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KNOW-HOW AGREEMENTS IN HUNGARIAN LAW

1. The protection of know-how is most effectively ensured today by the agreement concluded between the transferor and the recipient of the know-how. The parties settle and regulate the rights and obligations related to the transfer of know-how in the agreement, thus enabling the confidentiality of the know-how to be preserved.

However, the know-how agreement is not governed by the law of any country on its own. Although previously Hungary was the only one that provided legal protection of know-how in a specific form within the Civil Code, yet the elaboration, legal qualification and regulation of the know-how agreement is still a task to be solved. The need for a legal settlement of contractual relations as soon as possible can hardly be disputed, as this would provide a solution to many of the problems that currently exist in practice. This would be particularly important in the field of international turnover of know-how, as the international protection of know-how is also unsettled, so legal protection can be provided primarily on the basis of an agreement.

The essence of a know-how agreement must be seen in the fact that the holder of the know-how makes his contractual partner part of his knowledge, that is the transferor of the know-how makes certain knowledge available to the recipient of the know-how and in return the recipient pays a specified consideration.

The creator of the know-how has the general right to utilize and authorize all uses of the know-how.

A common feature of an agreement for the transfer or utilization of know-how is the entitlement on the part of the acquirer or utiliser.¹

The legal classification of the legal relations and agreements established in this way is a much-debated issue in both domestic and foreign literature and theory. Before going into this in detail, it is important to note that problems with the classification of the agreement can only be examined within the legal system of a given country, as the law applicable to matters not covered by the agreement means different in a given legal system.

Therefore, when we examine the legal classification of a know-how agreement, it is done on the basis of Hungarian law.

2. Given that a know-how agreement is not a named agreement, it must be decided which of the traditional named agreement types can best be classified as a know-how agreement, or whether there is a named agreement at all which, in its entirety, would be capable of making its provisions fully applicable to know-how agreements.²

We come across a wide variety of views in this area.

a. Some want to apply the rules of sales and purchase to know-how agreement.

Sales and purchase agreements are agreements for the supply of a matter. In order for know-how as an intellectual creation to be classified as a matter and thus to be the subject of an agreement, it must manifest itself in some form (technical documentation, training, etc.).

The know-how service may be a one-off transfer of some documentation, but it is not at all typical, in most cases the provision of experience happens over a longer period of time, and may even stipulate the achievement of a specific technical and economic result in the agreement.

On the other hand, in addition to the rules of sales and purchase, there are so many special issues in the case of a know-how agreement that outgrow the framework of a traditional sales and purchase agreement and at the same time exclude its sole applicability.

In the case of sales and purchase, the buyer acquires property, which he is then free to dispose of.³

On the other hand, when transferring know-how, provisions should be made for the manner and extent of confidentiality, the legal consequences applicable in the event of a breach thereof, whether the recipient acquires an exclusive right to use it or not, how the issue of further development of the transferred knowledge develops, etc.

It follows that, in the context of a sales and purchase agreement, a know-how agreement is inconceivable and cannot in itself be applied to legal relationships arising from the provision of know-how.

b. Other views suggest that know-how agreements should be subject to contracting agreements.

In Hungarian law, a contracting agreement is an obligation to achieve a certain result. The contractor undertakes to create a result that can be achieved with an activity for a fee.⁴ This is closer to a know-how agreement in that it presupposes a longer-term legal relationship in which the activity is carried out. However, the transfer of know-how is most often not aimed at creating results, or at least not solely on the basis of know-how, but together with the use of additional knowledge and experience.

There may also be a problem with the application of detailed arrangements. It is difficult to reconcile with the nature of the know-how, for example, the unrestricted procedural rights of the customer, the use of subcontractors, the application of the rules of impossibility, etc.

Thus, the exclusive application of the rules of a contracting agreement to know-how agreements is also unfounded.

c. Other views try to determine the similarity of a know-how agreement to a sales and purchase or contracting as whether the know-how service is *dare* or *facere*. In comparison, in the case of a *dare*-type service, the rules of sales and purchase and, in the case of a *facere*-type service, the rules of contracting are considered applicable.

In that regard, it must be stated that, in the case of know-how, it is very difficult to distinguish in which category the service falls in that sense, since, in general, it is both a *dare* and a *facere* service at the same time.

In most cases, an agreement contains a whole complex of services. These include those that they make their mark on the whole agreement, in which the purpose of the agreement is actually fulfilled (main services) and some that are inherent in their reinforcement (ancillary services).

It may still be possible to determine whether the main service is of a *dare* or *facere* nature, but on this basis the classification into agreement types cannot be decided. Several types of *dare* services are known: they can be permanent (agreements for the transfer of ownership) or temporary (obligations to use) and the transfer of the right is also included in this category.

The *facere* service can also consist of creating a result (e.g. a business), but it can also be a duty of care (e.g. an order).

The distinction between *dare* and *facere* services has only a dogmatic significance (these concepts are not included in the Civil Code) and, as we have seen, it is not possible to decide on this basis which agreement type the know-how agreement could be classified according to the nature of the service.

