

# EVOLUTION OF PRIVATE LAW – NEW CHALLENGES

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(Eds.)



# EVOLUTION OF PRIVATE LAW - NEW CHALLENGES

edited by

Piotr Pinior, Wojciech Wyrzykowski, Mateusz Żaba

*Abstract*  
General Aspect of Registration Obligations of Trading Companies in the Slovak Republic  
Registration of Companies in the Slovak Republic  
Agreement on Transfer of Terms of Business  
Corporate Creditors  
Katoiwice 2020

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## 2.

*Nataliia Bashuryn*

# Contractual Regulation of Scientific and Technical Information Relations<sup>1</sup>

### 1. Preliminary Remarks

Today, in Ukrainian legal doctrine, there is a lack of uniformity of approaches to the definition of the legal nature and place of treaties that regulate the use of scientific and technical information. Despite the existence of scientific works relating to contracts in the field of information, the provision of information services, as well as contractual relations in the sphere of scientific and technological activities, a general system of treaties regulating the use of scientific and technical information is poorly researched. There are no systems of such treaties in science, and there are many unexplored issues arising from the contractual use of scientific and technical information.

That is why this article is devoted to the compilation and development of a system of treaties in the field of the use of scientific and technical information, identification of their legal nature and characteristics, definition of their content and substantive conditions, as well as identification of possible areas for improvement of the Ukrainian legislative regulation in that area.

With regard to the conditions for authorizing the use of the object of the information right (both public information and restricted information), O. Koshanovska notes that they may be defined by an informa-

<sup>1</sup> This publication was written in the framework of Jean Monnet Module "Commercial Law of the European Union" and financed with the support of the European Union" (the Erasmus+ Programme of the European Union).

tion treaty, which exists in compliance with the requirements of the Civil Code of Ukraine and other laws<sup>2</sup>. Our investigation is based on these principles, and we will therefore consider a system of treaties containing conditions for the use of scientific and technical information.

We will then try to systematize these treaties in a certain way by analyzing their legal nature and particularities, identifying or grouping, as appropriate, a number of treaties in that field. It needs to be stated that we support the position of O. Kodynets that, as a result of human intellectual activity, information can exist both as an independent object and in the form of the results of creative activity, protected by a system of intellectual property rights and legislation<sup>3</sup>.

Let us now move on to a special law. Art. 16 of the Law of Ukraine "On scientific and technical information" (STI) regulates the relations between producers and consumers of scientific and technical information. In particular, it states that relations between producers (enterprises, institutions, organizations) and consumers of scientific and technological information should be based on contracts (treaties) and other forms of transactions provided for in the legislation in force.

On the basis of a general theoretical framework, the following view can be made on the place of the treaties: type –service contracts; kind – information service contracts; a subspecies – a scientific and technical information contract and a patent search treaty. We assess the fairness and validity of this approach through an analysis of the legal nature and characteristics of given contractual arrangements.

## 2. Treaty on the Provision of Scientific and Technical Information

Let us start with the characteristics of the treaty on the provision of scientific and technical information. We will analyze it through its ba-

<sup>2</sup> Kokhanovska O., *Private legal understanding of information relations in Ukraine*, "Journal of Civil Law", 2017, Op. 22, pp. 128-133. [Electronic Resource] [http://nbuv.gov.ua/UJRN/Chac\\_2017\\_2228](http://nbuv.gov.ua/UJRN/Chac_2017_2228) (as of 2.11.2020), p. 130.

<sup>3</sup> Kodynets O., *Information as an object of civil rights: concept, methodology, legal nature*, "The law of Ukraine", 2015, no. 1, pp. 107-115.

sic and specific features. As the scientific research of V. Luts shows, the systematization (grouping) of treaties is carried out on the basis of: the existence or absence of a contract for reciprocal satisfaction (paid and unpaid treaties), the distribution of rights and obligations between the parties (unilateral and bilateral), depending on a time when the treaty is considered concluded (real and consensual)<sup>4</sup>. The treaty must therefore be first examined in the light of these basic features and then its specific information features.

If there is a commercial component, a contract is concluded with a determined price of information products and services. This conclusion is supported by the assertion of O. Kohanovska that a contract on the provision of information services is generally reimbursable<sup>5</sup>. Thus, we conclude that the contract is paid, its essential condition is the price, which includes the amount and manner of payment of the amount to be paid, and the period or duration of such payment.

The treaty is bilateral in terms of the payment, given that each party has both a duty and a right of claim at the same time. The contract is also considered concluded at the time when the parties agreed on the substantial terms.

Any natural or legal person may be a party to the contract. It is typically executed by, on the one hand, a legal entity, a specialized body of scientific and technical information that provides information retrieval services or a person who carries out scientific information activities and also provides related services and, on the other hand, a customer that is normally a scientific institution or a natural person who is a developer of a particular scientific and technical issue.

