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Restrictions on Technology Transfer in Patent Licensing Agreements

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Abstract

The patent licensing contract is one of the most important tools for transferring technology to developing countries. It facilitates the legal acquisition and use of inventions, while also playing a key role in boosting national economic development. However, some developing countries attempt to maintain control over technology by imposing restrictive conditions within these contracts. These limitations can hinder the licensee's ability to fully exploit the patented technology and often reflect broader economic and political considerations.

The study will examine international initiatives and legislative measures adopted by certain developing countries to address or lessen the adverse impacts of these conditions.

Keywords: Technology transfer; license contract; patent; Restrictive terms; Technology monopoly.

Introduction

A patent licensing agreement is considered one of the fundamental contracts in the field of technology transfer, as it enables the lawful and regulated use of inventions. It also plays a significant role in supporting the economic growth of countries and acquiring new knowledge-based technologies and skills. However, practical reality reveals the dominance of developed industrial countries and global corporations in the knowledge domain, as these entities continuously strive to monopolize technology and maintain their knowledge superiority.

Including restrictive clauses in patent licensing agreements is a method employed by the licensor (supplier) to maintain control over technical knowledge, enabling them to monopolize technological markets and limit the ability of licensed countries to compete in the future. This approach may impede technology transfer and have negative repercussions on the economies of countries, particularly developing ones.

Accordingly, international efforts and national legislations have emerged aiming to curb such practices and to free licensing agreements from manifestations of economic dominance, ensuring that they serve as effective tools for technology transfer rather than instruments of control and monopoly.

What are the main international efforts and legislative policies adopted to liberate patent license agreements as a tool for technology transfer from manifestations of economic dominance, and to ensure balance in international contractual relations?

This study will adopt a descriptive approach to clarify the key conditions that restrict technology transfer within patent licensing contracts, and an analytical approach to examine the relevant legal provisions.

The study aims to identify the key restrictive conditions commonly included in patent licensing agreements related to technology transfer, while also examining the stance of the TRIPS1 Agreement and the main legislative approaches of developing countries particularly that of the Algerian legislator toward these conditions.

THE FIRST TOPIC: Restrictive Conditions in the Licensing Agreement and Their Impact on Technology Transfer

Industrialized countries aim to maintain their dominance over technology at all times, striving to preserve their competitive advantage and prevent the emergence of strong competitors. This drives them to include strict and burdensome conditions in patent licensing agreements related to technology transfer. These conditions are intended to ensure the use of technology in a manner that serves their economic and political interests, with little regard for the

development needs of developing countries, and sometimes even at their expense.[2]

It is worth noting that the United Nations Conference on Trade and Development was held, during which the content and scope of restrictive clauses and their legal implications were discussed. A disagreement arose between industrialized countries and those striving for economic growth regarding this matter. The latter called for increasing the number of clauses to more than forty with the adoption of mandatory nullity, while the developed or industrialized countries insisted on limiting these clauses to only nineteen with the adoption of relative nullity at the discretion of the judge.[3]

The licensor benefits from the legal protection provided by the patent for a statutory period that is generally not less than twenty years, thereby monopolizing the technical knowledge and turning this monopoly into a tool that challenges or prevents the licensee from acquiring genuine technological competence that would later enable them to optimally exploit the technical knowledge or technology subject to the licensing agreement.[4]

It is possible to study the effects resulting from the exercise of this technological monopoly under the licensing contract during the term of the contract itself, and then highlight other effects after the expiration of the contract term.

First requirement: Restrictions imposed during the term of the patent license agreement

Unfair or arbitrary conditions imposed by the technology provider on the licensee in an unjust manner, due to the provider's market dominance, aiming to restrict the licensee's freedom to fully utilize the technology. This negatively affects the licensee's ability to effectively exploit the technology, thereby affecting its competitiveness with others and adversely affecting the national economy and the flow of international trade.

These conditions are imposed throughout the duration of the license agreement for the exploitation of the patent. They limit the patent right itself or the optimal exploitation of the technical knowledge and technology subject to the license. The most prominent of these conditions include the following.

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First section: Restrictive Conditions on Patent Right

The intent of this provision is to prohibit the licensee or the recipient of the license from challenging the validity of the technology subject to the contract by

including clauses that prevent them from doing so or from contesting the validity or enforceability of the patent. The acceptance of this license by the licensee shall be deemed an implicit acknowledgment of the soundness of the technology and the patent, and, accordingly, the licensee shall not be entitled to raise any dispute regarding them in the future.