(At most, it may be capable of distinguishing between know-how and engineering services, provided that engineering services are purely *facere* and the know-how services are considered to be mixed *dare* and *facere* services.)

d. It should be noted that there are also views in the literature which, given that the transfer of know-how is mostly in the context of a lasting legal relationship, consider the provisions of the lease or the sub-lease to be applicable.

Lease and sub-lease are related institutions, some legal systems do not even differentiate between them, while in other cases (e.g. Civil Code) these are regulated within the framework of the chapter on leasing by special leasing provisions.

The Hungarian Civil Code regulates the sub-lease in a separate chapter, but it stipulates that the rules of the lease must be properly applied in non-regulated matters.

What is certain is that the sub-lease – as well as the transfer of know-how – is realized in a permanent legal relationship, however, taking into account the Hungarian regulations, we do not consider it appropriate to apply the rules of sub-lease in the case of know-how agreements at all.

The starting point should be that the concept of sub-lease refers primarily to agricultural land as the subject-matter of the agreement and it mentions only after this that it may also be a matter of other benefits, and consequently know-how.⁵

But it is clear from the whole regulation that the provisions on the sub-lease of agricultural properties in the Civil Code are primary, so this is the basis of the regulation. The know-how in this case should therefore be treated as a matter, although we have already mentioned in terms of sales and purchase that the transfer of know-how often involves the performance of an activity.

And if we go back to the rules of lease agreement, the problem is that the detailed arrangements are contrary to the nature of the know-how (e.g. the method of payment of the consideration, the lessor's liability, the rules for the termination of the lease agreement, etc.)

e. Finally, we should mention the views that identify a know-how agreement with an industrial property license agreement.

Undoubtedly, of the types of agreements mentioned so far, the license agreement is most closely related to the know-how agreement. Also, in everyday usage, the transfer of technical know-how for use is called a license.

Endre Lontai – whose name is linked to comprehensive legal elaboration and analysis of license agreements – starting from the economic-legal function of license agreements, considers it a common and decisive criterion in the two agreements that both of them transmit certain valuable technical information. A secondary role is played by the legal methods and institutions that ensure the possibility of transfer, the right of disposal in the position of the transferor. These secondary elements may at most be varied, may justify the formulation of agreement subtypes, but shall not affect the priority of the common uniform elements.⁶

In our view, that reasoning cannot be accepted. The essence of a license agreement is precisely that the licensor transfers all or a limited number of his exclusive rights under the patent. In the case of a know-how agreement, it is not a transfer of rights, but transfer of technical, economic organizational, etc. knowledge not protected by protection rights. It is from this fundamental difference that further peculiarities and differences arise.

Overlaps can, of course, occur, and it has even become common practice to require the patentee to behave in a positive way in addition to the transfer of rights. In this case, it is a mixed agreement. However, this does not preclude us from talking about a separate know-how agreement in cases where the transfer of knowledge and experience that is not protected by protection rights takes place separately from the license agreement.

In our view, in the absence of absolute protection, the rules on patent license agreement do not apply to know-how agreements.

3. In the course of the analysis and legal qualification of know-how agreements, it is necessary to start primarily from the economic and social reality, on the basis of which the transfer and use of technical and economic knowledge, experience and information takes place.

The aim of the know-how agreements is therefore to ensure the transfer of the mentioned knowledge and experience within a regulated framework and to ensure their use.

In the course of this activity, a specific legal relationship develops between the parties, which may involve long-term cooperation, and which requires the transferor and transferee of the know-how to provide reciprocal, complex services.

At the current level of scientific and technical development, it is no longer conceivable that the acquired knowledge and experience should be transferred exclusively within the framework of traditional forms of protection, but beyond them it should be possible to transfer knowledge and experience more widely.

Thus, the emergence of know-how as a new institution gave rise to a different legal relationship, different from the traditional one, created during its transfer and use. As we have seen, the problems of these legal relationships cannot be solved by applying traditional legal categories.

None of the types of agreements described can be applied in full to know-how agreements, and the general rules of the Civil Code on agreements are not, or not always, sufficient to provide an appropriate legal solution for know-how legal relationships with a number of special features, in certain matters not covered by the agreement.

It follows that a know-how agreement should be considered as a separate *sui generis* agreement and that a set of rules for this type of agreement should be developed.⁷

The growing turnover of know-how in economic life, that is the needs of practice, inevitably necessitate the development of a new type of agreement, instead of the use of background law material based on analogous provisions of other agreements and the general rules of agreements.

In the following, we will try to briefly summarize the specific features that characterize know-how agreements.

(Of course, this will only be about the so-called “clean” know-how agreement, including a legal relationship in which the transfer of know-how is the main subject of the agreement.)

a. Above all, the agreement must specify the subject of the agreement, which is what kind of knowledge and experience will be transferred. This can be the handing over of a technical documentation, training, assistance in commissioning, etc. If the knowledge transferred, or part of it, is protected by a traditional industrial property right, this must be indicated.

b. The obligations of the transferor of know-how must be set out in detail.