The treaty should therefore be made in writing, although, as regards the modern stage of development, it may also be in "the electronic form". Although pursuant to Art. 1 of the Civil Code of Ukraine, the electronic form is equated with the written form, the Law of Ukraine "On elec-

<sup>4</sup> Luts V., *Contracts in entrepreneurial activity: textbook*, Yurinkom Inter, 2008, p. 576. [Electronic Resource]: <https://yurinkom.com/files/content/Contrakty.pdf>, p. 55 (as of 2.11.2020).

<sup>5</sup> Kohanovska O., *Information in contractual relations*. The law of Ukraine, 2012, no. 9, pp. 85-95.

tronic commerce<sup>6</sup>” describes electronic transactions separately. Without going into the details concerning the existence or usefulness of such form of transaction, it should be pointed out that the provisions on electronic transactions laid down in the Law of Ukraine “On electronic commerce<sup>6</sup>” should be taken into account during the conclusion of a contract on the provision of scientific and technical information.

Account should also be taken of the time frame for the provision of the relevant services, since a contract on the provision of scientific and technical information is typically concluded in order to carry out further scientific or technological work in the relevant field. Where the search process takes too long, the relevance of such work may simply be lost. There should therefore be sanctions for a breach of the agreed term of execution.

The contract on the provision of scientific and technical information is fulfilled by the performance of activities to provide information products for a person’s consumption so as to satisfy their personal needs. The general rule is the personal execution, since the contractor is a specialized agency or a person with special information who carries out scientific information activities.

The contract is deemed to have been performed from the moment of execution of the service in the form of transfer of information products in the materialized or electronic form by the contractor and payment for it by the customer. Where the failure or improper execution of the contract has caused damage to the customer, he/she shall be compensated in full (in the case of the contractor’s fault).

### 3. Patent Prospecting Treaty

Attention should first be drawn to the patent search contract. As revealed by the literature review, some property relationships, for instance in the industrial property area, specifically patents and patent information contracts, are not regulated by contracts at all or are insufficiently regulated at the scientific and theoretical level<sup>6</sup>. The patent search contract is relevant

to the treaty on the provision of scientific and technological information, since its subject matter is also the provision of scientific and technical information to the individual, but in a specific sphere of patenting. At the same time, it is separate from the treaty on the provision of scientific and technical information because of its great practical relevance and special area.

The object of the contract is to provide information search services for inventions, describe foreign or domestic inventions, etc. As regards the list of information and services provided under the contract, it is worth noting, again, that the precise list should be defined in an annex forming an integral part of the patent search treaty.

The other components or features of the treaty are identical to the provision of scientific and technical information: a qualified specialist or specialized agency should be a party; written form is required for the establishment of all the conditions and preparation of the list of necessary information; the price of the contract and period of execution must also be indicated.

The treaty should be executed personally, however, in cases where it is expressly provided in the treaty and there is a specified list of cases, it can also be implemented through the involvement of other persons. A case in point is the information on foreign patents. In any case, the responsibility lies with the contractor. Protection of intellectual property rights should also be guaranteed under the treaty.

The contract is deemed to have been executed as soon as the contractor has reported the absence of patents, existence of registered patents and payment by the customer. Where the failure or improper implementation of the contract has caused damage to the customer, they shall be compensated in full in the case of the contractor’s fault.

In general, the provisions of the Law of Ukraine “On STI” are outdated, both in terms of terminology used and in terms of adequate allocation and delimitation of contractual constructions ensuring the use of scientific and technical information. In the event of a dispute concerning the necessity of amending the two above-mentioned treaties at the level of the Civil Code of Ukraine, it is necessary to ensure that their adequate legislative regulation in the Law of Ukraine “On STI” is accompanied by a qualitative assessment of its text and terminology.

<sup>6</sup> Melnyk A., *Civil protection of intellectual property in Ukraine*, author. dis. to receive sciences. degrees doc. legal sciences, Kiev 2004, p. 25.



## 4. Research, Development and Technological Contracts

The above circumstances oblige us to analyze the rules set by Chapter 62 of the Civil Code of Ukraine on contracts for the performance of research, development and technological works in the area of the contractual regulation of the use of scientific and technical information.

In order to understand the place of these treaties among other treaties regulating the use of scientific and technical information, we should refer to the work of Y. Zhornokuy, in particular with regard to the procedures for conducting venture capital activities and the relevant treaties applicable at its various stages. Research, development and technological contracts are used for the direct development and testing of an industrial property; whereas licence contracts or transfer of know-how contracts are used with regard to the realization of the rights to use the received object<sup>7</sup>. It can be said that these treaties mediate the emergence of scientific and technical information as part of know-how and, accordingly, they contain provisions that enable the parties to use the received facilities.

