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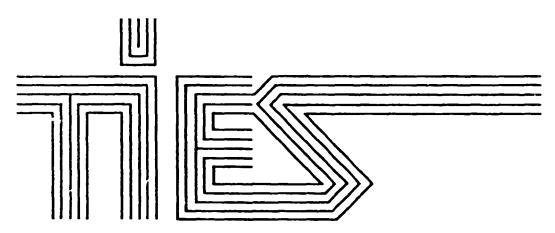
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NEWSLETTER

Technological Information Exchange System

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Compiled by the Industrial Technology Promotion Division, Department for Industrial Promotion, Consultations and Technology, UNIDO, P.O. Box 300, A-1400 Vienna, Austria.

Dear Reader,

There has recently been a rapid and continuous change in the international environment regarding the marketing and transfer of technology, with deep implications for the attitudes and perceptions of the various parties concerned, be they governments, industrialists or technology development institutions.

While the governments of developed countries have shown a growing involvement with technology transfer issues, geared towards protectionism, those of the developing countries seem to be gradually relaxing their regulatory functions on foreign investment and technology transfer, with a view to stimulating an increased investment and technology flow.

Against this background, UNIDO is addressing the evolving issues of technology acquisition, technology transfer, innovative forms of technology business and partnerships for technological development. To this effect, a number of interrelated activities are being pursued, with the intention of building up an awareness and competence in developing countries towards more appropriate technology transfer policies, improved access to foreign technologies and faster technological development.

The UNIDO team responsible for running the technology acquisition and negotiation programme, as well as the TIES activities, has now been made the richer with the participation of Ms. Rowena Paguio, who is well-known to most of the TIES members and many of our readers. Before joining UNIDO, Ms. Paguio was Head of the Transfer of Technology Office in the Philippines and her presence within our ranks is a fillip for TIES and an assurance for its continuing progress. We hope she will remain with us for a long, long time.

The TIES Newsletter has been, and should continue to be, an instrument for keeping our readers informed of our activities and of the changes and developments in the international environment. These purposes would be better served if our readers were to share their experiences and interests with us, as well as give us their suggestions for improving our Newsletter.

We look forward to hearing from you.

Technology Policy, Acquisition and Negotiation Unit Industrial Technology Promotion Division

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UNIDO News

Regional Workshop on Technology Transfer Negotiations and Contracting, Cairo (Egypt), 10-14 December 1990

The Workshop was part of a process aimed at implementing a systematic human development effort in the field of technology acquisition and negotiation in Africa. This is hoped to be achieved principally through the use of the UNIDO Manual on Technology Transfer Negotiations, which proposes a methodology of teaching intended to be assimilated so as to carry out courses for negotiatiors at the national level. The Manual is now proving to be a very relevant and valuable didactic tool. While the preparation of some chapters is still under way, it has now reached a stage that will permit specially tailored workshops to be set up, dpending on the needs, interests and expectations of the target audience. The high level of interest it is able to generate, as evidenced by the quality and volume of interaction during the Workshop also served to further enrich its content and design, including the refining of the methodology.

The Workshop was organized in co-operation with the African Regional Centre for Technology (ARCT) and the General Organization for Industrialization (GOFI) of Egypt and was attended by 50 participants at the management level from Egyptian private and public sectors as well as 14 participants from the African-TIES countries outside Feynt

The objectives of the Workshop were to apprise developing country negotiators of the general issues of technology transfer as they affect the development process and create an awareness of the various methods for acquiring technology together with the elements vital to a successful technology transfer process, as well as provide know-how and information on the preparation and structure of contracts that will cover the specific concerns of developing country recipients.

The Workshop dealt with the following topics:

- The role of transfer of technology in the development process;
- Technological infrastructure;
- Technology market characteristics;
- Structure and types of contracts;
- Principles of contract drafting;
- Payments in transfer of technology agreements;
- Guarantees and Warranties;
- Technology transfer through joint venture agreements:
- Success factors for transfer of technology.

This Worshop was by no means an isolated event. Its organization was in line with a long standing educational programme through which UNIDO has been gaining a leading experience in the training of negotiators and translating it into didactic materials and teaching methodologies for a more effective learning process of policy makers and negotiators of developing countries.

The ultimate goal of this programme is to provide developing countries with the tools for the creation of self-sufficient training courses on technology transfer

negotiations to be organized by national institutions and conducted by national experts.

The present Workshop represented an important step for the above goal to be achieved in Egypt in the near future. Our next targets for workshops will be Senegal and Nigeria, tentatively in June and September respectively. Readers will be given further details of these forthcoming events and the results achieved in another issue of the Newsletter.

Registry News

Greece

Concise presentation of the Industrial Property Organization (OBI)

1. Introduction

When the Ministry of Industry, Energy and Technology brought before the Greek Parliament Law 1733/87 "Technology Transfer, Inventions and Technological Innovation", it had considered and acknowledged the vital role a modern industrial property system is called upon to play in the country's technological and industrial development.

More specifically, two things were achieved by Law 1733/87, namely:

- (a) The establishment of the Industrial Property Organization (OBI), and
- (b) The modernisation of the national legislation for the protection of inventions, the encouragement of innovation and the registration of technology transfer contracts.

2. Scope and competence of ()B!

The OBI, established as a private legal entity, is supervised by the Ministry of Industry, Energy and Technology and administered by a seven-member Administrative Council. Its scope being the contribution to the technological and industrial development of the country, the OBI has been authorised to handle the following:

- (a) Granting of patents, patents of modification and utility models;
 - (b) Registration of technology transfer contracts;
- (c) Co-operation with similar organisations of third countries or international organisations, co-operation with R&D centres and organisations concerned with information dissemination;
- (d) Freparation and monitoring of international treaties on patents and technology transfer;
- (c) Representation of Greece at international organisations;
- (f) Rendering of consultation and information services concerning new technologies and know-how;
- (g) Monitoring and follow-up of patent exploitation, innovation, promotion and technology transfer in Greece and abroad;
- (h) Classification of patents and technology transfer contracts according to internationally acknowledged criteria.

3. The protection of inventions in Greece

The new reality characterising the protection of inventions in Greece is determined by two dominant factors, namely:

- (a) The ratification of the European Patent Convention (EPC) by Greece, making this country a full member of the Convention since 1 October 1986, and thereby offering the opportunity to interested parties to protect their inventions in all 13 Member States to the EPC. Within this framework, a receiving office for European patent applications had been installed at OBI; and
- (b) The modernisation of the national patent legislation which provides for two protection titles, namely:
- (i) the patent, the granting procedure of which incorporates the drawing-up of a Search Report stating the state-of-the- art in the technical field of the invention, and
- (ii) the utility model, which is governed by a simple registration system.

The new legal provisions have made the protection title "patent" more reliable, thus enhancing the protection basis of investments materialising from protected inventions. Additionally, the social prestige of inventors is also to be strenghtened. On the other hand, the utility model is suitable for the protection of so-called "small" inventions which especially cover the needs of small- and medium-sized industries and independent inventors.

4. Technology transfer

The OBI registers, according to the provisions of Law 1733-87, technology transfer contracts involving at least one contracting party residing or established in Greece. Data concerning contracts registered at the OBI remain confidential.

The OBI is planning to create an infrastructure sufficient for the enhancement of the negotiating position of Greek enterprises in acquiring technology. For this reason, the OBI will render consultations and information enabling the interested parties to:

- (a) Achieve technology assessment in any technical sector:
- (b) Locate alternative sources of technology creation and development at both the national and international levels;
 - (c) Select the most suitable technology:
- (d) Open the "package" of imported technology and its subsequent absorption; and
 - (e) Promote indigenous technology.

5. Dissemination of patent information

The OBI is planning to establish a Patent Information and Documentation Centre for the dissemination of "raw" or value-added information with sources in domestic or foreign patents. Moreover, this centre will undertake the promotion of indigenous inventive activities, as well as inform the scientific and technical community, professional chambers, enterprises, public organisations and the public in general of the role that the industrial property

system can play in the technological and industrial development of the country.

6. Regional and international co-operation

The establishement of the OBI has created an administrative body to enhance Greek presence in the international fora of industrial property.

The OBI will study and evaluate, in the light of Greek interests, the Patent Co-operation Treaty (PCT), the Convention for the International Patent Classification, etc.

