it's worded in the second Chapter (registration of contracts) Article (5) (contracting on technology transfer shouldn't contradict with the provisions and regulations contained in this law, the contract will not take an effect only after the registration in accordance with the provisions of Article 14 of the Act). Provisions of Article (14) states that: The Scientific Research Academy have to implement the provisions of this law, and it calls a help from competent organs, it has in particular:

1. Examine and evaluate the contracts.
2. Registering the contracts and issuing certificates.

It explains that registration is only a tool or a way to control those contracts and the resulting absence is a lack of validity.^{xiii}

Academy project chose the registration system as a means to impose control over the technology transfer contracts, and to ensure its submission to the controls and provisions of the project itself.^{xiv}

2.2.3. Administrative Formalities

Formalities sometimes must demonstrate about the contracts for certain authorities, the Decree No. 70-441 issued on 26 / May 1970 in France stated in Article (1) (each contract with the subject of abdication, by a natural person or legal person has a management center in France for a natural or legal person with a management center abroad, for industrial property rights and all intellectual elements of scientific or technical assistance in all its forms, especially the technical knowledge and studies are subjects of authorization by the Ministry of Industrial and scientific development).

The announcement under the French legislation works as later guarantee for the conclusion of the contract, as the legislator stipulated to be within one month from the date of its conclusion, and this confirms that it is only a formality and does not depend upon conclusion of the contract or a guarantee for parties, but put the technology transfer contract under the control of countries.^{xv}

2.3. Duration in Technology Transfer Contracts

Identifying the element of duration is one of the most complex issues that raised in technology transfer contracts is better for the importer, not to enter into a contractual relationship with a short duration than he could through the acquisition of technological mastery. At the same time, the contract mustn't exceed the reasonable limits, as the technical knowledge may become old which is known by technological limitations, and thus increasing the cost of technology transfer as the recipient is forced to pay an old and outdated technology just to be committed to the duration of the contract.

Determining the duration of the contract is based on several considerations, the most important among them is to verify the money paid by the recipient to the supplier during the contract period, the thing which is important for the supplier is receiving a return, and how to get it. This is important not only in determining the period, but in terms of determine the amount of time if it's long or short. If the duration of a contract is short, the supplier will insist on taking a formal sum of money which is called the principle charges which will be a relatively small.

Egyptian legislator has treated the issue of duration in technology transfer contracts through the Scientific Research Academy to organize the transfer of technology for the year 1987, as stated in Article 6, paragraph (g) the invalidity of the contract exceeds more than a decade.

It is noted that this period is relatively long, particularly, the project did not give the importer the right to terminate the contract and change the conditions that enable the termination request.

For example, in light of the academic project, if the duration of technology transfer contract is twelve years, it is considered null and void and will not be registered in the competent authority, this is no doubt this is harsh penalty, and it was better that the nullity should be limited on the time condition itself and not extends to the invalidity of the entire contract. However, if the period is at the core element that correct does not be a contract without it.

it is noted that if the contract period doesn't not exceed a ten years' period, the contract is right and does not invalidate despite the fact that economic conditions may change and the technology becomes useless and the paid money becomes unfair, or its confidentiality unfolded by the importer, so commitment and secrecy become unjustified.

Egyptian legislator in the Trade Act No. 17 of 1999, handled this matter better than the academic project, as the Article (86) of the Trade Act stated that (The two parties of the contract may ask to terminate the technology transfer contract after the expiry of five years from the date of signing the contract, or they may request to reconsider the amended conditions to be suitable for the general economic conditions, and may repeat this requirement after passing another five years, unless they otherwise agreed on other period).

This allows any of the parties to contract or request the other parties to terminate the contract or modify conditions after five years from the date of the contract, the importer, for example, can terminate the contract after five years, even if the contract period is ten years.

According to article (86) of Egyptian Trade Act, the Importer could continue the contract, but with a request to amend conditions, as the request reduce the price the technology contract become cheaper in the international market, or a more developed technology emerged in the market, it is possible to repeat the request every five years.

The drawbacks of this law are silence in processing the condition which the supplier usually insists upon the international contracts in technology transfer contracts from requiring the importer, after using the technology and expiration of the contract.

China did not specify the duration of the technology transfer, as its law referred that the contract expires at the end of the period of patent licensed by the authority, while the Vietnamese law stated the follows (the contract should not exceed more than seven years from the date of signing the contract, and If necessary, to lengthen the period in question is not permitted except with the permission of the authorized official body), while the Mongolian law did not provide a provision on the duration of the contract.

2.4. The Position of the Jordanian Legislator of Technology Transfer Contracts

Jordanian legislator did not address technology transfer contracts expressly through referring to duration and the implementation of the contract in general, and this applies to most Arab legislation.

Technology transfer contract is a contractual commitment stemming from the two wills, the will of the importer and the will of the supplier, in order to do something or refrain from doing a particular job for a specified valuable consideration. The Article 199 of the Jordanian Civil Code states that: the contract is valid unless the law provides otherwise, the contract rights should be on both parties to fulfill the requirements of their contract, the Article (202/1) of the civil code also states that (the contract must be performed in accordance with what it included and in a manner consistent with the requirement of good intention).^{xvi}

Article (9) of Unfair Competition and Trade Secrets Law No. 15 for the year 2000, talked about the intellectual property rights are the earliest wordings for technology transfer contracts, which states:

- a. Considered null and void all condition that restrict completion and contained in a licensed contract related to any of the intellectual property rights could have a negative impact on trade, and hampering the transfer and dissemination of technology, as in the following:
 1. Oblige the licensee, not to transfer the modifications done on the technology covered by the license contract, only the licensed could be transfer (improved reverse technology transfer).
 2. Prevent the licensee from completing administrative or judicial suits for Intellectual property rights which has been licensed.
 3. Oblige licensees to accept the license with a number of rights instead of one right.
- b. The intellectual property rights mentioned in paragraph (a) of this article include the following:
 - Copyright and neighboring rights.
 - Trademarks.
 - Business indicators.
 - Industrial charges and industrial designs.
 - Patents.
 - Designs of integrated circuits.
 - Trade secrets.
 - New Varieties of Plants.^{xvii}

Through exploration of these texts, the Jordanian legislator didn't regulate technology transfer contracts explicitly, but there are texts in different legislation addressed indirectly.

3. Conclusion

the phases which technology transfer contract undergoes through the phase of negotiations and the responsibility at this phase, one could state that the Initial agreements resulted from discussions in terms the responsibility of the parties has only a moral responsibility. moreover, what distinguishes the technology transfer contract in the negotiation phase and the conclusion phase of the contract is their confidential behavior which located in the technology itself not in the secrecy of the negotiations that the supplier and the importer keen to maintain. thus, this article suggests a legislation that regulates the technology transfer contracts, including the Egyptian legislator on technology transfer contract registration, because of the importance of registration in evidence and to proof rights in case of developed countries or developing countries that has organized technology transfer contracts.

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