This condition constitutes a restriction on the freedom of contract guaranteed by law to the licensee or the recipient of the technology. Its seriousness increases when the patent or technical knowledge subject to the license is part of an integrated technological system, which may affect the legal validity of the contract.

This condition is considered arbitrary, and what makes it so is that it grants the licensor the right to terminate the contract in the event the licensee challenges the validity of the patent. This condition includes an exemption of the licensor from liability for any legal claims or disputes related to the transferred technology that is the subject of the license or agreement.[5]

In addition to the restrictive conditions that may pertain to the patent right being licensed, there are also other commercial restrictions related to the nature of the operations themselves that are the subject of the license.

second section: Restrictive Conditions for the Technological Exploitation of Patents and the Associated Technical Knowledge

The primary objectives sought by the licensee after obtaining the technology subject to the licensing agreement include attempting to utilize it to overcome the industrial challenges facing their national projects, by integrating it into their production environment and adapting it to suit their technical capabilities. Additionally, the licensee aims to conduct research and development or to introduce improvements and modifications to the licensed product or manufacturing method. However, the licensor often imposes restrictions that limit the licensee’s ability to achieve these objectives.

1- Conditions Affecting the Suitability of Technology for the Local Environment

To ensure the suitability of the licensed technology to local conditions, the objectives of its transfer must be defined and studied, taking into consideration all the resources available to the licensee, particularly human and financial resources, in order to achieve the actual benefit from the imported technology.

The licensor may stipulate in the license agreement that no modifications shall be made to the imported technology on the grounds of maintaining the efficiency of the industrial method or avoiding substantial changes that could affect the full utilization of the invention and the accompanying technical knowledge.[6]

In fact, this condition restricts the licensee from making modifications to the final products or their manufacturing methods in accordance with its needs and circumstances in its internal environment.

2- Restricting the licensee's freedom to conduct research or make modifications to the technology subject to the license

There are several judicial rulings affirming that the restrictions imposed on the licensee hinder its ability to conduct research and development and make improvements to the transferred technology, thereby constituting an obstacle to its competitive freedom. Such factors also impede the licensee's efforts in the fields of production and marketing by restricting the use of the technology within a limited technical scope and a fixed design that does not allow for opportunities for development or expansion.[7]

One of the most significant negative implications of imposing this condition is that it prevents the licensee from developing the technology or enhancing their competitive position, particularly concerning making modifications to the invention, whether in the design of the final product to be marketed or the manufacturing method.

Additionally, the contract may include a clause requiring the licensee to transfer any modifications and innovations they achieve to the licensor without any financial cost or remuneration. This is known as a "grant-back clause." Under such a clause, the technology recipient is obligated to inform the licensor of any improvements made to the technology, whether these involve enhancements in production methods or the quality or characteristics of the products.[8]

These conditions become more complex when the modifications achieved are eligible for patent protection, meaning they meet the legal protection requirements.

In this manner, such indirect restrictions are employed to reinforce the dominance of developed countries through their multinational corporations over the global industrial system, thereby marginalizing the role of developing countries in this sector.

This condition is considered a restriction or a constraint on the licensee's ability to innovate and adapt the technology to local circumstances, as well as to introduce modifications to it, which negatively affects or hinders the licensee's full utilization of the technology covered by the licensing agreement.

Third section: Restrictions imposed on the freedom of the market

One of the most prominent forms of dominance and arbitrariness in licensing agreements for the exploitation of patents for technology transfer is the attempt by major companies to impose their control over the commercial activities associated with such patents and to exercise complete control over them.

One of the most significant forms in which these conditions can be embodied is the inclusion of a clause that imposes the production of a specific or limited quantity, restricts the geographical scope of marketing, or sets specific conditions regarding the nature of the product permitted to be manufactured.

1- Requirements related to the monitoring of production process quality

Clauses may be included in the contract that oblige the licensee to manufacture the product in accordance with the method and form specified by the licensor, and the licensee may be prohibited from producing or selling similar products. Consequently, the licensor may be granted the right to exercise technical supervision over the licensee through technicians selected by the licensor, with the aim of protecting the reputation of the trademark or maintaining

competitiveness. However, the primary objective of this may be to avoid the risks of competition arising from the production of licensed products.[9]

This condition restricts the licensee, depriving them of the ability to leverage their own potential in the production process and limiting their capacity to diversify their products or meet the requirements of export markets. This necessarily affects their ability to compete with others on the one hand and to work on developing their products in line with new technological advancements on the other.

2-Restrictions on the quantity or price of production

Setting a minimum threshold for production or pricing poses a risk of restricting the licensee's ability to export, particularly when the production volume set by the licensor barely meets local demand, or when the price is set so high that the licensee becomes unable to compete with the licensor's products in foreign markets.