Additionally, the OBI participates in various working groups of regional or international organisations (EEC, WIPO, etc.) for the preparation of a legal framework for the protection of software, integrated circuits and biotechnology.

7. Conclusion

The above brief presentation of the OBI shows that it is a flexible organisation which, according to its Five-Year Development Plan (1988-1992), will be able to contribute decisively to the technological and industrial development of the country by offering highly specialised services to all potential users.

Malaysia

Employment of expatriate personnel

It is the Malaysian Government's policy to see that Malaysians are eventually trained and employed at all levels of employment. Notwithstanding this, foreign companies are allowed to bring the required expatriate personnel to areas where there is a shortage of trained Malaysians who could do the job. In addition, foreign companies are also allowed certain "key posts" to be permanently filled by expatriates.

Companies should make every effort to train more Malaysians so that the employment pattern at all levels will reflect the multi-racial composition of the country.

Guidelines on the employment of expatriate personnel

(a) For new investments (that is, applications received between 1 October 1986 and 31 December 1990) where the foreign paid-up capital is US\$2 million and above.

Any company with foreign paid-up capital of US\$2 million and above, will automatically be allowed five expatriate posts including at least one key post. Additional expatriate posts will be given when necessary upon request.

The other conditions relating to expatriate employment are as follows:

(i) An expatriate officer who is transferred from one post to another within the same company is not required to obtain a new employment pass. His or her original employment pass will be amended:) reflect the change of post.

- (ii) A new expatriate officer replacing another expatriate officer is required to obtain a fresh employment pass.
- (iii) All employment passes are valid for the period of time as approved for the post, subject to a maximum of 10 years.
- (iv) All holders of employment passes will be issued with multiple entry visas valid for the period corresponding to that of the employment pass, subject to a maximum of 10 years.
- (b) For new investments (that is, applications received between 1 October 1986 and 31 December 1990) where the foreign paid-up capital is less than US28 million; and for companies licensed before 1 October 1986.

The conditions for expatriate employment for the above companies are as follows:

- (i) Key posts (for example, posts that can be held indefinitely by foreigners) can be considered for companies where foreign capital participation is approximately M\$500,000. However, this figure is only a guide, the number of key posts allowed depending on the merits of each case.
- (ii) For executive posts requiring professional qualifications and practical experience, expatriates may be employed up to a maximum period of 10 years, subject to the condition that Malaysians are trained to eventually take over the posts.
- (iii) For non-executive posts which require technical skills and experience, expatriates may be employed up to a maximum period of five years subject to the condition that Malaysians are trained to eventually take over the posts.
- (iv) For industries, designated by the Government as priority industries, such as those that are labour-intensive and those manufacturing industries that are wholly export-oriented, the conditions (i), (ii) and (iii) above may be relaxed, depending upon the merits of each case. Other companies not falling within any of the categories mentioned in this clause, may also be accorded similar privileges depending upon the merits of each case.

Applications for expatriate posts

Applications for expatriate posts (including key posts, executive and non-executive posts) can be submitted to the Malaysian Industrial Development Authority (MIDA) at the same time as the company's application for approval of its industrial project.

The above procedure applies for expatriate pesonnel by the following:

- (i) All companies proposing to establish new projects.
- (ii) All existing companies proposing to manufacture additional products (diversification of projects)
- (iii) All existing companies proposing to expand their production canacities (expansion of projects).

In the event that an applicant is unable to submit requirements of expatriate personnel when submitting the application, he or she may submit the foreign personnel requirements at a later stage.

Existing companies that are not undergoing any expansion or product diversification but wish to apply for additional expatriate posts or to renew existing posts, should submit their applications to the Standing Committee on Malaysianisation through the Immigration Department, as has been the practice in the past.

Labour policy and labour laws

It is the Government's policy to promote cordial employer-employee relations and industrial peace based on social justice, equity and good conscience so as to bring about a generally contented and productive labour force, thereby ensuring a favourable climate for investment and sustained economic growth. With this objective in view, the provisions of the labour laws set out minimum standards to safeguard the interests and spell out the rights and responsibilities of employers and employees and provide a legal framework for the orderly conduct of industrial relations.

Employment Act, 1955

The Employment Act, 1955 is the principal employment legislation regulating terms and conditions of employment. Among others, it sets out the minimum conditions of employment which include:

- (i) Ten paid gazetted public holidays in any one calender year;
- (ii) Eight days of paid annual leave for employees with less than two years of service. 12 days of paid annual leave for those employees with two or more years of service but less than five years of service, and 16 days for those with over five years service;
- (iii) Fourtzen to 22 days sick leave in a year depending on length of service and where hospitalisation is necessary, up to an aggregate of 60 days sick leave in each year;
- (iv) Normal hours of work shall not exceed eight hours a day or 48 hours a week;
- (v) Payment for overtime work at one-and-a-half times the ordinary rate of pay.
- (vi) Payment of maternity allowance for female employees on maternity leave for 60 days at the ordinary rate of pay subject to a minimum rate of MSo.00 per day.

Trade Unions Act, 1959

The Trade Unions Act, 1959 provides for the registration and administration of trade unions in line with the policy of Government to encourage the growth of democratic, healthy and responsible trade unionism, within the context of public and national interests. A trade union should confine its membership to employees within a particular trade, occupation or industry and should apply for registration upon its formation. The Trade Unions Act provides sufficient safeguards against militancy or unlawful activities of trade unions. All trade unions are inspected periodically to ensure compliance with the law.

Industrial Relations Act, 1967

The Industrial Relations Act, 1967 provides for the regulation of relations between employees and workmen and their trade unions, and the prevention and settlement of trade disputes. Some of the main features of the Act are:

- (i) Protection of the legtimate right of employers and workmen and their trade unions:
- (ii) Exclusion of workmen in managerial, executive, confidential or security capacities from the scope of recognition of trade union, the majority of whose membership are not employed in any of these capacities;
- (iii) Procedure relating to submissions of claims for recognition and scope of representation of trade unions and collective bargaining:
- (iv) Non-inclusion in the union's proposals for collective bargaining on matters relating to promotion, transfer, recruitment, retrenchment, dismissal, reinstatement and allocation of duties and prohibition of strikes over any of these matters:
- (v) Emphasis on direct negotiation between employers and workmen and their trade unions to settle their differences and provision for speedy and just settlement of trade disputes by conciliation or arbitration when direct negotiation fails;
- (vi) Provision for the Minister of Labour to intervene and to refer at any stage any trade dispute to the Industrial Court for arbitration;
- (vii) Prohibition of strikes and lock-outs after a trade dispute has been referred to the Industrial Court, and on any matter covered by a collective agreement or by an award of the industrial court;
- (viii) Protection of pioneer industries during the initial years of their establishment against any unreasonable demands from a trade union because trade unions cannot demand better terms of employment than those stipulated under the Employment Act.

Employees Provident Fund Act, 1951

The Employees Provident Fund Act, 1951 provides for a compulsory contributory provident fund which is payable to employees in full on reaching the age of 55 years. All employers and employees are required to contribute to the Fund at rates of 11 per cent and 9 per cent respectively of the employees' monthly wages.

Technology Acquisition

The following article has been sent to us for reprinting

in the TIES Newsletter by courtesy of Dr. Wahby G. Wahba, Senior Under Secretary of State of the Egyptian Investment and Free Zones Authority. Regular subscribers to the TIES Newsletter may wish to refer to Issue No. 30 of July 1985 in which an article on the same subject appeared together with an unofficial English translation of the original Arab text of the draft law on the organization of transfer of technology.

Egypt

Experience Gained in the Acquisition of Technology Through Joint Ventures

Introduction

International agreements on the transfer of technology can take many forms, from simple sales contracts for equipment and expertise, to licensing agreements and joint ventures. In negotiating these agreements a great deal of attention is often paid to provisions covering definitions, obligations, royalties and dividends, restrictive business practices, taxation, disputes and defaults, terminations, renewals, and so on.

The literature on technology transfer has been less than adequate as a source of guidance, having been much concerned with the search for "success' in technology transfer. Yet judgements as to success in this field inevitably depend heavily on the objectives, points of view, and often, particular value systems of the individuals making them.

