
The Impact of Breach of Confidentiality during the Negotiating Phases on the Contract Terms in the International Trade Contracts

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Abstract

this research dealt with the issue of The impact of breach of confidentiality during the negotiating phases on the contract terms, where the negotiating were defined, its types, and shedding the lights on the confidentiality in the contracting in the first part of the paper, then we talked about the civil responsibility upon the breach of confidentiality in the second part of the paper, statement of the problem is represented in explaining the legal items related to the preliminary negotiating subsequent to the contracting in the international agreements and conventions from one hand , and for the impact of breach of confidentiality during the negotiating phases on the contract terms from the other hand, the researcher followed the analytical descriptive and the comparative methods in order to answer the research statement of the problem, findings showed that we can use the tort liability to claim compensations of any negotiating party due to the breach of confidentiality by the other party.

Keywords: Legal redress-compensation, pre-negotiating, confidentiality, contractual liability.

1. Introduction

As its known, the contract is the document that determines the rights and responsibilities in all of the legislations and items of civil law, and these items, for certain, include the contraction process for the agreement, negotiating and performance at the same time.

Since trade is the major industry in most of the world countries socially, economically and politically, trade contracts were in need for coping with the contemporary changes in terms of providing rules for traders like those terms or acts related to providing the safe legal environment which result in flexible trade culture or place for traders, as a result international trade contracts appeared there.

Before making or agreeing on the contract through the negotiating on the contract at which all the related parties agree on some terms of the contract or few conditions that will regulate the business in order to attain every parties interest, so that the agreed upon contract will be the result of such negotiating process upon that, and this process wasn't left for them but certain conditions must be adhered to socially confidentiality issue.

Based upon the review of the Jordanian law items, there is no items were found related to the issue pre-negotiating phase, and this the case also in Vienna conviction, which is the basis for the international transactions, there wasn't also any indication for the negotiating process except the case included in item 8.

Upon the past words, this paper will deal with the impact of breach of confidentiality during the negotiating phases on the contract terms, whether the contract was agreed upon or not, through two subjects covered here: the first related to the nature of the negotiating and the second specified for the civil responsibility resulting from the breach of confidentiality.

2. The Study Significance

The research significance is reflected in discussing the nature of the negotiating process on the contract terms and in discussing the impact of breach of confidentiality during the negotiating phases on the contract terms as most of the national law items ignored this term even the international agreements and convictions, even there wasn't any indication for the issue of the pre-negotiating that precedes the contraction process. So, the study significance is reflected in the following:

The study significance is made up of two parts:

2.1 First: Theoretically

As its hoped, that this study will bridge the gap in this field based on the results and recommendations made here by answering the all of the questions made about the related laws according to the items indicated from one side, and in dealing with the most sensitive phase that precedes any contraction process through negotiating from the other, hence any breach of its core items will result in rights lose.

2.2 Second: practically

Practically, it's of great importance in terms of all of related parties of the international trade contracts from one side, and in any benefit resulting for any contract party from the other side, as he/she knows his rights and responsibilities which will lead to less breaches and arbitrations resulting from the breaches of the contract negotiating by expressing the paper results and recommendations considering the popularity of such contracts around the world.

3. Objectives

The aim of this research is shedding the lights on the impact of breach of confidentiality during the negotiating phases on the contract terms as follows:

- 1-the definition of negotiating.
- 2-defining term of confidentiality and its types.
- 3- defining types of negotiating.
- 4- shedding the lights on the impact of breach of confidentiality during the negotiating phases on the contract terms.
- 5- determining the legal gap about this issue.

3.1 Statement Pf the Problem:

The problem statement is represented by determining the legal gap about regulating the items of the pre-negotiating period of the international trade contracts in the international agreements and convictions and shedding the lights of the gap of this issue in the national legislations, and knowing the consequences of the impact of breach of confidentiality during the negotiating phases on the contract terms, so the problem is embodied in the following questions:

- 1-definition of confidentiality?
- 2-whats meant by negotiating?
- 3-what are the legislations related to the negotiating of the contract terms?
- 4-did the international agreements and convictions had items related to negotiating the contract terms.
- 5-whats the type of responsibility resulting from the breach of confidentiality in the contract negotiating phase?

3.2 Method

1-the descriptive method: where the descriptive method will be followed in order to answer the problem statement by describing it.

2-the analytical method:

This method will be followed in order to answer all of the questions related to the statement of problem by analyzing the legal texts related to the study subject and reviewing the legislative and jurisprudential views about this case.

3-the comparative method:

Here the comparative method will be used in order to reviewing the international laws and convictions as necessary.

The subject will be as follows:

The first chapter: the nature of negotiations.

The first part: defining negotiations.

The second part: confidentiality term as conditional in negotiations.

The second chapter: the civil responsibility upon the breach of confidentiality.

The first part: tort liability.

The second part: contractual liability.

3.2.1 The First Chapter: The Nature of Negotiations

The international trade contracts had spread in many fields recently due to its characters or traits for the contract parties, countries, merchants.... based upon the huge amounts of such contracts, there was a need for negotiations to be launched before making such contracts known as the negotiations phase, so we'll deal with it in this part of the research by explaining its nature and types and explaining the confidentiality term in negotiations in the second part too.

