

Compulsory Licenses for Patents and their Impact on the Exploitation of Technology in Bahrain: Comparative Study

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Abstract

This research paper considers the various laws and regulations together that regulate the area of compulsory licensing of patents in Bahrain. As this is an area of law that has a high degree of regional and international consideration, Bahrain has become a member to different groups, which all have their own rules to regulate how the issuance of compulsory licenses and the processes surrounding them play out. While the overriding law in Bahrain is the final authority in any case where a dispute might arise from a patent holder or potential patent user relating to a compulsory license over a patent issued in Bahrain, by virtue of the various agreements the country has made with other jurisdictions relating to how such matters are regulated, there is an ongoing need to review the up to date status of each provision. This includes Bahrain's membership in the GCC Patent Office as one of six member states, and under the World Trade Organization and World Intellectual Property Organization's member agreements, particularly with regard to Article 5 and the Paris Convention.

This paper seeks to consider all aspects of the regulations at the same time for a comprehensive picture of the commitments the country has made to the region and internationally, for the purpose of being able to see where aspects were included in Bahraini law and where Bahraini law does not particularly align to one or the other group's related agreements.

Purpose: This paper identifies the methods of compulsory licensing of patents used in Bahrain and their importance in the ability to exploit them in industry or trade in order to improve the economic level in the Kingdom.

Research Problem: The paper also seeks to research the problem as to whether the field of mandatory contracts for transfer of technology in Bahrain is regulated and how those regulations contradict the Paris Convention for the Protection of Industrial Property [with particular focus on Article 5]. This leaves scope for the regulator to determine whether the technology transfer contract is legally binding or not.

Methodology: For this research paper, the individual legal points concerning the compulsory licensing of patents as covered under Law No. 1 of 2004 on Patents and Utility Models (Bahrain) and Article 5 in Paris Convention for the Protection of Industrial Property have been analysed in its specific context, and the TRIPS agreement, WTO and WIPO regulations regarding compulsory licenses were reviewed. This analysis was completed with a view to bringing clarification to the intended purpose of discerning differences surrounding the handling of compulsory licenses between Bahrain, and the Paris Convention that dictates the WIPO, to which Bahrain became a member of in 1995.

This research paper will juxtapose the existing Bahraini provisions for compulsory licensing and compare them to the requirements as set out by the Patent Office of the

Cooperation Council for the Arab States of the Gulf (GCC Patent Office). Overall, the three different regulatory mechanisms, which affect upon the commitments Bahrain has made with regard to compulsory licensing through membership in the GCC and through ascension to the Paris Convention under WIPO membership, will be considered. It is the author's intention to show that there is a discrepancy which exists between the rules that each dictates and the way in which Law No. 1 of 2004 plays out in national cases. Law No. 14 of 2006 was also reviewed in full and considered in its context as it changed some of the rules previously set out under Law No. 1 of 2004.

Keywords: Compulsory, Licensing, Disputes, Patent, Paris Convention, WIPO, WTO, TRIPS.

I. Introduction

With regard to compulsory licensing in Bahrain, it is first recognized that Bahrain's requirements, possibilities and obligations for same have been laid out under Law No. 1 of 2004. At the same time, Bahrain has signed up for membership with the Patent Office of the Cooperation Council for the Arab States of the Gulf, commonly referred to as the GCC Patent Office, and also by inclusion in the World Intellectual Property Organization, commonly referred to as WIPO.

Revised legislation was ratified by the Bahraini government to implement the World Trade Organization Trade Related Intellectual Property Rights (WTO/TRIPS) Agreement obligations in 2006 and passed laws to bring the nation's local legislative frameworks into a status that would comply with the Paris Convention commitments. However, when looking at the time periods which are allowed for compulsory licensing, and other points within that sphere, there is a time difference in what is allowed which would seem to make the legislation stand out as different than the commitments which would have led to the country placing same conditions as those stipulated by one or both of the WTO/TRIPS, or the GCC Patent Office.¹

While intellectual property rights are recognized in Bahrain, there are no requirements relating to technology transfer that would force a firm to divulge their technology or to share it under a compulsory licensing to a partner that is located in Bahrain. Firms are also not required to undertake in the development or even in the research of the intellectual property in Bahrain. There is a requirement for the patent holder to actually work the patent, and the patent owner will have three years under Bahraini law to facilitate the working use of the intellectual property contained in the patent. If they do not satisfy that requirement, the patent will become available for compulsory licensing under law. Rights to own a patent can also be removed if annuity fees are not paid within six months of their due dates, and if the patent lapses, the rights that were conferred under it lapse².