Following that approach, this paper will deal with the Egyptian experience in the acquisition of technology through joint ventures that began some 14 years ago with the adoption of the "open door policy", which in fact constituted a turning point for the Egyptian economy. This policy stresses on the one hand an increased dependency on market mechanisms, and on the other, the adoption of various types of incentive to encourage private domestic and foreign investors to play a larger and more effective role in the economic activities of the country.

The "open door" policy heralded by Law 43 of 1974 emphasizes the need for additional production capacity and seeks the use of modern technologies, a high level of know-how and top managerial skills to realize that production. Initially, Law 43/1974, dealing with the Investment of Arab and Foreign Funds and Free Zones was enacted to promote the inflow of foreign capital and technology, but subsequent legislation and Government practice have expanded the strategy towards a greater degree of liberalization. Promotion of foreign investment has been reinforced by a decentralization of administrative powers and in particular through the creation of the General Authority for Investment and Free Zones (GAFI), which has been administering the Investment Law since 1974. The Authority is the only body having full approval power for foreign investment projects.

Import of technology

Until recently Egypt did not pay much attention to the

import of technology in its official policies. Because of the country's high level of education and degree of industrialization there has for many years been an appreciation of the role of modern technology and hence of the need to keep abreast of world technology. This realization has led to an "open" approach to foreign technology. Attitudes have recently changed, partly because of a growing recognition that the country possesses a scientific and technological potential of its own and hence that it is not always necessary to import technology, but also because Egypt will continue to seek the best technology available from foreign suppliers in relation to its own needs.

Under Law 43/1974 there are two broad categories of projects: inland projects and those located in geographically designated free zones. Approved projects in the inland category are entitled to a package of incentives and guarantees. Tax holidays are granted for periods ranging from five to fifteen years. Privileges also include a large measure of freedom with respect to the repatriation of profits and capital. Projects in the other category, the free zones, are geared to exportation, and are permanently free of taxation. Imports into and exports from the free zones are not subject to any restrictions. All guarantees provided by the law against non-commercial risks apply equally to free zone projects. All projects operating under the provision of the investment law are considered as belonging to the private sector, even when carried out as a joint venture with a public company.

In the case of inland projects, technology is one of the main factors taken into account when considering applications for investment projects, and the prospect of obtaining and introducing a new technology to the country is a reason for giving approval. Free zone projects are not considered in the present context. There is a reason, however, to be sceptical as to the effectiveness and significance of the transfer of technology made within the free zones. The main reason being the strong vertical integration of the production process in export-oriented industries.

This can only favour routine activities, often highly automated, as in the case of the electronics components industry, and hence offering little chance for improvement and calling on unskilled labour that can adapt to the jobs created after a few days' training. The specialized nature of the tasks prevents any skills acquired, however slight, from being used in other sectors of production.

In fact, if any technology transfer is to take place in the free zones, it is mainly by means of quality control, which calls for a higher level of skills: supervisors, foremen, production engineers, management staff, etc. Thus, if local nationals are employed on these tasks, the transfer effects will never involve more than a limited number of people. Workers never master the technology of the production system, but only acquire the basic technical knowledge necessary for the operation of the production process.(1)

Transfer of technology environment

Egypt has no special legislation governing technology licensing. The basic legislative right for the Government to intervene in the process of technology transfer through joint ventures is Law 43/1974. The law - as mentioned before - facilitates a free inflow of foreign and Arab capital, conferring on it substantial privileges, guarantees

and exemptions. Foreign investment may be in terms of currency, machinery and equipment, materials and re-invested profits. Intangible assets such as patents and trade marks, held by residents abroad, together with preliminary studies, can be capitalized and form part of invested capital. Special priority is given to projects that will increase exports, encourage tourism, reduce the import of basic commodities and to projects "that require advanced technical expertise or that make use of patents and trade marks of worldwide reputation".

It is noteworthy, however, to mention that direct transfers of technology, unaccompanied by investment, still have no institutional mechanisms or adequate channels for entry into the country. In this case one can assume that Law 43 stands in the position of having institutionalized technology "packaging". The present practice indicates that the joint venture instrument is administered normally, with emphasis being placed on a desired form of "packaging", that is, the accompaniment of a managerial system and methodology. In the field of technology transfer, it could be said that the net impact of Law 43 has been to set in motion a series of changes of direct relevance to the use of modern technology in Egypt's industrial sector. There has in fact been a sharp increase in the number of arrangements and in particular of their packaging together with foreign investment. Due to the emphasis on augmenting production capacity, much of the technology has been embodied in new machinery, in addition to a relatively large number of separate contractual agreements to cover technology per se. In many cases of joint ventures the foreign supplier of equity capital and the foreign supplier of technology may be the same entity. Bundling together equipment purchases with "disembodied" technology (e.g. licensing arrangements) renders it difficult to sort out one from the other.

As noted above, technology is one of the main factors taken into account when considering applications for investment projects. The application form that has to be completed by all potential investors is detailed and comprehensive. The technology factor, including costs of importing technology is assessed in a number of different ways, and specifically:

- A description is required of the technology to be transferred and the training to be given in the use of the technology.
- The machinery and equipment to be imported must be described fully and their origin indicated.
- Under the heading "workers to be employed" there are three main categories: technical/administrative, skilled and unskilled. The respective numbers of foreign and local staff in each category have to be stated.
- In the table which recapitulates the balance of payments effects, particulars must be entered concerning expatriate salaries, interest payments, loan repayments, royalties, management fees and other payments in foreign currencies.

Under the "open door policy" and the hard push for industrialization, a considerable amount of modern technology has been coming into Egypt, as are also patented and brand-name products. Thus, the need for appraising technology, in itself and as reflected in the licensing agree-

ments, became important and urgent. As a matter of fact, the Investment and Free Zone Authority relies on specialized bodies (such as the Ministry for Agriculture, the General Organization for Industrialization, the Ministry of Health, offices dealing with non-governmental organizations, international organizations, universities, consultants, etc.) for the technical appraisal of the projects submitted to it and the technology agreements that may be involved. Economic and legal appraisal is conducted by the Authority's staff members and experts. A weighted system is used to measure the impact of the projects on the national economy and determine the extent to which it conforms to the national economic objectives.

Technology transfer flows through joint ventures

Based on the information kept at the Investment Authority, this section will deal with technology transfer flows through joint ventures from the angle of collaboration type, sectoral distribution of contracts, country of origin of the technology imported and royalty rate of the contracts concluded. A sample of 117 agreements (concluded during the 1980-1987 period), representing almost all fields of activity specified in Article 3 of the Investment Law 43/1974 has been used as a basis for this analysis.

Type of collaboration: Approximately 40 per cent of the number of transfer of technology contracts under review (Table 1) contain the transmission of know-how. Licensing sale or assignment of trade marks represent only about 15 per cent of the total, while contracts involving technical assistance and management assistance account for 27 per cent of the contracts included in the sample.

Table 1. Number and percentages of contracts by collaboration type (1980-1987)

	No.	Per cent
Know-how	69	24.4
Trade mark	.30	10.6
Patent	5	1.8
Technical assistance	61	21.5
Basic engineering	9	3.2
Detailed engineering	12	4.2
Management assistance	16	5.6
Training	58	20.0
Licensing	7	2.5
Marketing	3	1.1
Construction or set-up	1	0.3
Turn-key	4	1.4
Supervising (Start-up)	5	1.8
Equipment repair or		
maintenance	3	1.1
Total	283	100

Sectoral distribution of contracts: A breakdown of the number of contracts by sector (Table 2) shows that most of the contracts under review are related to the manufacturing sector. Figures show a concentration in percentage of about 60 per cent in two main fields, namely engineering and chemicals. Food and beverages account for only 50 per cent while pharmaceuticals, building materials, textile and leather products account for approximately 7 per cent, 9 per cent and 6 per cent respectively.

Country of or ain of imported technology: Table 3 shows the technology flows by percentage of supplier countries. The USA and the EEC account for about 79 per cent of the number of transfer of technology contracts reviewed in this analysis. The EEC stands out as the leading supplier of technology (57.4 per cent). Use of technology from other European countries accounts for 13.4 per cent, while technology flows from Japan and Canada account for 3.4 percent each.

Royalty rates (based on net sales)

Figures available show the following: 22 per cent of the contracts reviewed had a royalty rate of 5 or more per cent: 64.5 per cent of the contracts concluded accounted for a royalty rate ranging from 2 to 3 per cent; 13.5 per cent of the number of contracts had a royalty rate of 1 to 2 per cent.