3.2.2 The First Part: Defining Negotiations

Jurisprudence defined negotiations as: a group of suggestions that the parties reach or agree upon in the future contract, equally, in order to achieve the common interest for the related parties”, other defined it as” the phase that precedes contracting, with its processes, that are embodied by the negotiations, discussions, and different view, that lead to an agreement which achieves their objectives through specifying rights and responsibilities.

So, in the context of the international selling contract, negotiations about the terms of the contract comes in many different types; like the handing of goods, price negotiations, the product quality in the contract.

There is no doubt that negotiations are a very major part of the contracting process, through it the legal, financial and technical points are discussed in which every related party will know his rights and responsibilities with the parties' capabilities also, and agree upon the most important contract issues.

Other jurists considered the negotiations as a protective procedure, as it aims to agree upon the most important issues of the contract to avoid any future conflict when implementing the contract, so that the contract will be definite and clear for all parties.

Others regarded the negotiations as a solution, so that when the final contract was made and any conflict had happened, the parties can review the negotiations made in order to settle the conflict.

3.3 The Negotiations Include Many Elements Such As

1-specifying needs: this element is represented by every party definition of his needs and objectives of this contract in order to be discussed, reaching a compromise for the parties' interests, so that any party can also consult an expert from more information.

2-legal conditions/terms: this element is embodied by determining the legal terms by the related parties through negotiating specially that related to the place of the act, the merchandise, specifications and price.

3-receiving contracts: this element is when one party, the buyer often, specifies his needs and merchandise specifications where the seller will present his offer for him according to the terms and specifications and mutual interest.

Hence, the contract negotiating is regarded as one of the most important types of negotiations as the jurisprudence defined it as “any contract including a group of additional responsibilities binding for the two parties in order to reach the final contract”.

From the past words, we can infer that the contractual negotiating is similar to the promise to contract, the Jordanian jurisprudent defined it as: the promise of both parties or one of them to make a contract in the future”.as a result there is a resemblance between the two types of contracts, as they are made upon the intention of two parties for a work to do in the future, while they differ in terms of the first as if he breaches his obligation and the other party want arbitration, the act made by the court of law will be regarded as a final contract

in the contractual negotiation of the international trade contract, if some of the parties breach some of his liabilities in the final contract, then the contractual responsibility will be applied here so that the court act won't be a substitute for the final contract.

Upon that, we realize that there is a gap in the Jordanian legislations in dealing with the issue of the negotiating as there is no specific articles at this subject, but, as in the Vienna convention for international transactions, there was no indication for it except in the explanation subject, so any vagueness or trouble, the reference will be what was agreed upon in the negotiating phase.

3.4 The Second Part: Confidentiality Term as Conditional In Negotiations.

The international institute for the unification of private law (Rome institute) in 1994 indicated in article (2),item (16) that the negotiating parties must adhere to confidentiality item about the international trade contracts during the negotiating phase, based upon the fact that the negotiating process is of most importance for the economic and intellectual issues, as most of the international contracts are of major economic value, as indicated in the article:” any participating party in the negotiating process, who got any secret information, will abide not to say, inform, publish any of it ,so that the contract sound and no breach was made ,otherwise compensation”.

With regard to the Jordanian laws, like the Jordanian legislations, the researcher finds that Jordanian legislator didn't deal with the confidentiality term during the negotiating phase even the pre-negotiating of the contract wasn't also, and the same can be said about it for the Vienna convention which is the corner stone for the international transactions because no indication was made for this issue in the international transactions law, therefore the researcher sees that even if there was no indication for such case, it doesn't mean non adherence to it based on the goodwill principle in transactions as its indicated in the national legislations which is what Vienna convict assured in 7th article of the convention as follows: internationality will be regarded in explaining this agreement so that there will be unified application of it and goodwill in international trade at the same time, other unsettled issues will be dealt with according to general principles of the convention”.

So, if we reviewed the principles accepted by the international institute for the unification of private law (Rome institute) that the negotiating parties must adhere to confidentiality item about the international trade contracts during the negotiating phase as a basic and major item here.

Other jurisprudents believed that the negotiating parties must adhere to confidentiality item about the international trade contracts during the negotiating phase and in terms of the technical issues included. Others said that the related parties must adhere to goodwill during the negotiating phase, and respecting it so that no party has the right to hurt the other party based on this principle in this most important phase.

Upon that, we can say that the secret or the confidentiality that must be kept during the negotiating phase is any information that must be held and not told or informed to any other party as this may cause harm or hurt the other party, so in terms of definition, it can be any type of information known by limited number of people as the are interests related to it so it must be kept held.

The researcher inferred that the Jordanian legislator didn't have any articles related to the pre-negotiating in terms of confidentiality where we can rely on in order to deal with this issue during the negotiating of the contracts.

