Principles Governing Contracts of Technology Transfer in the International Commercial Law

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Abstract

Trade and economic development in the international arena results from the steady stream of scientific discoveries, inventions, new products and increase of share in global commercial markets due to changes and developments in technology. In this regard, the international transfer of technology through trade agreements plays an important role in helping countries achieve the knowledge and skills of the developed countries. It seems that countries first should specify their technical and commercial goals, policies and plans in a broad and long-term scale and then make necessary arrangements for full proficiency in basic sciences to acquire skill in the applied sciences based on resources, capacities and needs of the recipient country because the main stage of technology transfer can be considered as the appropriate technology selection stage.

Key words: Technology, Technology Transfer Contracts, Technical knowledge, commercial, secrets, foreign investment, Intellectual Property Laws, Competition Law.

Introduction

Today, technology is expressed in sense of technical knowledge or behavior or set of scientific and experimental knowledge and competencies, commercial and industrial secrets and can have technical, scientific and even legal aspects. Therefore, it can be discussed as a commodity or object of transaction and under an independent title in form of special contracts in the field of industrial property and the international commercial law. To mention types of technology, it can be said that technology can be considered as a scientific or experimental achievement or taken into account as a commodity or capital in the field of commerce and economic exchanges. Among the technology transfer methods, one can refer to commercial transfer and non-commercial transfer. In non-commercial transfer of technology, transfer is ascertained with conventional consideration and in relations between universities and research centers. On the other hand, transfer is based on the contractual relation of the parties. This relation is formed based on profiteering and attainment of the mutual benefit of the contracting parties and plays main role in this type of transfer and technology transfer is intended in its legal concept. Considering that technological advantages are necessary for keeping competitive position in many industries, conversion of technological advantages to competitive advantages requires special prerequisites. Besides creation of technology through research and development, management and organization, technology transfer as one of the methods affecting achievement of the required technology has been changed into an undeniable necessity for technology development.

Literal and idiomatic definition of "technology"

"Technology" is a combination of two Greek words "Techno "meaning skill and "logos" meaning construction (Iran Zadeh, 2003, P. 17). In Latin terminology, technology is equivalent of the Latin word "Technology" which has consisted of two words "techno" meaning technique and art and "logy" meaning knowledge and science " and its literal translation ids technical knowledge . However, technical knowledge has more limited meaning in industry and commerce and it refers to technical information and skills which is applied for design, construction, use or maintenance of product or execution of a process and doesn’t include many subjects and contents of technology such as tools, equipment and machinery. Therefore, to prevent limitation of meaning of "technology" to special cases of technology, there is more appropriate Persian equivalent and this term has been accepted and applied in legislative literature.
Technology transfer, concept and its constituents

It is possible to achieve technology in manufacturing agencies only through technology transfer whether vertical transfer or horizontal transfer. In vertical transfer or research and development transfer, technical information and findings of applied research are transferred to stage of development and engineering design and then enter production process by commercializing technology. In horizontal transfer, technology is transferred from a power level in country or another country to the same power level in another place. In this case, the higher the technology recipient level the less the cost of technology transfer and the more effective absorption would be (Banavand, 2007, P. 4). In this definition, technology transfer is the interconnected chain of the purposeful activities through which technology components are utilized more widely in other places than its origin. Therefore, innovation and transfer of technology is a reasonable combination of management, science and creativity with technology and the key person is a person who creates a vital connection between production and service process on the one hand and existing technology (Cooke, Mayes, 2005, p5).

Place of technology and its subject in international commerce

According to what was defined above, technology has broader meaning and is referred to as a set of tools, equipment, machinery, methods, awareness, knowledge, techniques, skills, experiences and organization which are used in production, commercialization and enjoyment of goods and services and include four sections of tools technology, human tools, information tools and organizational tools. Technology is created in context of investment, practice and experience due to innovation and creativity and gains low and high financial value dependent on different factors such as its type, supply and demand. In some cases, technology is a part of the valuable assets of the holder or the only valuable asset which he holds. This issue has made technology especially important. Today, technology and its support have been discussed in different sciences such as law. Intellectual property regulations have addressed support of different types of technology at national, regional and international level and support these subjects by different means. Industrial and commercial property right is one of two important branches of intellectual property law. Intellectual property is generally property resulting from intellectual activities and thinking in industrial and commercial, scientific, literary and artistic fields (Amani, 2004, P.25). Intellectual property right has been long divided into two branches of literary and artistic work right and industrial property law. Literary and Artistic Work Right is a set of exclusive rights and privileges which is granted to writers, artists and other creators in the literary and artistic fields according to law. This field also includes rights of the executors and producers of the hieroglyph and distribution organizations which are affiliated with literary and artistic work right (Safaee, 1996, P. 64).