Table 2. Number and percentage of contracts by manufacuring sectors (1980-1987)

	No.	Per cent
Food and beverages	6	5
Pharmaceuticals	10	7
Textiles	5	4
Glass and glass products	1	1
Engineering	35	31
Wood products	2	2
Building materials	11	9
Paper products	1	I
Agriculture	2	2
Chemicals	33	29
Minerals	3	3
Metal industries	6	4
Footwear	2	2
Total	117	100

Table 3. Number and percentage of contracts by supplier country (1980-1987)

	No.	Per cent
USA	27	21.3
EEC	73	57.4
Non-EEC	17	13.4
Japan	3	2.4
Canada	3	2.4
Africa	1	0.7
Asia (except Japan)	3	2.4
Total	127	100

Capital intensity

Figures released by the Investment Authority show that up to the end of December 1985 about 40 per cent of the inland projects (in operation) are in the industrial sector. Those amount to about 270 projects(2) with a total paid-up capital of £E 783 million and investment costs of £E 2,852 million. Figures also show that non-financial inland projects, (in operation), amount to 487 projects with a paid up capital of £E 1,500 million and investment costs of about £E 4,470 million. Non-financial projects have actually created about 125,000 jobs which means that the average

investment cost per job is around EE 30,000. Capital intensity per worker in services, agricultural and construction projects is generally average (£E 28,000), while for the industrial projects it is more than average (£E 43,600). This may be taken as an indicator of the fact that industrial projects operating under Law 43 are characterized by high capital intensity as compared to other sectors. At the same time, its capital intensity is much higher than the general average of the national economy as a whole, which stands at about LE 20,000. Technology used by Law 43 industrial projects tends to be more capital intensive compared to other industrial projects operating under other laws.

Negotiating technology agreements

It is probably appropriate to note here that no single type of transfer arrangement is likely to succeed in all situations. One of the most important factors that can help provide a framework for designing transfer arrangements is the stability of the relationship between the supplier and the recipient of technology.(3) In the case of "joint ventures" there is often an explicit agreement on the degree of participation of each party in such preliminary activities as feasibility studies, market surveys, other pre-investment services, industrial process choice, engineering design. plant construction and installation, and personnel training. In this case the heavy involvment of the supplier in such activities will give the recipient the chance to avoid several problems that may arise when components have to be obtained from a variety of different sources. Similarly, if the technology being transferred is "packaged", as it often is, the recipient can avoid the problems associated with market failures and imperfections, uncertainty and the time lags in assembling the elements needed for the transfer that can arise when technology is unpackaged. On the other hand, costs to the recipient associated with a highdegree of packaging can be substantial. Packaging makes it easier for the technology supplier to price various elements of the technology freely, perhaps extracting profits from sales or peripheral, or fictitous technology.

Many factors can, however, affect the bargaining power of the parties in the relationship, from the importance to each party of setting up the operation to aspects of the negotiations such as the negotiators' competence and background. But perhaps the most important determinant of their relative bargaining power is the availability and costs to the recipient of alternative sources of technology. Recipients must therefore be as well-informed as possible about alternative potential suppliers and their merits.

In Egypt it has been found that the investor often meets with difficulties when trying to evaluate the offers given to him by prospective partners and suppliers of technology. There is still a great need to support the tasks of the investor by establishing and strengthening the availabe machinery and sources of information about alternative technologies. The local negotiator is in an even weaker position if he is seeking loans and may feel helpless in front of the external parties. The cost of technology may finally prove to be much higher, or even exorbitant. Given this picture it has been felt that Egypt should adopt a national technology policy aimed at maximizing the benefits drawn from imported technology and at the same time substantially increasing the technological output from the in-

digenous science and technology establishment.

A draft code on technology regulations(4) was prepared, which provides for the systematic evaluation of foreign technology available in relation to alternatives; unpackaging and the elimination of restrictive conditions and assistance to local companies in the negotiation of technology contracts. The law might be regarded as a starting point or continuation of a fresh approach to policy, in which case the legal instrument could serve to create space in which new lines of action could be worked out.

Footnotes

- (1) Basile, A. and Germidis, D., *Investing in Free Export Processing Zones*, D. dopment Centre Studies, OECD, Paris, 1984, p.50.
- (2) This number represents the projects that presented their balance sheets for 1985 to the Investment Authority. Other projects (in operation) are not considered in this context.
- (3) Derakhshani, S., "Negotiating Transfer of Technology Agreements", Finance and Development, Vol. 23, No.4, December 1986.
- (4) For a brief description of the main provisions, see as follows:

The Draft Code

Scope of the law

The draft legislation covers seven chapters with 17 articles. It defines the terms contained in the law in view of the fact that the law governs issues not covered in any preceeding legislation in Egypt. The scope of the law covers various types of transfer of technology agreements. In defining technology and technology transfer, Egypt followed the concept adopted by the United Nations Conference on Trade and Development (UNCTAD) in the Draft International Code of Conduct on the Transfer of Technology. The international draft code defines technology as "systematic knowledge for the manufacture of a product, for the application of a process or the cendering of a service, and does not extend to the transactions involving the mere sale or mere lease of goods". Article 4 stipulates that pure sale, leasing or rental of goods is not considered transfer of technology. Also trade marks would not be considered transfer of technology unless they form part of technology transfer transactions. Licensing of trade marks is considered within the scope of the law provided that the trade mark is important for the export of products manufactured under license or may bring along recognized technical prestige. The main idea behind this is to reduce the use of foreign trade marks in the domestic market. Direct sale of computer programs, models and industrial drawings, know-how or assignment of rights are considered to be transfer of technology.

Registration

The draft law also proposes the obligation to register technology transfer contracts with the Academy of Scientific Research and Technolgy with a view to affecting the processes of examination, control, evaluation and the monitoring of the implementation of the contracts. The Registry, with the assistance of specialized agencies, will develop model contracts for technology transfer. It will also help in the negotiation processes concerning the transfer of technology and the possibility of partial technology packages. If registration approval is denied, the agreement will then be null and void. This means that the agreement cannot be enforceable before any authority and that fulfilment thereof cannot be required before Egyptian courts of law.

It goes without saying that the executive regulations will take care of the "procedures" including the period within which the entity in charge of enforcing the law will take a decision on the agreements submitted for registration, the possibility of the parties to appeal against that decision and patent infringement and validity.

Enforcement

The draft law also provides for the monitoring of the execution of the agreements to be carried out by the competent authority and other agencies concerned to ensure the enforcement of the agreement as approved by the authority. Furthermore, penalties are included in the draft legislation for (a) failure to present the contract for registration; (b) furnishing of false data for registration; (c) refusal to supply information when required; and (d) execution of the contract under different requirements than those registered.

Restrictive practices

As of course expected, the draft law governs conditions disadvantageous to national interests as well as unfair conditions that may lay a heavy burden on the acquiring party. In certain cases however, some of these conditions may be tolerated. The prohibitions are only in a few instances formulated in a strictly per se manner and covered by Article 6.

It may be appropiate at this point to give some examples of these conditions and the general criteria proposed for their application. Article 6 prohibits registration of contracts in seven cases. The first is the prohibition of registration if the purpose of a contract is to transfer locally available technology. This clause has been interpreted to mean that a contract cannot be accepted when it involves technical know-how in the public domain, or covers technical know-how that a local research institute can provide.

The last clause of Article 6 prohibits the registration of contracts with terms of enforcement that exceed ten years. Although all obligations of the recipient company are not to exceed a period of ten years, there is nothing in the law that prevents the Registry from accepting a new contract after the original one has expired. Approval will, of course, be given on a case-by-case basis. Other conditions dealing with the type of restrictive practices that must be eliminated from contracts before they can be registered include:

The contract that obliges the licensee to grant back to the licensor the patents, trade marks, innovations or improvements made during the contractual period, or if the contract contains certain conditions that may lead to an unequal relationship between the parties involved. The last statemant has been interpreted to mean that a contract may not be accepted if the exchange of information on improvements or innovation developed by either party is not conflucted on a reciprocal basis with regard to remuneration.

The contract that limits the activity of the acquiring party in the field of research and development.

The contract that prevents or restricts the acquiring party from exercising their rights to export.