These conditions are restrictive as they limit the scope of the licensee's exploitation of the invention and the associated Know-How, whether in terms of the fields or the geographical area in which the technology recipient is permitted to carry out their activities or market the manufactured products.[10]

It is worth noting that the primary purpose of these conditions is essentially to prevent the licensed project from being able to compete with the licensor or supplier, in order to maintain its competitive advantage within the industrial sector related to the patented invention.[11]

Fourth section: Clause of obligation to purchase

This clause obligates the licensee to purchase equipment and materials, including machinery, basic production materials, necessary spare parts, and complementary technologies, from the licensor or one of its branches or affiliated companies, under the pretext of improving production, reducing costs, or ensuring the quality of the final products. [12] This results in the creation of a state of economic dependency for the technology recipient.

This condition is one of the most common unfair terms in licensing agreements, along with the export restriction clause. Both are among the most criticized by developing countries receiving technology, as the licensee may obtain the necessary raw materials, machinery, and other equipment from other sources at better prices or lower costs.

While developing countries seek to acquire technical knowledge and technology at reasonable and appropriate costs, the restrictive or arbitrary conditions associated with technology transfer agreements often increase expenses, hindering their development plans and indirectly contributing to raising the costs of technology transfer beyond the expectations of these countries.

second requirement: Restrictions imposed after the expiration of a patent license agreement

Patent licensing agreements often include provisions from the licensor or technology provider that oblige the licensee to cease using the technology and technical know-how covered by the contract after the expiration of the agreed exploitation period. This compels the licensee to request a contract renewal under new terms if they wish to continue the exploitation.

The most important of these restrictions are:

First section: The licensee shall be prohibited from using the technical Know-How covered by the license agreement after its expiration

To ensure the protection of trade secrets related to the licensed technology, it is imperative to maintain their confidentiality, as this serves the licensor's own interests. The disclosure of such secrets could result in irreparable harm and cause them to lose their economic value. It is important to note that the license does not constitute a legal sale, thereby preventing the licensee from transferring or assigning this technology to third parties.

Therefore, the licensor often stipulates in the contract that the licensee is obligated not to use the invention or technology after the expiration of its term without prior and explicit permission, and to return all documents containing technical knowledge and technology immediately upon the termination of the contract, while maintaining their confidentiality even after the patent expires and falls into the public domain. According to Algerian legislation, the duration of a patent is twenty years.[13]

It should be noted that if the licensee wishes to continue exploiting this technology, they must request the renewal of the contract under new terms and a different financial consideration. This reinforces their ongoing dependence on the technology and Know-How provider. Furthermore, the extension of these terms beyond the contract's expiration prolongs the financial obligations beyond the legal protection period of industrial property rights.[14]

second section: This agreement includes a non-compete clause

The licensee should regain their commercial freedom or independence upon the termination of the licensing agreement. However, the existence of a non-compete clause within the licensing agreement often restricts their independence in conducting their business activities despite the expiration of the contract.

The licensee, under this clause, is obligated to refrain from engaging in any activity that is considered competitive to the technology subject to the exploitation of the patent. However, this clause conflicts with the provisions of competition law, as it essentially seeks to restrict the recipient's freedom to exercise their legitimate right to compete within the economic market. This clause obligates the licensee to refrain from engaging in any activity deemed competitive to the technology subject to the patent licensing agreement; in fact, this contradicts the principles established under competition law, as it aims to restrict the recipient's right to economic competition.[15]

This condition originally started as a means to monopolize production and then distribution, until it became today a tool used in some contracts to deepen and consolidate dependency.

Third section: The licensee's continued payment of royalties after the expiration of the patent

The meaning of this is that the licensee is obligated to pay financial compensation even after the patent enters the public domain or the technical Know-How loses its confidentiality. This also includes the licensee's obligation to pay royalties for modifications to the technology covered by the licensing agreement.

The United States Supreme Court has ruled in its decisions that a technology supplier may not charge royalties for an expired patent, even if the contract includes the transfer of technical Know-How associated with it. Additionally, if the Know-How has lost its confidentiality or has been disclosed, or if the technology subject to the license has entered the public domain, the supplier may not claim royalties.[16]

It should be noted that there is no legal basis for imposing these restrictive or arbitrary conditions after the expiration of the contract, particularly after the expiration of patent protection and its entry into the public domain. This grants the licensee the right to retain the technical knowledge associated with it and to continue using it in production without paying royalties after the protection period ends.

The cancellation of such conditions enhances the technological empowerment of the licensee through the actual exploitation and development of the transferred technology.