Under those treaties, the contractor undertakes to carry out scientific research, develop a sample of a new product and design documentation for it, create new technology, etc. A. Davydyuk points out that a technology in legal relations can act as a series of objects, in particular as a technology in its information embodiment – a collection of systematized information containing details on those actions; information on the processes and sequencing of substances and energy to achieve a certain end-state technology<sup>8</sup>.

In short, the essential terms of the performance of research, development contracts are the object, price and conditions. If a contract is fi-

<sup>7</sup> Zhornokui Y., *Legal regulation of venture entrepreneurship (civil law aspect)*, thesis for the degree of Candidate of Legal Sciences: 12.00.03, National University of Internal Affairs 2003, p. 12.

<sup>8</sup> Davydyuk A., *Economic and legal regulation of commercial concession (franchising) in relations related to the transfer of rights to technology. Law and an innovative society*, 2014 No. 1, pp. 30-37. [Electronic Resource] [http://nbuv.gov.ua/UJRN/pric\\_2014\\_1\\_6](http://nbuv.gov.ua/UJRN/pric_2014_1_6), pp. 32-33 (as of 2.11.2020).

nanced from the State budget, the conditions for the identification of the subjects of intellectual property rights are also substantial<sup>9</sup>.

In view of such essential terms of the contract and its peculiarities, it is worthwhile to go over the characteristics of the obligations of the parties to the contract. Art. 895 of the Civil Code of Ukraine imposes on the parties the obligation to ensure the confidentiality of the subject matter of the contract, its implementation and the results obtained. Where the parties so desire, the scope of confidential information may be defined by contract: for instance, reduced or increased. The literature review shows that “information” in that case means scientific, technical, organizational, commercial and other information, the value of which is not known by third persons and it is not freely accessible. This includes not only information obtained in the course of the performance of work, but also information available to the parties at the time of the conclusion of the contract<sup>10</sup>. That is, the parties to the contract may stipulate confidentiality or lack of confidentiality with respect to: the use of scientific and technical information available at the time of the conclusion of the contract, transmitted by the employer to the contractor for the performance of the work.

In general, the parties, as owners of such information, are obliged to ensure the confidentiality of the information. This is due to the fact that new intellectual property objects are created during the implementation of research, development and technological works in order to acquire exclusive rights for which a temporary or permanent restriction of information on such objects from third parties is necessary. Such a restriction is necessary for the further patenting of the result of the activity or, in the case of scientific and technical information, for the preservation of the know-how that was created in the performance of the treaty.

<sup>9</sup> Velikanova M., *Contracts for the implementation of research, development and technological works*, thesis for the degree of Candidate of Legal Sciences: 12.00.03, Scientific-Research Institute of Private Law and Entrepreneurship of the Akad. Legal Sciences of Ukraine 2009, p. 15.

<sup>10</sup> Voronin Y., *Some problems of regulation of legal relations during scientific and technical research, the consequence of which is the creation of inventions*, “Journal of the Kiev University of Law”, 2009 No. 1, pp. 210-214. [Electronic Resource] <http://dspace.nbuv.gov.ua/handle/123456789/24277>, p. 213 (as of 2.11.2020).

An analysis of the provisions of Art. 896 of the Civil Code of Ukraine shows that the customer has the right to use the results of the work transferred to them under the conditions and within the limits established by the contract. The contractor is entitled to use the result for himself, unless the contract provides otherwise, and also has the right to transfer the results to other persons, as long as the contract provides for such a right. In fact, the main content of the article is to establish certain limits on the use of the results of the work, which are generally in line with the provisions of Art. 430 of the Civil Code of Ukraine concerning intellectual property rights in objects created by order.

The provisions of Art. 896 of the Code also refer to the limits of the use of know-how and, therefore, allow a treaty to define additional powers of the parties to use it, authorize its use and so on. Those provisions, in our view, also apply to all scientific and technical information arising at the time of performance of the treaty and are part of its result.

O. Kodynets notes that the peculiarities of the legal construction of the treaties for the implementation of the national development plan, as well as the relationship with related treaty designs, make it possible to characterize them as a special type of contract, thus giving rise to treaty obligations in the field of information. Those contractual forms are aimed at facilitating relations in the sphere of accumulation, storage, processing and dissemination of scientific research as well as scientific and technical information<sup>11</sup>.

As an object of scientific and technical information, know-how means certain generic technical solutions/technical knowledge related to commercial secrecy. As a trade secret, they are also an object of intellectual property rights, with appropriate protection.

D. Maritz indicates that agreements on the disposal of rights to know-how can become a contract of commercial concession, an agreement on the transfer of know-how<sup>12</sup>. As it can be seen from the literature review, in ad-

<sup>11</sup> Kodynets O., *Contractual informational relations in the field of scientific activity: problems of theory and practice*, "Entrepreneurship, economy and law", 2015, no. 2, pp. 15-18.