The contract that prevents the acquiring party from utilizing a complementary technology from other sources.

The contract that imposes restrictions on the acquiring party relating to the size of production or sale prices for both local and foreign markets.

Article 7 covers five clauses that deal with, among others, the type of restrictive practices that could be accepted for considerations related to the common good, in accordance with the nature of the contract and the requirements of the national economy.

The most important may be the first clause, which prohibits the registration of the contracts that set a price out of proportion to the value of the technology acquired or impose a disadvantageous burden on the national economy. Of course, it is not possible to establish general rules concerning an adequate level of payments, but the registrar can at least examine some of the most obvious implications for the economy of contractual arrangements with foreign companies. Such an examination should deal with the effects of payments for technology on the company itself, the effects of the payments on the balance of payments, and the effect of the payments on the cost of goods and services produced and on the consumer sector in general.

Guarantees

In recent years technology transfer legislation has focused more on the issue of clauses that could guarantee a successful technology transfer compared to earlier legislation where reference was sometimes made to performance guarantees.

The Egyptian Draft Code is in this respect unique, as it includes a variety of obligations and clauses that should be included in the agreement that no other legislation has covered. Most notable is the obligation to disclose risks that may result from utilization of the technology, particularly those related to the environment and public health and to make good damages resulting from the utilization of the technology affecting persons and property. Furthermore it makes reference to contractual guarantees when it concerns employment of local labour and utilization of local resources.

Settlement of disputes

Article II stipulates how disputes are to be settled with a view to resolving them in the most speedy and reliable ways. The law provides that the Egyptian courts of law shall primarily have jurisdiction to decide on such disputes and allows for arbitration. Arbitration takes place subject to specific rules contained in Article II. The law also states that disputes shall be subject to the provisions of the Egyptian law. The law concludes with the listing or sanc-

tions to be imposed in cases of violation of the provisions of the law.

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Sri Lanka

New incentives and concessions to foreign investors

The Foreign Investment Advisory Committee (FIAC) and the Greater Colombo Economic Commission (GCEC) which administers the country's Economic Processing Zones (EPZs) have offered new incentives and concessions to foreign investors.

The GCEC package of benefits includes:

- 100 per cent exemption from tax on corporate (normally 50 per cent) and personal incomes, dividends (normally subject to withholding taxes of up to 25 per cent) and royalties for up to ten years;
- extended tax concession for an additional 15 years;
- duty free import of equipment, components and raw materials;
- no limit on foreign equity holdings in EPZ companies and transfer holdings without incurring tax and exchange control liabilities;
- exemption from tax on capital transfers and on the procec !s of liquidation;
- special considerations for industries introducing new or advanced technology.

The principal ingredients of the FIAC package are:

• a tax holiday for up to five years;

- during the holiday, dividends are exempt from income tax provided they are declared;
- expatriate employees pay 25 per cent less income tax for the first three years. However, remittances abroad are limited to two-thirds of the employee's salary;
- non-resident shareholders can freely remit their dividends;
- no duty or turnover tax is levied on imported machinery if half the company's production is exported;
- no duty or turnover tax is payable on approved raw material imports;
- if not export earnings are high enough, then the company only has to pay half its tax liabilities for five years.

(Source: Asia-Pacific Tech Monitor, July-August 1988)

When is a product or process "On Sale"? — The effective date could invalidate important patent rights

If an inventor or his employer has a product or a product made by a process "on sale" for more than one year, it is too late to file for a patent. This one year period is known as the "grace period". It is not necessary that the product be actually sold but merely that it be offered for sale. Also, if a secret process is used for more than one year for commercial purposes, it is too late to file the patent application.

In a straightforward case, where the product is being produced in quantity and the research has been complet d, there is relatively little difficulty in determining when a product is "on sale". The difficulty arises when the product is only in a prototype or earlier stage. It has generally been felt that the product must have been actually reduced to practice before it could be placed on sale. However, a recent case concluded that this is not always an absolute requirement. The decision of whether or not a product is "on sale" is based on the totality of the circumstances. The law is still clear that when the invention is merely in the conceptual stage, with no substantial work being done towards a reduction of pra-tice, then it cannot be "on sale", even though the inventor has sufficient cofidence that the conception will lead to a product he has offered for sale. Also, if the product is not fully reduced to practice, this is a strong but no absolute indication the product cannot be "on sale",

(Source: Intellectual Property Happenings, September 1988)

An introduction to the use of warranties and guaranties

(Warranties and guaranties in computer licence contracts)

In the last issues of the TIES Newsletter (Nos. 40 and 41) we mentioned that we will be reprinting a number of

extracts from a paper prepared by Mr. G. Markos of Chemokomplex, Budapest, Hungary, Hereunder is the third and last of these extracts.

Warranties and guaranties in computer software licence contracts

This type of licence contract is even more complex than a patent or know-how licence contract and therefore the correct wording used in the contract is even more important because of the following:

• Not only is there no special law on licences in general, but computer software in itself is not protected by any sort of "industrial property" (patents, trade marks, etc.), but by copyright, the efficiency of which is presently rather dubious in developing countries.

 Computer software is a special product, which if completely free of any defects, is a rarity.

 The licence agreement on a software is in practice not one contract, but a set of contracts: the licence contract; the maintenance contract; the training contract and (if applicable) the consultancy contract (not considering the contracts for the acquisition of hardware and "back-up").

So why is software not protected by patents?

Patents protect industrially realizable new technical inventions. The word "technical" is here taken in the concept that most patents act as an intervention in nature, as a result of which a change is effected in a product or process.

Software is essentially a mental product in the form of a mathematical formula. There is no direct change in any product or process, no intervention in nature, irrespective of the fact that the "formula" as a means or an "instrument" can then be used in production.

The situation is similar to that of medical treatment. No "treatment" can be taken to mean a change in product or technology. An operation, medication, X-ray or a catheter means no change in a "product", "process" or "technology", but the instrument used in treatment, the instruments used in the course of an operation, X-ray equipment, a medicine or a catheter are products produced by means of processes and technologies, and consequently any invention improving or developing them as products or processes are "technical" and can consequently be patented.

There have been efforts to find a solution to the patenting problem, although for specific softwares in certain countries patents have already been granted, but nonetheless a solution to this problem is still a task for the future.

Software is therefore protected by copyright, being an "Intellectual property" means for protection, but not in the

"industrial property" category.

If the recipient country is a member of the International Convention for Copyright Protection, the software can be considered to be protected in such a country, otherwise there is no protection and it must be treated as a nonpatented know-how or trade secret. This applies to most developing countries.

Nowadays, software has become an article of everyday trade. A youngster may enter a shop and buy a new gadget together with a program (software) for it. He then goes home, plays with it and writes a new program. The new

generation will, next to their mother-tongues, also speak computer languages. This is good. But the software package, being the subject of a transfer of technology transaction, is not a gadget, it is a means of production, and an expensive one at that. The recipient will also want to have some sort of assurance that the software he is spending money on will "fit its purpose".

There is even some debate on the nature of the contract for software. There are views adopted by courts of law where a software supplied together with the computer hardware was considered as "goods" and the entire contract as a "sales contract". There have also been cases where it was considered as a "lease", irrespective of the fact that the contract was entitled a "licence contract". In fact, software may be purchased outright if it is made-toorder. In most cases however this does not apply.

Software may be procured together with the hardware (the computer) but also separately. Also, the hardware may be purchased or procured under a lease, or hired.

If the software is to be procured from a big company (e.g. a software house), usually a printed contract form prepared by them is quite frequently presented for signature only and not for negotiation. The same may happen when dealing with the hardware supplier, who may present such a printed contract made by the owner of the software, which the buyer is kindly requested to sign on a "take it or leave it" basis.

Such a situation has two basic disadvantages for the

recipient.

The first is that such pre-printed contract forms usually exclude any guaranty, or restrict it to a best efforts obligation to correct any identified smaller "bugs" (defects or faults). This leaves the licensee without any actual protection against failure on the part of the supplier to correct and provide an appropriate software. Many such model contracts go even further and explicitly exclude any warranty for fitness or any warranty implied by law (according to American legal concepts this does not oblige the licensor to warrant. Such model forms do not even include a warranty (if not explicitly excluded) that the software will fit the user's needs, even if this is specified. Many such contracts also specify dates after which no suit can be brought against the licensor or supplier and also exclude indirect and consequential damages from any claim for compensation.