Bahrain has also gained from an exception relating to compulsory licensing, as have 155 other countries and territories, which all have national legal provisions relating to exceptions from the standard rules on compulsory licensing that the Paris Convention and WIPO set out. For instance, Bahraini laws state that compulsory licenses can only be granted for public non-commercial uses or in order to remedy a practice that has been declared anti-competitive by a court or other administrative proceeding whenever the patent relates to semiconductor technology³.

¹ - World Trade Organization TRIPS, Paris Convention

² - Law No. 1 of 2004 Bahrain

³ - GCC Patent Office Rules

II. What is Compulsory Licensing of Patents?

TRIPS and Bahraini laws did not give specific definition for the patent and compulsory license. This reflects a lack of agreement on a specific concept of patent. A patent can be defined according to the subjective criterion by focusing on the inventor or invention itself. In terms of the novelty of this invention or the extent of its application in industrial terms or the patent is a provision which gives the patent owner or copyright licenses the ability to use their rights against payment either under regulatory stipulations or as determined within an arbitration or an adjudication. Compulsory licenses allow companies or individuals the ability to use another's intellectual property without consent in exchange for a set fee paid for the license. This is different from the normal rights, which are inferred under patents, in which the intellectual property holder is allowed to enjoy the exclusive rights to the patent and can decline to allow anyone to use the patent that they want. Compulsory licenses are mainly granted either for public health or for other socio-economic needs. The main difference is the grounds upon which a grant for a compulsory license can be gained. While the same factors are established, such as periods, those periods can vary depending upon which law or agreement is being adhered to⁴. While Bahrain has its own regulations in this regard, they have also signed up two other regulatory bodies that regulate compulsory licenses, and there can be scope for discrepancies between the terms of each.

III. Importance of Exploiting Compulsory License Patents

Public health needs are always paramount when a compulsory license is granted, and many come within the health sector in terms of ensuring access to medications that the public are not being served by under the normal patent terms. This could be for reasons of affordability or for inaccessibility in a region where the product is not already available⁵. There are seven main reasons why a compulsory license can be granted:

1. Licensing Refusal. If a patent owner refuses to license their patent over a set amount of time for a reasonable fee offered by the applicant, then a compulsory license can be granted.
2. Public interest. This area is undefined as to what could constitute public interest, which allows each case to be considered on its own merits and in a broad context.
3. Public health and nutrition. This category includes ensuring the affordability and availability of medicines. If prices rise too high, or production falls too low, then the patent can be legally infringed upon through the granting of a compulsory license.
4. Situations of extreme urgency or national emergencies. This would include any type of natural catastrophe, famine, or war. The need to negotiate ahead of time for a voluntary license is waived in these circumstances.
5. Anti-competitive practices. This category is well defined under the TRIPS agreement and allows for the waiving of certain conditions prior to granting the compulsory license, such as prior negotiations.
6. Dependent patents. If a new patent requires the use of an existing patent, then grounds for compulsory licensing can be made.
7. Failing to exploit the patent or working the patent insufficiently. Where most of the regulations state that, a local working of the patent must be made in order for it to not be subject to a compulsory license, the TRIPS agreement seems to dispute this. However, under the Paris

⁴ It is noted that most national laws do not contain a specific definition of patent. It is limited to objective criteria in determining a patent. As novelty and industrial applicability. As well as determining what falls within the scope of the patent. The judiciary tends to do so. In the United States, the judiciary in one of its cases did not tend to give a specific concept of innocence (for example; *Ortmayer vs. McInain* (US, 419 F.2d 141) CARLOS M. CORREA (op cit) p.51.

⁵ Standing Committee on the Law of Patents, https://www.wipo.int/edocs/mdocs/scp/en/scp_30/scp_30_3-main1.pdf

Convention, failing to work a patent in the country it is registered in is specifically listed as grounds for a compulsory license.