Changes of technology and its subjects based on international commercial documents and laws of Iran

It is clear that legal actions and membership in the international commercial organizations to support intellectual property rights in the developed and less developed countries should lead to promotion of technology innovation, transfer and propagation of technology, mutual benefit of the manufacturers and users so that it leads to economic and social welfare. Meanwhile, there is inevitable need for registration of trademarks and the countries are required to join inventions support agreements and to predict punishments for unauthorized use of industrial property and enact laws supporting industrial design rights as the factor of growth of national industries of the countries.

Actions of international societies in support of the patents, industrial designs and trademarks

Support of the intellectual work right to facilitate international trade leads to enactment of conventions such as Paris Convention. Principle of national behavior, principle of priority, principle of the patent's independence and principle of importing manufactured goods form the fundamental principles of this convention. These principles have been codified to ensure and support owner of such right. The potential concern of the owner's abuse of his exclusive right led to addition of the requirement of exploitation of the registered invention or technology or requirement to transfer its exploitation to the third parties to the convention. In articles of Madrid agreements, customs measures have been stipulated for false indication of the source of goods. Obligation to suspend clearance of the goods mentioned in text of the agreement
will not be applied to prevent gray markets¹ when the products have been commercialized by the owner of the right. Following that regulation, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a step toward solidification and fixation of the private rights of the holders of intellectual property right, which has increased the minimum term of the patent's exclusive right to 20 years and this support includes all types of technology. In the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), exclusive rights of patent mean right to prevent others from using, manufacturing and selling invention of the process and product resulting from process². In this definition, the owner's right for invention or products has preexisted and the law has declarative not performative role and in case production of a registered products is contradictory with environmental regulations or hygienic regulations, acquisition of the patent right for that product doesn’t give its owner right of production (TRIPS, 2002).

**Iranian law approach to formulation of the intellectual property support laws**

Considering the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), new law for registration of trademarks, inventions, industrial designs and trademarks of Iran enacted in session dated October 29, 2007 by the judicial and legal commission of the Islamic Consultative Assembly was executed in May 2008. In this law (compared with the old law of patent registration 1931), there were many changes including prediction of punishments for unauthorized use of industrial property and support of industrial design rights. Iran studies and executes the international contracts including Paris Convention for the Protection of Industrial Property, Madrid Agreement Concerning the International Registration of Marks and its protocol, Lisbon agreement on International registration of applications of origin, Madrid agreement concerning prevention of false indication of the source of the goods, World Intellectual Property Organization and Convention establishing the World Intellectual Property Organization, investigation of suggestion for adding the Islamic Republic of Iran to other international contracts of industrial property considering policies of the Instruments and Landed Property Registration Department and use of experiences of other countries in this regard and in case of participation in the meetings and conferences represented by the respective organization.

**Assessment of transfer method in the technology contracts and its stages**

Technology transfer is done in different ways and we describe some of the most common ways which are related to technology transfer from the commercial and legal perspectives. Considering that technology transfer means absorption and acquisition of technology, general process of guidance, reinforcement, expansion and promotion of the existing technology level and also acquisition of the new technologies based on economic and social development plans of the transferee and is special type of technological transformation which is done in three stages of invention, innovation and publication (Haj Sharifi, 1993, P. 169). Industrial change and economic development of Iran can be attainable through legal use and in the form of the international commercial contracts in this field. The fact is that technology transfer is one of the most common term in the development process of the third world countries on the one hand and the developed countries and industrial countries on the other hand due to enjoyment of different economic, commercial and technical dimensions but from the legal perspective, technology transfer is a type of trade which is performed as a contract between two parties (generally two countries or two legal entities) i.e. buyer and seller. This transfer can be attained in national or international borders. In national border, technology is transferred from an industry to another industry, an economic section to another economic section or from an organization to another organization. International border transfer may be possible between two developed countries, two developing countries, one developed country to a developing country or even vice versa but the presence of a transferor and a transferee is necessary (Navaz Sharif, 1988, 99 2). Different factors interfere in classification and expression of types of technology transfer and on this basis, technology transfer is divided into different classes considering different factors such as goals and equipment of transferor and execution of the contractual obligations by the contracting parties. Among them, technology commercial transfer vs. technology noncommercial transfer is one of the most important classifications which are done through conclusion of the agreements or contracts between transfeere and