The second disadvantage is that should such a preprinted contract be signed, the buyer would have one contract with the supplier of the hardware together with a certain governing law (being reasonably the same law applicable to all contracts related to the same project) and another contract, or set of contracts, for the software with quite a different supplier, with a governing law quite different to all others. This can be done, of course, but it is definitely not the most advantageous situation for the recipient. In the absence of a homogeneously written contract, baying at its centre the project and the same applicable law, the recipient must resort to quite other remedies, entering into disputes or litigations based on potentially quite different rules, while his computer and project may either have to stand idle or lose the advantages expected from the software package.

What is a software package"

For our present purposes, "software" may be defined as programs that control computers to perform specific functions.

A "software package" may be defined as a specific computer program or set of programs developed to perform certain defined functions useful to any computer user.

Such a "software package" can be further divided into three groups:

"Systems packages", comprising programs or sets of programs that help the customer to operate his computer and his peripheral equipment more efficiently;

"Applications packages" include programs for accounting, administration, production, distribution, as well as design, simulation, modeling, etc.;

"Custom software" may be defined as the development of a new program by means of a substantial modification of existing programs, to enable them to perform functions and needs specified by a particular user.

Literature also mentions "Customized software" defined as a "standard" software or "package" software that is modified to fit a particular customer's requirements

All the above could belong to our subject matter.

Once we have selected our supplier for both hardware and software, and once we are sure that the software we are making a contract for can be operated on our computer and can do the job we have in mind, i.e. to make our technology to be transferred work well, we should think of the questions raised and try to answer them in respect of any other part of procurement for the project, namely:

- What could go wrong (what defects, what breaches of contract are possible)?
- What should be warranted?
- What remedies will the recipient have in the case of a defect or breach?
- What are the causes of relief for the supplier that will be excluded from his liabilities?
- What are the sanctions the recipient will have it such remedies were not performed or remain unsuccessful?

As to potential breaches, this is similar to that of any other procurement: non-delivery, late delivery, legal defects and physical defects.

At this point we will follow the suggestions of Josef Auer and Charles Edison Harris, from their work Computer Contract Negotiations.

In the case of not observing the delivery schedule, they suggest:

"Delivery Schedule

The Software shall be delivered to User at times and in the component order specified in Schedule D hereto, which is hereby incorporated and made part of this Agreement (the "Delivery Deadline"). For such purposes:

"Delivery" shall include installation of the Software on User's system, as follows:

A failure to deliver any component of the Software, whether the Basic Package, the Additional Enhancement Services, Documentation, Codes, or Installation Support, by the total failure to deliver and the Software shall not be deemed to be delivered unless

and until all of its elements are delivere!.

"User's Rights Upon Default

If the Software, or any component thereof, is not delivered to User within days following the applicable Delivery Deadline therefor, the User shall have the right and option, following ten (10) days advance written notice to Vendor, during which the Vendor shall have the right to cure by full performance of its delivery obligations hereunder, to declare the Vendor to be in default hereunder and to cancel and rescind the Agreement as provided in Section X.

It is suggested to specify the right to claim compensation for damages and to procure the software from another source at the expense and risk of the licensor.

As to delays, an appropiate penalty scale is recommended, in the form of days. As to a warranty against legal defects, it is strongly recommended that the contract specifies a "non-transferable, non-exclusive perpetual licence to use, perform, execute and copy the programs licensed and portions thereof solely for their recipient's use, subject to the conditions of the contract". Title to all programs and to applicable rights in patents, copyrights and trade secrets remain with the licensor or vendor. Title to the copies, however, shall be with the recipient.

The same authors quoted above suggest the following warranty clause:

"No infringement; Indemnification

Vendor warrants that the Software is, or shall be when completed and delivered hereunder, original to Vendor and that neither the Software nor any of its elements nor the use thereof shall violate or intringe upon any patent, copyright, trade secret or other property right of any other person or other entity. Vendor agrees that it will, and hereby does, indemnify and hold User, its parent, subsidiary, and affiliated companies, and the officers, directors, employees and agents of each, harmless from and against any and all loss, cost, liability, and expense (including reasonable attorney's fees, which shall specifically include costs and reasonable attorney's fees associated with appellate proceedings) directly or indirectly resulting from or arising out of any breach or claimed breach of this warranty. During the pendency of any claim against Vendor or User with respect to any such infringement. User may withhold payment of any sums otherwise required to be paid hereunder, so long as Vendor shall actively pursue the defence of any such claim. In the event any controversy shall arise concerning which party hereunder shall be charged with responsibility of defending any such claim, each party shall have the right to defend itself and the other party shall, to the extent its interests are not otherwis, adverse, provide reasonable assistance to the other party in connection therewith.

This text has been quoted to show how experts on the subject would word such provisions. It is believed that the above text could be shortened and made similar to those recommended in the previous sections but adapted to the subject of the software. It is also believed that similarly to a patent infringement case, the licensor would be the only person able to effectively defend the case.

Warranty against defects in the software

It is crucial that the subject matter of the licence be clearly defined in the contract. The functional specification, the system specification, the application specification and the various flow charts and manuals should be clearly identified and specified. It is in particular the functional specification that must be set out and described in detail and in clear and simple terms, all the more so because the systems specification will be based on it.

The next important part is that the contract should correctly specify the implementation plan, setting out in detail the delivery and installation of the software and its testing.

Testing is usually first done on the licensor's hardware and identified defects corrected.

The recipient should insist that all individual programs be tested separately and on the recipient's own hardware on site and live data. Such testing should also be combined with "debugging", i.e. correcting faults and defects, as well as completion of training of the recipient's staff, which should have been started in advance at the licensor's site.

Experience shows that it usually takes several months for the software to settle and become stabilized. The recipient should therefore insist that the Final Acceptance Certificate be signed only after the end of this stabilizing period, which is normally about six (6) months.

The acceptance provision should ensure that the recipient does not accept a product or assure the obligation for payment for such a product, until the licensor has demon trated that the software has passed certain objective performance tests. Because software defects may be particularly difficult to detect until the software is used to perform all relevant instructions on the particular system, the conditions of the acceptance test should be carefully tailored to the actual needs of the recipient, to his equipment and the function or purpose of the software.

Auer and Harris suggest the following provisions to this end:

"Acceptance

Acceptance testing. Following delivery and installation of the Software on User's system. Vendor shall certify in writing to User that the Software is ready for acceptance testing. With Vendor's assistance, User shall, within thirty (30) days after such certification, operate the Software on such System to determine whether:

(a) the Software meets the Specifications, performs the functions, and does not exceed the facilities, usage or "run time" limits and standards set forth in this Agreement, including the Schedules and Exhibits hereto; and

(b) the Software is capable of running on a repetitive basis on a variety of User's actual data, without failure; and

(c) the documentation for the Software meets the requirements of this Agreement, including the Schedules and Exhibits hereto.

Acceptance. If the Software successfully meets these acceptance tests, the User shall so notify the Vendor in writing in five (5) days and the Software shall be

deemed to be accepted and the "term" of this licence shall be deemed to commence. If the User fails to give the Vendor notice of Acceptance or non-acceptance within thirty-five (35) days after written certification by the Vendor that the software is ready for acceptance testing, the Software shall be automatically deemed to be accepted by the User.

Default. If the Software fails to meet any or all of the above specified acceptance tests, the User shall forthwith notify the Vendor of such failure in writing and the Vendor shall have ten (10) days thereafter in which to correct, modify or improve the Software to cause it to meet each such acceptance test and, thereafter, the user shall have thirty (30) additional days in which to reconduct all of the acceptance tests specified above. This process shall be repeated as may be necessary until the Software is deemed to be accepted hereunder within ninety (90) days after Vendor's initial written certification to User that the Software is ready for acceptance testing. The User shall have the right and option, following ten (10) days advance written notice to Vendor - during which period the Vendor shall have the right to cure by full performance of its obligations hereunder — to declare the Vendor to be in default hereunder and to cancel and rescind this Agreement as provided in clause X. (Reservation of right to claim compensation for damages and to procure the software from another source at the expense and risk of the licensor)."

What should be warranted?