IV. Regulating Compulsory Licensing of Patents in Bahrain

Under the World Trade Organization TRIPS agreement, which Bahrain is a party to after accession to the Paris Convention, the only limitations that Bahrain, or any member state would be obliged to follow, relate to the conditions and the procedures that must be followed whenever a compulsory license is granted. The TRIPS agreement refers to different reasons why a compulsory license should be granted but does not limit the reasons in which member states can choose themselves to enforce a compulsory license grant. In this regard, broad discretion is given to countries relating to compulsory licenses, which are for public health needs. The Paris Convention is an extension of these regulations.

Under the GCC Patent Office, which Bahrain is a member of; there are very specific regulations, which must be followed, laid out across different Articles in the agreement. Finally, the Bahraini Law No. 1 of 2004 is the overriding authority law in relation to compulsory licensing of patents in Bahrain. Although the regulations do not contradict one another particularly, they do set out different periods, reasons, and processes that should be followed. Therefore, by choosing any one to follow, it is highly likely that those terms will either be allowed broadly but not defined within the range of patent agreements or will slightly align within those terms. Courts of different GCC states can also take precedent from other courts within member GCC states where possible on matters that relate to all processes surrounding compulsory licenses⁶.

There are no discernible differences between the regulations which are outlined under the Paris Convention for the Protection of Industrial Property, namely within Article 5, and what exists in Law No. 1 of 2004 on Patents and Utility Models in Bahrain. Article 5 states:

“A. (1) Importation by the patentee into the country where the patent has been granted of articles manufactured in any of the countries of the Union shall not entail forfeiture of the patent.

(2) Each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses, which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work.

(3) Forfeiture of the patent shall not be provided for except in cases where the grant of compulsory licenses would not have been sufficient to prevent the said abuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory license.

(4) A compulsory license may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last; it shall be refused if the patentee justifies his inaction by legitimate reasons. Such a compulsory license shall be non-exclusive and shall not be transferable, even in the form of the grant of a sub-license, except with that part of the enterprise or goodwill which exploits such license.

(5) The foregoing provisions shall be applicable, mutatis mutandis, to utility models.”

⁶ - UNCTAD, https://unctad.org/Sections/dite_totip/docs/tot_ip_0021_en.pdf

V. Oversight by the Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC Patent Office).

In terms of patent regulations, which exist from the Cooperation Council for the Arab States of the Gulf, Articles 19 and 22 specifically regulate compulsory license grants relating to top patents that are issues by the GCC patent office. The specific grounds under which a compulsory license can be granted are stipulated within Articles 19 to 21 of that patent regulation. In Article 19, it states that a Board of Directors can grant a compulsory license if the owner never exploited or insufficiently exploited the patented invention, within the meaning stated in Article 13 of the Patent Regulation. In Article 20 and Article 22, reasons for granting compulsory licenses are extended to include states of emergency, dire public necessity, or for a non-commercial use.

The permission of government agencies is covered in Article 20 and Article 23, which clarifies that a government agency located within a Council Member State can request a compulsory license for exploiting a patented invention that would have its basis in the public interest. In those instances, the Board of Directors are allowed to approve the license grant in accordance with the terms of Article 19 and while observing the clauses that were stipulated across Articles 20, 21, and 22 of the Patent Regulation.

Article 21 deals with the grant of compulsory licenses in cases where the patent is dependent. Particularly, this provision stipulates that if one invention must exploit another invention in such a way as to require a major technical advance and a lot of economic importance, the Board of Directors can grant one or both parties compulsory licenses to exploit the other party's invention. This would be unless the two parties came to a mutual agreement to share between them with regulatory intervention. For a compulsory license to be terminated under these regulations, Article 22 specifies that licenses will be cancelled if the beneficiary of the license has not exploited it to a sufficient level in a two year period from the date the license was granted, which could be further renewed for another two years if there is a legitimate reason that can be shown for the delay. It can also be terminated if the dues and amounts to be paid which are stipulated in the bylaws are not paid within three months from their due date. In addition, if a compulsory license beneficiary does not satisfy any of the rest of the terms, which were stipulated when the license was granted, or if the circumstances, which the license was granted in changed, or are unlikely to reoccur, then compulsory licenses can also be terminated.