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¹ IBID, Article 51
² Adapted from articles 27 and 28 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
transferor and against different obligations and more importantly, transferee's payments due to achieving different aspects of technology. The important and conventional methods of technology transfer such as transfer of industrial property right, contracts of transferring technical knowledge and cooperation contracts and provision of technical services and direct foreign investments are included in this class. Anyway, in each of the common contractual forms, it should be noted that type of transfer may be classified considering "the subject or set of contractual subjects" irrespective of commercial and contractual way of transfer. It means that apart from a specified form, contract may imply a special subject or obligation or a set of combined subjects or obligations and in this regard, major types of contractual transfer of technology can be divided as follows:

**Technology transfer as a contractual package or set**

In the first type, parties agree that considerable rate of the information and awareness related to the subject will be transferred to the applicant in addition to right of using and describing its technological dimensions. For example, one can refer to guidance and supervision of the transferor on construction, operation and execution and provision of the technical consulting services of a turnkey project. In the second type, only one right or basis of a technology is transferred, for example, when formula of a drug or a type of concrete is transferred, it doesn’t necessarily mean that the transferee has enjoyed technical knowledge of the transferor for production (Abbas Pour, 1987, P.149). A country enters technology transfer process when there is suitable and correct understanding of empowerments and equipment in the country. To ascertain transfer of technologies which indicate "treated occurrence" for any reason such as lack of full adaptation to the importing country, it is necessary to apply special and integrated measures in different stages of technology transfer. For this reason, there will be more correct and logical understanding of the subject by dividing process of transferring to different stages. Certainly, transfer of technology is a continuous process which usually starts with time of decision to acquire it and also includes other stages (Rezaee, 2002, P. 41).

**International organizations and documents for supporting technology transfer**

At international level, some conventions and agreements are used, for example, Paris Convention for the Protection of Industrial Property, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and World Trade Organization (WTO) Agreement which will be discussed later. Then, the successful experiences in the field of global trade and the models accepted by the developed countries will be mentioned because transfer and absorption of technology in the third world countries is a complex category which has involved not only the developing countries but also many western research meetings and international organizations both from the scientific perspective and from the perspective of cultural, political and economic dimensions. Level of the technologies in the advanced countries and the third world countries is considerably different and technology transfer is an undeniable necessity to reduce distance and difference between technology in the advanced countries and technology in the less developed countries.

**Contracts for international trade technology transfer in the local laws of Iran**

Despite reliance of the related Iranian laws in the field of international trade technology transfer contacts, unfair trade competitions and intellectual property right on the international documents and translation of foreign texts which increased ambiguity of its writing and literature in mind of the lawyers, judges and authorities of economy of Iran in some cases, specifications and advantages of its execution in Iran are growth of economic efficiency, social wealth, protection of inventor, producer and consumer's rights to establish justice and prevent individual views in market, monopoly and discrimination. Considering effort to privatize ownership and control the industrial and commercial units and make planning and policies adopted in this field, it is necessary to observe necessary aspects and execute the codified laws which explain place and role of government in control and supervision in market and includes all conditions governing the relations of private units with each other and the government and can regulate the market effectively. Despite the above reasons which can prove claim of necessity of laws related to prevention of unfair trade competitions in Iran, there is no special definition of "prevention of unfair trade competition" in the contemporary laws of Iran. In law of Iran, the single act of the law amending article 244 and article 249 of the public punishment law enacted on July 20, 1931 in paragraph A of article 244 defined unfair
competition and predicted protection of commercial ownerships which might be damaged unfairly area of trade competition but Discretionary Punishment Law enacted in 1983 eliminated this definition. In law of Iran, to protect against unfair competition in the technology transfer contracts, e-commerce act enacted in 2003, article 45 of the law amending articles of the fourth economic, social and cultural development plan of the Islamic Republic of Iran and execution of the general policies of the 44th principle of the Constitutional Law enacted in 2008 can be used (Habiba, 2008, P.98). Article 64 of the e-commerce act protects disclosure of trade secrets in context of the electronic exchanges against unfair competition and based on article 66, to protect rights of the consumers and encourage legitimate competitions in context of electronic exchanges, it is prohibited to use trademarks as Domain Name or any online indication of the trademarks which deceive or confuse the party about authenticity of goods and services and the violator will be punished as stipulated in this law. Article 45 of the law amending articles of the fourth plan of economic, social and cultural development of the Islamic Republic of Iran and execution of the general policies of the 44th principle of the constitutional law enacted in 2008, any declaration which causes confusion of the parties will be prohibited. As observed above, there are limited laws of Iran regarding prevention of unfair competition while e-commerce plays less important role than the market commerce in Iran. Limited areas of unfair competition have been limited in e-commerce law and the fourth plan law has supported the confusing remarks (Bagheri, Babae, 2011, P.97). Of course, regarding the fact that Iran joined the Paris Convention and principle of the national conduct governing it, the foreign nationals are protected against unfair competitions.