- That the transferred software conforms to the functional and performance specifications and runtimes stated by the licensor;
- That it will comply with certain specified and objectively defined standards;
- That within a "warranty period" of six (6) months after the date of the acceptance certificate, the licensor will correct any defect identified at no expense to the recipient;
- That if the licensor fails to properly meet his obligations under the warranty, he will pay a certain amount as liquidated damages and will also agree that the recipient engage outside contractors to complete the work unsatisfactorily or untimely executed at the expense of the licensor.
- For this purpose, the payment schedule should be linked to phases of the work, e.g. 10 per cent on signature against and advance repayment bank guaranty, 50 per cent on acceptance and 40 per cent on final acceptance (expiry of the warranty period).

Maintenance agreement

Since defects may be detected even after expiry of the warranty period, it is customary to also sign a maintenance agreement or contract with the licensor. Under this agreement the licensor will correct errors identified beyond the term of the agreement against payment as specified in the contract. This is no warranty agreement and a separate warranty is required to cover the obligations of the licensor to correct errors under the terms of the contract. These

may be similarly worded.

Recommendation

As it may be surmised that software licences will not only be taken for administrative purposes but also for process control and optimalization, it would be in the best interests of the recapient to include the licence for the software into the licence contract made with his licensor, or if the contract is made for a complete plant, then into the contract made with the transferor. In such cases, the recipient can ensure that there will be only one single governing law, that the software will have the right functions and that all provisions and conditions on the technology will also be valid for the software.

Summary

Summarizing all that has been said about warranties and guaranties, it may be repeated that the best guaranty is a well-prepared and organized project with a well-selected and co-operative transferor with whom the recipient also co-operates.

Nevertheless, contractual warranties and guaranties are important.

In order to have good contractual warranties and guaranties, all details must be analyzed and the following questions raised and answered:

- What could go wrong, how and when?
- What should the partner do to correct the defect?
- Within what time limit?
- At whose expense?
- What if he does not do it or does not successfully do it?
- What should we do in each case?
- What can we do to enforce fulfilment of obligations and how can we do it
 - What does the success of the project require?

When we have all the answers, then we should put them into the texts of draft warranties and guaranties, after which a lawyer should be consulted to have it correctly inserted into the contractual provisions — but only then, otherwise he may write what he thinks is wanted and not what he knows is wanted.

Then we should negotiate in complete awareness that warranty/guaranty provisions are only parts — although important ones — of all the other provisions, and also that warranty and guaranty are goods that have their own price.

It is strongly recommended to have the same governing law in the entire package of contracts and to possibly use a codified law as the law applicable and acceptable to all parties concerned, which is known or available to them. It is also recommended that in the awareness of such a law, the contract should clearly spell out the rights and liabilities of the parties, leaving as little as possible to differences of judgement and interpretation, wherever it is in the interests of the recipient.

Legislation

Portugal

Foreign investment legislation

Decree-Law Nr. 197-D/86 of July 1986

The Foreign Investment Code established by Decree-Law Nr. 348 77 of 24 August 1977, together with supplementary legislation, set up a system for prior assessment and authorisation of foreign investment projects and contracts involving the transfer of technology. It has permitted the important task of adequate conceptialisation and control of these types of transactions to be correctly carried out, thus providing a wealth of information and experience.

The accession of Portugal to the European Economic Community has also created the need to adjust regulations concerning foreign investment to conform with the new legal system and transitional measures arising from the Treaty of Accession.

As a result, and following legislative measures already made in the monetary and foreign exchange fields, the Government felt that the time had come to set up a new legal mechanism to handle incoming foreign investment and supervise its employment in clear, flexible terms. This would allow the Portuguese authorities to maximise the positive effects of foreign investment in Portugal without unnecessary interference in the decision-making procedures of companies. It would also permit investors to be aware of their rights and obligations without difficulty.

Accordingly, the present system of granting permission along imprecise lines has now been replaced by a system of prior declaration, where the competent authority will limit itself, by its silence, to approval of the feasibility of the investment projects submitted to it. The same body wili, however, have sufficient legal means at its disposal to block or correct any project that it considers contrary to the country's legal dispositions.

Together with this Decree-Law, Regulatory Decree Nr. 24/86 of July 1986 has also been published, which replaces Nr. 54/77 of 24 August 1977. This latter Decree sets up the basic formalities for investment contracts, since experience gained in this area has shown that it is advisable to retain this special form of regulating foreign investment and it clearly sets out its scope and objectives.

In accordance with Article 201, Nr.1(a) of the Constitution therefore, the Government decrees the following:

ARTICLE 1

Foreign investment transactions in Portugal must be subject to the principles defined by the State in relation to economic policy, the general laws of the country, the legal system resulting from Portugal's Treaty of Accession to the European Community and the rules laid down in this Decree-Law and supplementary legislation.

ARTICLE 2

1. With regard to companies already constituted or to be constituted in Portugal, foreign investment operations are those acts that have as their objective, or may give rise to, stable and long-lasting economic links from which effective decision-making power is obtained or strengthened, either directly or indirectly, immediately or cumulatively, when practiced by or with the intervention of:

(a) Non-resident individuals or corporate bodies:

(b) Portuguese companies or companies established in Portugal which, through a holding in their capital or by any other means, should be considered economically connected, either directly or through subsidiaries, to non-resident individuals or corporate bodies.

2. Non-resident individuals or corporate bodies are defined, respectively, as individuals with habitual residence abroad and as corporate bodies of whatever

type with head offices abroad.

3. Portuguese emigrants are considered to be Portuguese residents for the purpose of this Decree-Law and supplementary legislation.

ARTICLE 3

1. Under the terms and for the purposes of Article 2, the following acts and contracts are considered foreign investment operations even though not directly associated with the import of capital:

(a) Establishment or expansion of branches or other forms of representation of companies with head offices abroad, or of new companies owned exclusively by the investor, and total or partial acquisition of companies

already existing:

(b) Participation and acquisition of holdings in the capital of companies or in groups of companies, newly constituted or already existent, in whatever form it may be made:

(c) Implementation and alteration of contracts for joint-ventures and the association of third parties in hold-

ings or capital quotas:

(d) Total or partial take-over of commercial or industrial establishments, by acquisition of assets or by means of

contract for the alienation of the business:

(e) Total or partial take-over of agricultural businesses through leasing contracts or any other form of agreement which implies the right of tenure and the commencement of activity by the investor;

(f) Carrying on a business involving building complexes, whether associated with tourism or not, in whatever legal

form this may be made;

(g) Supplemetary calls on capital, advances by partners or shareholders and, in general, loans linked to profitsharing.

2. The acquisition of property located in Portugal by non-residents as part of an investment project, will be subject to the rules applicable to foreign investment operations.

ARTICLE 4

1. Foreign investments involving foreign exchange trans-

actions may be made in accordance with the respective regulations, by means of:

(a) Transfer of funds from abroad;

- (b) Use of funds in bank accounts, in national or foreign currency, which have been opened in Portugal by non-residents:
- (c) Importation of equipment supplied by the foreign investor:
- (d) Inclusion of loans and other assets of the foreign investor in Portugal that are eligible for transfer abroad under foreign exchange legislation;

(c) Inclusion of technology.

2. In foreign investment operations involving foreign exchange, the competent authority will obtain in relation thereto the categorical opinion of the Bank of Portugal. If no opinion is given within one month from the date of reception of the respective application, this will imply tacit agreement by the Bank.

ARTICLE 5

1. Foreign investment operations in Portugal are subject to a system of prior declaration, with the exception of those covered by an investment contract, which are covered by Regulatory Decree.

2. The transfer between non-residents of holdings, contractual rights, or legal positions forming part of foreign investment operations, is also subject to the procedure of

prior declaration.

3. The following are exceptions to the rules set out in the

two preceding paragraphs:

(a) Subscription to, or acquisition of, holdings in the capital of Portuguese joint-stock companies if, as a result of such subscription or acquisition, the proportion of shares held by non-resident individuals or corporate bodies does not exceed 20 per cent of the capital of the Portuguese company and is not related to other deals or contracts that could give rise to stable and enduring economic links or imply, directly or indirectly, immediately or cumulatively, acquisition or strengthening of effective decision-making power in the company;

(b) Transactions referred to in paragraph 2 of this Article, if both the buyer and the seller are nationals of a Member State of the European Comunity and have their habitual residence or their head office located therein.