The GCC made agreements to be members of the following international patent treaties:

- WIPO Paris Convention for the Protection of Industrial Property 1883.
- WIPO Convention Establishing the World Intellectual Property Organization 1967.
- WIPO Patent Law Treaty 2000.
- Patent Cooperation Treaty 1970.
- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994.

Even though the GCC Unified Patent Regulations defined the situations under which a compulsory license can be granted, it still defers to member state laws for the provisions surrounding the compulsory licensing. Although not stated within their bylaws or other regulations, the GCC states that it must gain the consent of all six-member states prior to granting a compulsory license, which they can do in keeping with the law of the member state it is being enacted in. This agreement acts as a safeguard in preventing any abuse of compulsory licensing⁷.

⁷ - Patent litigation in the Gulf Cooperation Council (GCC): overview Bahrain, [https://uk.practicallaw.thomsonreuters.com/7-6215?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-6215?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

VI. Relationship between TRIPS and Bahraini Law

Article 27 (1) of the TRIPS Convention provides that a patent may be granted for any invention either the invention was products or else. In all fields of technology. Rights must be enjoyed Ownership of such inventions without distinction as to the place or technological scope of the invention or whether the products were imported or locally produced. These provisions broaden the scope of the patent as compared to a convention Paris, under which certain issues could come out of the patent, for example 65 countries refused to grant patents for pharmaceutical products States (such as France and Canada) have provisions on compulsory licensing affecting the scope of enjoyment Patent protection with respect to medical matters or, more precisely, to prevent such monopoly of inventions⁸.

However, it cannot be said that the TRIPS Agreement has initiated a unified system that must be followed by all States. WTO members still have the freedom to regulate the protection of inventions the scope of TRIPS depending on the circumstances of each member on the strengths and weaknesses in different areas, the extent to which a patent system affects a member's access to technology.

Therefore, I will refer to different points on TRIPS to see how this affects national law:

In the United States of America, the Patent Commissioner explains that any material Created or installed in nature shall not be patented unless it is given a new form, or quality Composition that does not represent the origin in nature in accordance with applicable law⁹. This means that the Seriousness condition does not mean not Pre-existing, but precedence in the technical sense.

In the European Patent Agreement, when the material found in nature is formed in a new composition, or for the new means by which it is extracted¹⁰. They are new as long as they are not accessible to the public.

Article 1 In Bahrain's patent law, it is no different from the position of European law or US. The expansion of a patent is provided that the TRIPS Agreement does not contain a uniform definition or concept that prevents the expansion or narrowing of a patent.

The separation between the invention and the discovery has become more complicated after the spectacular evolution of the framework Biological. This is because the use of genetic engineering and other techniques led to reproduction and use Material found in natural. A patent for the natural gene is therefore possible. However not in the TRIPS Agreement that this flexibility in granting a patent is therefore necessary developing countries (such as Argentina and Brazil) explicitly stipulated not to grant a patent on Genes without following the TRIPS rules¹¹.

Rights Granted

Article 28 of TRIPs Agreement stipulate that:

1. A patent shall confer on its owner the following exclusive rights:
 - a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing (6) for these purposes that product;
 - b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

According to this Article is refer to the right of import as an exclusive right of the patent holder in its context, it refers to article VI, which expressly provides that the Convention

⁸ - CARLOS .M CORREA, intellectual property rights, Op cit, p. 50

⁹ - Report published in Official Gazette '1077. O.G 24. Of 21 April 1987.

¹⁰ - CARLOS CORREA 'op cit 'pp. 52-53

¹¹ -CAROLOS CORREA' intellectual property and international trade 'op cit 'p. 198.

does not contain what is possible. Its use to deal with the emptying of intellectual property rights means that this issue is left to national laws. According to this issue, the patent holder has no right to prohibit the use or resale of the production that he placed on the market or to license it¹².

When referencing the provisions of national laws we find Bahrain Law It set forth the TRIPS rules on the rights of the inventor in article 11 of Patents and Utility Models.