Confidentiality doesn't mean every piece of information known or informed but certain types of information that have some characteristics like secrecy, where there are limited number of people that could get this information and during the negotiating phase here, the other thing is that it has an economic value, so there are economic benefits gained from it regardless of its quantity or value as if its financial that can increase profits or limit losses or attract investors to the company away from the rivals. Here we can infer that confidentiality is one of the most important commitment of the negotiating parties regardless of the approval of the final draft of the contract or not, so its made by keeping the information safe during this phase, an issue which wasn't covered by the legislations except in the confidentiality in the labor law, where the law assisted on keeping the confidentiality by the employees, hence with the lack of such articles for this condition, adherence to it must be assured based on the principle of Goodwill adopted in the contracts law.

3.5 The First Part: Tort Liability

The Jordanian law stated "every tort will be handled by the person responsible even if it's not known".

So, every injuring part will be liable for any compensation for the harm being done by him under the condition of full responsibility about the harm or damage taken place so that the event will have the following conditions:

3.5.1 First: tort: tort is defined as" any civil responsibility of harm even if its not on purpose, and tort means any type of word used here to express harm or injury like illegal labor or act, so that any tort will include any act or leave causes harm to the others".

So, tort, as in our paper, is limited to the issue of confidentiality breach of the pre-negotiating phase of the contract, as it is seen earlier, so that it includes any act that leads to harm or tort for the owner, so that the perpetrator will be liable of his act here.

3.5.2 Second: injury: jurisprudence defined injury as "any physical or corporate harm, so tort isn't enough to make the person liable but there must a proof of such physical or corporate harm".

With regard to the compensation, the arbitral tribunal of Jordan stated that compensation doesn't include the physical only but the literature or corporate injuries also, so the Jordanian legislator didn't indicate the corporate or moral compensation explicitly".

3.5.3 Third: causality: no doubt that causality or reciprocity is a major condition for any injury, where the injury must be present due to the tort which is known as causality and must be directly related to the injury resulting from the act of tortfeasor without any foreign or indirect act here, but if something out or foreign was here, this case will be regarded as exemption or exclusion from liability"and that's what was indicated by the Jordanian legislator" if the person liable proofed that the injury was a result of a pandemic, force majeure, unexpected act, unforeseen act, or tort will be an execution of liability unless the law stated otherwise".

Upon that, the injured party of the confidentiality breach will be capable of suing the tort in the case of any harm or injury happened to him, his products, or anything else whether it was physical or corporate and must be directly related to the breach action.

If the person breached this term or condition, as in the French legislation, then the owner has the right to sue the tort clamming for compensation with a special indication for French law doesn't consider the act on purpose only, so as the French jurisprudent, GHESTIN, says that the breach is only for suing or claiming compensation from the tort.

Worth mentioning that Vienna convict didn't indicate the right for suing or claiming compensation from the tort in the case of breach in the negotiating phase, so its suitable to have such case in the national legislations here as follows" if there were no such items, then the international private law will be considered here. Hence, the responsibility about the tort in order to claim compensation for the breach of confidentiality according to the applicable law here which is the international private law for the injured party.

3.6 The Second Part: Contractual Liability

According to the jurisprudential views that the negotiating parties are responsible about any breach during this phase in terms of any breach or confidentiality breach before agreeing upon the contract, so if any party didn't fulfil or withdrew from the negotiating without any reason or made any breach, then the contractual liability principle will be implemented for the tortfeasors here.

The researcher believes that contractual responsibility is made up of the same elements of the tort responsibility except the tort that is the counterpart of the contractual responsibility or the contract breach which is the liability of the other part of fulfilling his responsibility in the contract.

Based upon the past words, the researcher doesn't support the view that says that contractual responsibility if confidentiality was breached, as there is no relationship that goes between the contractors as long as this case happens in the negotiating phase which means that it's establishing contract and not a final one here.

4. Conclusion

The researcher concluded the following in this subject:

Findings

- [1] 1-most of the national legislations didn't deal with the issue of terms negotiating of the contract as its in Vienna convention for 1988, but the international institute for the unification of private law (Rome institute) in 1994, made the negotiating parties, as in article (2), liable about confidentiality.
- [2] 2-negotiating is defined as a group of suggestions made by the parties in order to find a solution for any future contract, which is made collectively and aims to achieve the mutual interests.
- [3] 3-contractual negotiating is regarded as of most important negotiating types where jurisprudence regarded it as a "contract including a group of liabilities that are binding for both parties till reaching the final draft of the contract.
- [4] 4-the issue of the breach of confidentiality is a controversial issue.
- [5] 5-any party in the contract can sue the other party for tort in order to be compensated as confidentiality is of most important in the contract negotiating phase.
- [6] the negotiating parties must adhere to goodwill by keeping confidentiality of top priority here in this phase.

Recommendations

- [1] 1-the researcher recommends of putting down articles that organize the issue of pre-negotiations in any contracting process here due to its important role in keeping rights and responsibilities.
- [2] 2-making amendments for Vienna convention for the international trade contracts by putting forward articles that organize the pre-negotiations phase specially for the confidentiality element here.
- [3] 3-adherence to goodwill for the people related to the contracting industry by adherence to the general principles found for organizing transactions.

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