<sup>12</sup> Maritz D., „Know-how” as an object of information protection, "Information and Law", 2014 No. 3, pp. 70-75. [Electronic Resource] [http://nbuv.gov.ua/UJRN/Inf-pr\\_2014\\_3\\_13](http://nbuv.gov.ua/UJRN/Inf-pr_2014_3_13), p. 74 (as of 2.11.2020).

dition to the contracts stipulated by law, another type of contract – contract on the transfer of know-how – may be distinguished. What follows is a brief analysis of the agreements stipulated by law in the field of intellectual property law, subsequently correlated with the know-how transfer agreement.

## 5. The Contract on Transfer of Know-How

In his dissertation study, E. Petrov offers to apply the construction of the treaty on the transfer of know-how to a wide range of confidential information coming to the conclusion that the treaty can best be described as onerous, bilateral and consensual. The subject of the contract is a piece of undisclosed information and the right to use that undisclosed information. Taking into account the peculiarities of the conclusion of a contract on the transfer of information, the author concludes that it is necessary to conclude a preliminary agreement where a brief description of undisclosed information should be made without disclosure of its nature<sup>13</sup>. It is clear that the preliminary and main contract should be made in writing.

Due to the legal nature of the contract on the transfer of know-how, it will include: the subject, the confidentiality regime in respect of «know-how», the manner of transferring know-how, price, payment procedure. It is necessary to stipulate in the agreement the grounds for the termination of the contract, such as the loss of secrecy of information constituting know-how. The subject is the transmission of information in the form of: transfer of technical and other documentation; provision of the necessary technical assistance; interview and demonstration of an object (model, unit, device) in which the purchaser of know-how gains technical information embedded in the object's constructive and other solutions; training of experts of the recipient (transfer of experience, skills, working methods); the sale of equipment, appliances and materials necessary for the development of technological processes<sup>14</sup>.

<sup>13</sup> Petrov E., *Information as an object of civil law relationship*, thesis for the degree of Candidate of Legal Sciences: 12.00.03, Nat University of Internal ref. H., 2003, p. 13.

<sup>14</sup> Begov T., *The concept of „know-how” and the agreement on its transfer*, 2009, p. 134.

Based on the presence of specific grounds for the termination of the contract on the transfer of know-how, it should be noted that the legal implications may include not only the termination of the contract and all obligations under it. The termination of existing contractual obligations is possible due to a loss of confidentiality caused by one of the parties. It is this proposed that payment of a penalty for the violation of the confidentiality of the parties be laid down in the contract for such cases or, where no penalty is stipulated in the contract, damages for a loss of income and so on.

Based on the analysis of contracts mediating the use of know-how, it should be observed that the issue of confidentiality appears to be of paramount importance. It therefore seems necessary to briefly describe the obligations of the parties arising from a contract to protect the confidentiality of know-how and other scientific and technical information. In his dissertation on the civil law regulation of trade secrets as an object of intellectual property law, T. Ivchenko notes the following obligations of the parties to protect the confidentiality of information constituting a commercial secret:

- a) to take the necessary measures to exclude the disclosure of trade secrets (information leakage) in the course of its use in the production and sale of goods, work and services;
- b) to treat as confidential documents and products made using trade secrets (know-how) received under the contract;
- c) not to transmit the originals (copies) of documents or products to a third party without the prior consent of the other party;
- d) to acquaint trade secrets only with a limited circle of authorized persons by concluding with them an agreement on non-disclosure of information<sup>15</sup>.

## 6. Conclusions

Based on that approach and general theoretical foundations, we can outline the following vision of the place of these contracts: type – service

agreements; kind – contracts on the provision of information services; subspecies – an agreement on the provision of scientific and technical information and a patent search agreement. We evaluate the justice and validity of that approach having regard to an analysis of the legal nature and features of those contractual structures.

The primary provision of the use of scientific and technical information is carried out using the agreement on the provision of scientific and technical information and the agreement on the implementation of patent searches, which are subspecies of the agreement on the provision of information services. To transfer the rights to scientific and technical information, in particular rights to its use, we should use the contract on the transfer of know-how, as well as intellectual property law agreements. The use of scientific and technical information and transfer of rights to it may be part of contracts in the area of rights of intellectual property, as well as research, development and technological contracts.

On the whole, the legislation of Ukraine requires significant changes in the part of the regulation of contracts used in legal relations concerning the creation, transfer and use of scientific and technical information.

<sup>15</sup>

Ivchenko T., *Civil Law of Regulation of Commercial Law and Law on Intellectual Power in Ukraine*, thesis for the degree of Candidate of Legal Sciences: 12.00.03, The Institute of Power and Rights, V.M. Koretsky NAS of Ukraine K., 2009, pp. 9-11.