THE SECOND TOPIC: The Position of the TRIPS Agreement and Key Arab Legislations on Restrictive Conditions in Patent Licensing Agreements

According to the most significant studies in the field of technology transfer, the success of technology exploitation licensing agreements depends on the availability of technological capability on the part of the recipient party. This entails that the licensee or the technology recipient must possess the competence and ability to absorb and develop the technology. In reality, however, most developing countries lack such capability, which increases their dependence on developed countries and compels them to enter into agreements with unfair terms, especially given the dominance of multinational corporations over patents and technical Know-How. This situation is opposed by the TRIPS Agreement and the legislations of developing countries, which aim to ensure fair and effective technology transfer and empowerment in technical knowledge.

The issue of restrictive conditions constitutes a prominent challenge faced by UNCTAD regarding the regulation of technology transfer, as it is an important international matter that requires addressing within the context of business interests and commercial relations between industrialized countries and developing countries with emerging economies.

Accordingly, the position of the TRIPS Agreement will be addressed due to its relevance to the trade-related aspects of intellectual property rights, followed by the position of the most important national legislations of developing countries.

First requirement: The TRIPS Agreement's position on restrictive conditions related to technology transfer in patent licensing agreements

Article 40 of the TRIPS Agreement addresses measures related to unlawful practices in intellectual property licenses, allowing for the regulation of abusive conditions in contracts for the transfer of technology and technical knowledge.[17]

The convention, through this article, has adopted a number of principles and measures related to restrictive conditions, which can be summarized as follows:

First section: Intellectual property licensing restrictions adversely affect the transfer of technology and international trade

The TRIPS Agreement explicitly affirms that contracts related to the supply of technology or those involving the licensing of the exploitation of intellectual property rights may include restrictive conditions imposed by the licensor. This includes the exploitation of patents and all intellectual property rights, including industrial property rights, which may result in adverse effects on international trade flows and constitute a barrier to the transfer and dissemination of technology.

second section: The right of Member States to prohibit unfair terms listed in the blacklist

One of the most significant abusive practices or restrictive conditions in the exploitation of intellectual property rights as stipulated in Article 40 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) includes those that prevent the licensee from disputing the validity of the patent subject to the license against the technology supplier, or that require the technology supplier to own any improvements or innovations developed by the recipient or licensee.

The article also emphasized that certain licensing conditions related to intellectual property rights may restrict competition, adversely affect trade, and hinder technology transfer. Therefore, the second paragraph of the same article permits countries to define such practices in their laws as abusive uses that infringe upon industrial and intellectual property rights in general and constitute unlawful exploitation that distorts competition within their markets.

It is worth noting that, despite the advantages carried by this provision, its scope remains limited, as it focuses solely on restrictive conditions or abusive practices whose regulation is justified to address the restrictive impact on competition in the context of technology transfer and dissemination. It does not address conditions that negatively and directly affect the transfer process, which undermines the effectiveness of the text in achieving the necessary balance between the protection of intellectual property rights and the promotion of technology transfer.

Third section: The right of Member States to take appropriate, consistent with the provisions of the Convention, to prevent and monitor restrictive practices

The TRIPS Agreement, particularly Article 40, permits member states to incorporate into their legislation restrictions on certain arbitrary or unfair conditions that negatively affect transactions related to technology transfer and the utilization of intellectual or industrial property rights, especially the exploitation of inventions or innovations subject to patents.

second requirement: The Approach of Key Legislations in Developing Countries Towards Restrictive Conditions

Patent licensing agreements constitute an important tool for technology transfer; however, they often contain restrictive clauses that may hinder fair competition, encourage anti-competitive practices, and harm the interests of developing countries striving to localize technology.

A study conducted by the United Nations Conference on Trade and Development on 232 patent licensing agreements in various countries revealed that half of these licenses included a clause requiring the licensee to purchase raw materials from the technology supplier or one of its affiliates. Meanwhile, only one quarter of the total agreements were found to be free from restrictive or abusive clauses.[18]

Therefore, the position of Algerian legislation will be addressed, followed by that of the Egyptian legislator, by way of comparison.

First section: The Algerian legislator's stance on restrictive contractual clauses

Pursuant to Article 37, paragraph one, of Ordinance No. 03-07 relating to patents, the Algerian legislator allows the patent holder to enter into licensing agreements granting the right to exploit their invention through a contract. Paragraph two of the same article stipulates the nullity of any abusive clause in the contract that imposes unjustified restrictions on the licensee, which negatively affect competition in the domestic markets.