Contracts of technology transfer and competition rights

In the economic systems based on free market, the government controls and regulates the free competition flow in order to create fair and balanced conditions for attendance of all commercial activists in the market, eliminate exclusive and discriminatory barriers and behaviors and also support the consumers by codifying the regulations. These regulations mean achievement of three important goals of integration, equity and fairness and efficiency. From the economic perspective, integration means integration of markets and opening them to each other. Equity and fairness means creation of equal opportunities for the commercial activists, support of small enterprises and support of the consumers. Efficiency means achievement of goals such as encouraging using production factors optimally, create motivation against competitors, encouraging innovation for supply of the new products and development of technology, lower prices, promote selection right of the customer and increase quality of the supplied products (Shokoohi, 2002, Pp. 1-3). Scope of subjects governed by such regulations is very broad. So, agreements3, procedures and coordination are also governed in addition to the contracts.4 Intensive need for technology on the one hand, and its exclusivity on the other hand, put the technology owner in better position so that he may abuse this position and impose broad conditions and limitations on the opposing party. These conditions and limitations sometimes not only put the opposing party in bad condition but also cause disruption of the free market by blocking entrance way of other competitors to the market and pushing the competitors aside or handling prices and products. Therefore, contracts with technology subject will be more vulnerable to violation of the competition regulations and for this reason, competition regulations of these contracts will be governed by them.

Conclusion

Human could have found appropriate response to many of his needs which have been regarded as his wishes long time ago. Technology had led to different achievements such as development, welfare, employment, alleviation of pains, priority and profit. For this reason, industrial and commercial activists including governmental and private activists conclude different contracts to achieve it so that no part of the society can be excluded from this rule. Widespread prevalence of these contracts in industry and commerce has necessitated study of legal issues of the contracts for technology transfer. According to findings of the thesis and based on the mentioned questions and hypotheses, it can be said that: Despite all challenges which the

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3 The Agreements means the ones which cannot be called contract due to lack of legal requirement.
4 For example, refer to paragraph 1 of article 81 of the European Union Convention.
developing countries face, receipt and absorption of technology are their inevitable options to achieve economic development and growth, create wealth and increase employment. In this regard, there are widespread tools, methods, channels and contracts for technology transfer and give the economic agencies and industries options to choose. Correct understanding of each of these tools and recognition of the advantages and disadvantages of each of them can increase decision power of the managers to select the suitable options but it should be noted that despite necessity of observing the competitive principles in the technology transfer contracts, their legal nature will be procedurally or substantively similar to that of general conditions of the contracts (specific contacts). Introduction of appropriate technology doesn’t necessarily mean application of advanced technology but the most suitable technology is the one which is consistent with goals of development of a country and also is less expensive while using the existing resources optimally in that country. Technology transfer can be regarded as the most useful or useless transaction and effective use of the transferred technology will be dependent on efforts of the countries which receive technology to adapt to, apply and develop it. In this regard, the following cases are suggested.

Recommendations
1. Considering that laws related to the technology transfer contracts have been translated and adapted from the international documents and conventions, some definitions for the applied terms are ambiguous to society of Iran and can cause many problems for execution. It is recommended that the legislator contribute to economic prosperity of the country and finally welfare of the people in society by correcting and removing the weaknesses and ambiguity of the existing laws. For example, it is recommended to regulate laws relating to damping in international commercial communication between the Iranian merchants and foreign competitors.
2. Merging the small enterprises and creating an independent organization for organizing, inspecting and supervising area of trade in private sector and commercial companies, manner of establishment, articles of association, scope of work and extent of duties and responsibility of the founders, regulating geographical and financial dispersion and preventing monopoly and recognizing appropriate technologies for economic growth and development in Iran.
3. Legal protection of the private persons’ rights for bringing an action against the competitors who disrupt principles of sound competition in trade markets directly or indirectly with unfair trade methods and vitiate the persons’ benefits by enacting the integrated regulations and determining legal procedure, proceeding and independent forum.

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