- a. The name of the inventor shall be mentioned in the patent unless the same requires in writing not to do so.
- b. The patentee is entitled by virtue of the subject patent the right to prohibit others from any of the following actions without prior permission:
 1. Manufacturing, exploiting, using, offering for sale or selling the patented product or importing the same for any of the aforementioned purposes, should the subject patent be a product
 2. Using the manufacturing method, using the product directly made through this way, offering it to sale, selling or importing the same for any of the aforementioned purposes, should the subject patent be a method for manufacturing a product.
 - Extract from the article the following. The article has stipulate on the moral right, even only that mention the name of the inventor. However, the article authorized the waiver of this right in writing. This is a predominance of the idea of a financial right within the scope of a patent, because one of the principles or characteristics of the moral right are that it may not be waived.
 - The text took the idea of ownership, and then used the negative method in determining the rights of the inventor, but it expanded in Determine cases of prohibition to include product. Indeed, the generality of the rule stipulates not to exploit third parties to the invention are sufficient because one of the characteristics of the right of ownership is that it grants the three powers of the owner is an exploitation use and disposal of the property. The authenticity of the property right is one of its qualities and means the commitment of others General negative obligation not to prejudice this right without the consent of the owner.

Findings and Conclusion

Since there are no unified courts which hear GCC related patent cases, it is up to each member state to determine any patent related cases in their own jurisdictions but in line with the stipulations as set under GCC rules. This is a curiosity at times where countries such as Bahrain have laws that stipulate different timeframes for the allowance of a compulsory license, and other difference in common factors. It would seem, then, that the best that any country can do to comply with the GCC patent laws they aligned to would be to align their own national laws to those standards exactly, but this would be hindered by the desire or requirement to do the same for another set of regulations that appear under other agreements. This is the case with the different regulations which were created by the various organizational bodies which Bahrain aligns to in relation to the issuance of compulsory licenses.

It is clear that Bahraini law relating to compulsory licensing of patents used in Bahrain has been updated at times to align with different global membership agreements relating to same. There has not been any case law to find publicly which could be referred to within Bahrain in terms of a patent holder disputing the issuance of a compulsory license, so if one were to be taken as a comparison it would again get interesting. Would that case be from another GCC Patent Office member state, or

¹² - CORNISH ‘W. Experimental use of patented invention in European Community States. IIC. Vol.29 ‘1989 ‘n.7. pp.565-566.

would it come by way of WIPO member states bringing a similar dispute? The answer of course, is that it could align to whichever the Bahraini legislation wanted to. While there are some differences in the ways in which these different member groups determine the time, period allowed and the anticipated work that should be accomplished by a patent holder, including how much is produced and at what cost, the general categories are all present across all member groups.

It could be determined that the World Intellectual Property Organization would have given rise to the GCC Patent Office, and to similar regional groups across the globe. As such, most direction that the GCC would have taken can be seen to be present within the Paris Convention, but some differences do exist. While the GCC Patent Office has stated what steps they would take before issuing a compulsory license, the fact is that they have not issued one yet. In that regard, to see a compulsory license purchase process actually take hold, it would be more beneficial to look on a global context and to the WIPO TRIPS agreement.

Health and technology are clearly the two main areas in which the idea of being forced to use a patent without the permission of the intellectual property holder globally, with the idea of creating affordable and available medications among all developing nation's primary concern. So far there has not been any dispute relating to the issuance of a compulsory license in Bahrain that has taken root in court. Since there are no courts for patent law specifically, any such case would play out in the civil courts of the country. One reason why there might not have been any such disputes is that it appears there is no context under which a dispute against a compulsory license could be issued, i.e., there is no point in the world which makes the demand for a compulsory license by a nation or region invalid.

References

- [1] World Trade Organization TRIPS, Paris Convention
- [2] Law No. 1 of 2004 Bahrain
- [3] GCC Patent Office Rules
- [4] It is noted that most national laws do not contain a specific definition or patent. It is limited to objective criteria in determining a patent. As novelty and industrial applicability. As well as determining what falls within the scope of the patent. The judiciary tends to do so. In the United States, the judiciary in one of its cases did not tend to give a specific concept of innocence (for example; *Ortmayer vs Mclain* US 419, 141) CARLOS M. CORREA 'op cit' p.51.
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