The legislator has stipulated the nullification of any abusive clause in patent exploitation contracts if it is likely to harm free competition in the domestic market. However, this provision suffers from a deficiency, as it does not clearly define the concept of such clauses and overlooks their impact on competition in the global market.

Based on that, it can be said that this legal provision, by itself, does not provide sufficient protection for the licensee against restrictive conditions that may be included in the licensing agreement for the exploitation of the patent, particularly in cases involving the transfer of technology from abroad.

Other legal provisions in Algerian legislation may also be relied upon to invalidate such restrictive clauses, including Article 6 of Ordinance No. 03-03 mentioned above,[19] which prohibits practices and agreements that wholly or partially hinder or distort free competition in the market. It identifies the main prohibited behaviors that have a negative impact on the market and competition or that lead to unfair competition.

Article 7 of the same order also prohibits abuse resulting from market dominance or its partial or total monopolization with the aim of determining or controlling production.

The Competition Law grants the Competition Council the authority to examine abusive conditions related to a dominant market position. This may apply to licensing agreements for the exploitation of patents involving technology transfer, as patent-holding companies often seek to maintain their competitive advantage.

It should be noted that the application of Algerian law in this context faces a challenge related to determining the applicable law governing technology transfer licensing agreements, which complicates the effective implementation of these legal provisions in practice.

second section: The Position of Egyptian Legislation on Restrictive Clauses

The Egyptian legislator incorporated the legal provisions governing technology transfer contracts within the Commercial Law of 1999. Pursuant to Article 75, any clauses imposed by the technology supplier or licensor that are deemed unfair to the transferee may be annulled, in order to protect the latter as the weaker party in the contractual relationship. The International Code of Ethics also affirms this principle for Technology Transfer.

The Egyptian legislator did not impose a prohibition on these conditions under the provision of this article, but rather left it to the discretion of the judge to annul them,[20] unless the purpose of such clauses is to achieve a genuine benefit for the technology supplier such as requiring the display of the trademark to enhance consumer confidence in the product, or imposing export restrictions on goods manufactured using the technology to a specific territory in order to preserve distribution rights granted to agents who have been licensed the same technology.

The article referred to a number of restrictive conditions by way of example rather than limitation, thereby allowing for the possibility of challenging any clause included in the contract if the court determines that such clause harms the interests of the technology recipient, particularly if it limits their ability to benefit from the technology or impedes their capacity to understand, improve, or develop it.

Conclusion:

The main conclusions established through this study:

-The essence of these provisions is to restrict the dissemination of the knowledge and technology subject to the licensing agreement in a manner that ensures the licensor retains continuous control over the licensed technology.

- The restrictive conditions directly contribute to limiting the licensee’s or technology recipient’s independence, both technologically and commercially, thereby reinforcing their continued dependence on the technology provider.

- One of the most significant adverse effects of these conditions is the weakening of the recipient’s ability to independently develop technological

capabilities, as they are deprived of the opportunity to adapt the transferred technology to their local requirements. This, in turn, limits their prospects for development into a producer of technology with the capacity to compete on a global scale.

- One of the main drawbacks associated with such conditions is that recipient countries of technology often become mere consumer markets, without acquiring the technological capabilities necessary to effectively control and manage the technology. This situation contradicts their development goals and hinders their progress.-The Algerian legislator has not explicitly clarified its position regarding these conditions, unlike the Egyptian legislator, which indicates a legislative gap in this area.

-The Algerian legislator has not clearly stated its position regarding these conditions, unlike the Egyptian legislator, which indicates a legislative gap in this area.

Among the most important recommendations:

-A legal framework must be established to regulate restrictive conditions in patent licensing agreements and other means of technology transfer, clearly identifying the most significant of such conditions and explicitly declaring their nullity and inadmissibility in any form.

-It is not sufficient to merely rely on legal provisions that declare restrictive conditions null or prohibited; rather، it is necessary to adopt comprehensive legislation that primarily focuses on enabling technology, thereby allowing developing countries seeking economic development to overcome the challenges and deficiencies in sectors related to imported technology or technical know-how.

-The regulatory role of the Competition Council must be activated to annul unfair restrictive clauses in technology transfer contracts whenever a situation of market dominance is established.

- Developing countries should unite in negotiating blocs and adopt collective positions to safeguard their national interests, thereby exerting pressure on other parties to abandon the restrictive and unjust conditions they seek to impose.

- The support of developing countries for national scientific and technological research, along with the emphasis on valuing national innovations and inventions and providing the necessary funding for them, constitutes a pivotal step toward reducing external dependence and achieving independence and self-sufficiency, particularly in the technological and economic sectors.

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