In particular, provisions should be made for:

- the schedule for the transfer of knowledge and experience,
- to what extent it authorizes the transferee of the know-how to use it,
- to which areas the restriction of the usage permission applies,
- how the transferor’s warranty develops for the usability of the transferred material on the one hand and against any third-party rights on the other hand,
- whether and to what extent the transferor may be bound by obligation of confidentiality.

c. Obligations of the transferee of the know-how:

– payment of the consideration for the knowledge transferred. The method of payment must also be recorded, because many variations are conceivable (lump sum payment, payment in instalments, payment as a percentage of the amount received for the product produced, etc.)

– must keep the knowledge acquired secret. It must be determined to which part of the know-how the confidentiality applies,

– must undertake to treat the information received as confidential and to use it only for the purposes specified in the agreement,

– is obliged to utilize the acquired know-how to an appropriate extent and to a high standard,

– may not grant a right of use (license) without the consent of the transferor.

d. The transferee of the know-how is entitled to further develop the acquired knowledge but is obliged to inform the transferor thereof. The transferee is obliged to transfer his own development results to the transferor of know-how for a certain fee.

e. Performance is contractual if the transferor of know-how provides all the documentation and knowledge necessary which are necessary for the performance of the subject of the agreement.

f. During the performance of the agreement, the parties have an increased obligation to cooperate.⁸

g. Both contracting parties shall take special care to ensure that the transferred know-how is not made available to third parties.

h. Disclosure of the transferred know-how may lead to the termination of the transferee’s obligation to pay fees.

i. The duration of the agreement should be specified, and the issues of termination should be regulated accordingly.

j. In the event of termination of the agreement, it may be regulated that certain clauses (e.g. confidentiality obligation) remain in force after the termination of the agreement, or that the transferee continues to use the knowledge obtained for the purpose stipulated in the agreement.

By listing the dispositive rules described here, which are by no means exhaustive, we only wanted to show what (possibly how) it is appropriate to regulate in know-how agreements. The development of a complete set of rules for this type of agreement will, of course, require further in-depth, thorough legal analysis, taking into account the results of practice as well.

Only then can we take a position on how to incorporate an independent, named know-how agreement into our agreement system.

During the codification, the published concept and regulatory topics of the new Civil Code support the proposal according to which a named type of agreement formed from the generalizable rules of license agreements contained in separate laws must be included in the new Civil Code as a license agreement. In the end, this proposal was not included in the new Civil Code.

Recognition of know-how agreements as a separate type of agreement is therefore not yet on the agenda for codification work.

However, the needs of EU regulation, as well as practice, point in the direction that this important issue will be raised again in the future and the debate on the regulation of know-how agreements may come to the centre of attention.

¹ Görög Márta: A know-how jogi védelmének alapvető kérdései HVG ORAC, Bp., 2012. 126. p.

² Megjegyezzük, hogy az Iparjogvédelem területén felhasználható szerződéscsoportok néhány sajátos vonást mutatnak. Ilyen pl: a szerződések tárgyának immateriális jellege, a magas fokú kockázat, valamint a szerződések bizalmi jellege.

³ Lásd 2013. évi V. törvény a Polgári Törvénykönyvről 6. 215. §-át

⁴ 2013. évi V. törvény a Polgári Törvénykönyvről 6. 238. §

⁵ 2013. évi V. törvény a Polgári Törvénykönyvről 6. 349. §.

⁶ Lontai Endre: A szellemi alkotások joga Tankönyv Kiadó, Budapest 1987. 213. p.

⁷ Csészy György: A szellemi alkotások joga Novotni Kiadó Miskolc, 2007. 253. p.

⁸ Ennek fontosságát külön is kiemeli Tattay Levente könyvében. Tattay Levente –Pintz György-Pogácsás Anett: Szellemi alkotások joga, Szent István társulat Budapest 2011. 369. p.

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КОМУ ВЫГОДНА КОРРУПЦИЯ В СУДАХ?

Общеизвестно, что коррупция исторически возникла с самого зарождения государства и его органов в любой стране мира. И борьба с коррупцией так же имеет тысячелетнюю историю. Однако наиболее тяжелые последствия от коррупции мы имеем именно в судебной системе, поскольку от ее функционирования зависят правопорядок и законность в государстве и обществе. Без справедливого и объективного суда невозможно существование демократического, правового и социального государства.

При этом под коррупцией мы понимаем прежде всего подкуп. Для наиболее полного представления, что такое коррупция, необходимо обратить внимание на три аспекта. Во-первых, коррупция в переводе с латинского «corruption» – подкуп. Именно подкуп – сущностная основа данного явления. Во-вторых, коррупция – это преступная деятельность в сфере политики или государственного управления, заключающаяся в использовании должностными лицами доверенных им прав и властных возможностей для личного обогащения. В третьих, коррупция – это попытка получения прямо или через посредников правительственным чиновником или лицом, исполняющим публичные функции, любых предметов денежной стоимости, а также другой выгоды – подарки, услуги, обещания, преимущества для себя, других лиц или организаций, обмен на

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