4. Operations mentioned in the foregoing item are subject to special regulations and registration at the competent authority within a period of 30 days.

ARTICLE 6

The basic procedures pertaining to the system of prior declaration are the following:

- (a) Before starting any operation the investor submits the investment project to the competent authority, accompanied by all the necessary and useful documentation and information:
- (b) The coinpetent authority has a period of two months, as from presentation of the properly documented project, to give a final decision thereon;
- (c) Failure to pass down such decision within the said period, gives the interested party the right to proceed immediately with his investment, in accordance with his

project:

(d) During the period of study, the competent authority may authorise the foreign investor, at his request and on his responsability, to carry out any pressing and urgent matters relating to the investment project.

ARTICLE 7

1. The competent authority may only reject investment projects on a preliminary basis if they have been incorrectly organised, and such projects may be corrected or completed in the periods and conditions established.

 Investment projects, including those submitted by nationals of a Member State of the European Community.

may be rejected in the following cases:

- (a) If they have as an objective an activity which in Portugal, albeit only occasionally, is related to the exercise of public authority;
- (b) If, by their nature, terms or conditions of execution, they risk affecting public order, security or health;
- (c) If, directly or indirectly, they relate to the production or trading of arms, ammunition or warlike material;

(d) If they contravene any provision of law.

3. The Parties referred to in Article 2, Nr.1(a) may not present to the competent authority, in their own right or through an intermediary, any investment project which has been rejected.

ARTICLES

1. Investment projects submitted by individuals or bodies who are not resident or do not have head offices in any Member State of the European Community, may be the object of assessment and possible negotiation in the light of their effect on the economy of the country.

2. The above-mentioned assessment will be made with a view to estimating the technical and economic viability of the foreign investment projects and an overall appraisal, bearing in mind the partial or cumulative existence of the

following, amongst other aspects:

(a) Creating of new jobs;

 (b) Positive foreign currency balance that will help the external balance of payments;

- (c) Improvement of national resources, principally by their transformation;
 - (d) Use of national goods and services;
- (c) Contribution towards industrial reconversion projects:
- (f) Localisation, taking into account regional development programmes:
- (g) Production of new goods and services or improvement in the quality of products already manufactured in the country;
 - (h) Introduction of advanced technology;

(i) High added value;

- (j) Amount foreseen for recourse to domestic loans in order to finance business capital:
 - (1) Professional training for Portuguese workers;
 - (m) Reduced industrial pollution.

ARTICLE 9

1. Investors and companies referred to in Article 2, Nr.

1 (b) shall carefully and accurately fulfill the requirements of this Decree-Law and supplementary legislation.

2. Compliance with those requirements, together with the carrying out of foreign investment operations effectively and promptly and the achievement of the objectives of the respective investment projects, are a necessary counterpart to the guarantees conceded.

3. Foreign investments have access to all the incentives

provided for in Portuguese legislation.

4. The parties referred to in Article 2, Nr. 1(a) have the right to transfer abroad, in terms of foreign exchange legislation, the following:

(a) Dividends or distributions of profits, after deduction of legal amortisations and taxes due, and in accordance with their respective holdings in the capital of the company;

(b) The proceeds of sales of their investments, including

any capital gains, after payment of any taxes due;

(c) Any amounts due to them, after deduction of the respective taxes, which are established by acts or contracts and considered to be foreign investment in the terms of this Decree-Law.

ARTICLE 10

Portuguese companies with no foreign capital intending to draw up an agreement or contract with non-resident individuals or bodies that may be covered by Article 2 or 3 of this Decree-Law, must initiate the system of prior declaration and submit it to the competent authority.

ARTICLE 11

Monetary and foreign exchange authorities, banks, notary and registry services, as well as public departments in general, which in their line of duty have received acts or contracts covered by Articles 2 or 3 of this Decree-Law, will suspend processing the petitions until such time as the applicants can prove that they have obtained the competent authority's intervention or decision.

ARTICLE 12

1. Foreign investment operations that do not comply with this Decree-Law and supplementary legislation, shall be ruled ineffective, specifically for the purposes of exchange control.

2. Where the terms of this Decree-Law and supplementary legislation have been infringed upon, the competent authority should instigate enquiries in order to determine facts and responsibilities, and the possible application of

penaltics.

3. As from notification of non-compliance, the competent authority may, as a preventive measure, suspend all or part of the effects of the matter under investigation.

ARTICLE 13

1. The Foreign Investment Institute is the competent authority for the Portuguese mainland.

2. The competent authority is the direct intermediary with the foreign investor and is governed by its own statutes.

3. The competent authority carries out the promotional activities with a view to attracting foreign investments of major interest to the country's economy. It supports and guides investors in the setting-up phase, particularly in their contacts with other official bodies.

4. The competent authority keeps an organised register of Portuguese companies with foreign capital, of foreign investment operations and of holdings by non-residents in

the capital of Portuguese companies.

5. The competent authority shall prepare and publish the technical regulations necessary to put into effect this Decree-Law and supplementary legislation, within a period of 60 days from the date of its publication.

ARTICLE 14

Compliance by the foreign investor with the obligations laid down in this Decree-Law and supplementary legislation is a prior requisite for the carrying out of foreign exchange transactions forming part of the approved project, and for the signing of deeds and the registration of acts of foreign investment.

ARTICLE 15

- 1. The Portuguese State may enter into administrative investment contracts with foreign investors and Portuguese companies with foreign capital, with a view to carrying out undertakings of special interest to the country's economy, in terms to be decreed.
- In undertakings effected contractually, the effective award of benefits will depend on precise and prompt compliance with objectives set by the investors.

ARTICLE 16

The competent authority exercises the powers conferred upon it by Article 6, Nr.4 of Decree-Law Nr. 326/85 of 7 August 1985, in accordance with the rules and regulations laid down in this Decree-Law and specifically, in its Article 8.

ARTICLE 17

1. This Decree-Law and supplementary legislation will be made applicable in the autonomous regions of the Azores and Madeira, allowing for necessary adaptations.

2. The following are hereby revoked: Decree-Laws Nr. 348/77 of 24 August 1977 and Nr. 174/82 of 12 May 1982 and Regulatory Decrees Nrs. 51/77 and 53/77 both of 24 August 1977.

ARTICLE 18

This Decree-Law shall come into effect as from the date of its publication.

Recent Publications

PPD.83(SPEC.) Workshop on industrial co-operation among develop-

ing countries in the field of agricultural machinery and agro-industries. Novi Sad, Yugoslavia, 16-20 May 1988. Report

IPCL.66(SPFC.) Expert group meeting on small- and medium-scale enterprises including co-operatives. Harare, Zimbabwe, 7-19 June 1988. Financing problems of small-scale industries (SSI) in Africa.

IPCT 67(SPEC.) Workshop on biotechnology for Latin America and Caribbean countries ("Biotechnology: An opportunity for Latin America and the Caribbean") Havanz, Cuba, 8-12 February 1988 Report

IPCT.68(SPEC.) Expert group meeting on small- and medium-scale enterprises including co-operatives. Harare, Zimbabwe, 7-10 June 1988. Report

IPCT 69(SPEC.) Phtalic and maleic anhydride syntheses

UNIDO IO R.250 Workshop on hazardous materials waste management, industrial safety in chemical industry and emergency planning Guidelines for governments and industries—A plan of action for UNIDO Vienna, 22-26 June 1987. Waste disposal and water treatment in selected preserved food industries in Egypt.

DP ID SFR.A. 1031 Pilot production of medicines using indigenous raw materials. Viet Nam. Technical report: Processing of selected herbal medicinal preparation, and their formulation into standardized dosage forms.

DP/ID.SER.A 1033 I ow-cost modular prefabricated wooden bridges. Bhuran, Technical report: Timber for the UNIDO bridge

DP/ID SER.A. 1034 Regional network on pesticides for Asia and the Pacific, Indonesia. Technical report: Packaging of pesticide formulation DP/ID SER.A. 1035 Federal Institute of Industrial Research, Industrial Information Centre, Phase II. Nigeria. Technical report: Further development of industrial information services, computerized databases, training in industrial information and co-operative activities DP/ID. SER.A. 1037 Establishment of an electronic service and training centre, Ramnagar, U.P., India Technical report: Printed circuit board design laboratory

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