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ACTUAL ASPECT, CONTRACTUAL ESSENCE AND THE NEED FOR LEGAL SECURITY OF KNOW-HOW PRODUCTION CONFIDENTIALITY IN THE REPUBLIC OF MOLDOVA

Ольга ТАТАР
Доктор права, преподаватель кафедры Частного права Комратского государственного университета
Арсен АХМЕДОВ
Кандидат юридических наук, доцент кафедры гражданского права ФГБОУ ВО «Саратовская государственная юридическая академия»

На данный момент картина регулирования передачи know-how представлена в виде ограниченного количества норм, хаотично разбросанных в нормативных актах, которые регламентируют know-how. Это прослеживается в тот момент, когда масштабы распространения know-how столь значимы для всей мировой экономики. Все изложенное выше наталкивает на мысль, что включение новых положений относительно know-how в ГК РМ, а также предложение отдельных разработок по регулированию know-how базируется на существующей практике в РМ, а также на имплементации зарубежного опыта в данной сфере. Однако, уместен также тот факт, что сопоставление нормативной базы РМ с зарубежной, путем ее обновления и дополнения должны базироваться на общих началах договорного и обязательственного права в целом.

Ключевые слова: *договорная сущность, секрет производства, инновация, специфика, конфиденциальная информация.*

Olga TATAR
Doctor of law, Lecturer at the Department of Private Law, Comrat State University
Arsen AKHMEDOV
Candidate of Legal Sciences, Associate Professor, Associate Professor of the Department of Civil Law of the Federal State Budgetary Educational Institution of Higher Education “Saratov State Law Academy”

At the moment, the picture of know-how transfer regulation is presented in the form of a limited number of norms, chaotically scattered in the normative acts that regulate know-how. This can be traced at a time when the scale of the spread of know-how is so significant for the entire world economy. All of the above suggests that the inclusion of new provisions regarding know-how in the Civil Code of the Republic of Moldova, as well as the proposal of separate developments for the regulation of know-how is based on the existing practice in the Republic of Moldova, as well as on the implementation of foreign experience in this area. However, it is also appropriate that the comparison of the regulatory framework of the Republic of Moldova with the foreign one, by updating and supplementing it, should be based on the general principles of contractual and contractual law in general.

Keywords: *contractual essence, production secret, innovation, specificity, confidential information.*

Today, there are a lot of all kinds of terms that would make it possible to single out information that contains practical value, confidentiality, secret, a kind of secret, the disclosure of which will cause significant damage to the owner of this information. In this regard, the owner of the classified information resorts to all sorts of tricks in order to prevent this information from being received by third parties.

Know-how is a kind of new, innovative, remaining unknown at the request of its owner information, so that ultimately, in no case will it be made public. The data that have entered the public domain cannot be regarded as protected. In a way, they must be new since the lack of novelty is an indicator of their publicity.

The object of know-how can be any kind of knowledge including legal, economic, technical and mana-

gerial. To reveal the specifics of know-how as such, I would like to study the nature of this data, its essence and purpose. To do this, let us turn our attention to the nature, origin, specifics of the regulation of this kind of information by the legislation of the Republic of Moldova and the legislation of foreign countries.

The term "know-how" itself is borrowed from the English term know-how (to know how to do it). This means that the owner of this information developed the technology of this or that production before anyone else, and access to it was not possible, i.e. this kind of information was not available to public.

The most significant sign of the concept of "know-how", according to V.N. Evdokimova, is considered an element of confidentiality, that is secrecy of such information or documentation. [1, p. 29].

The revealed features of know-how in comparison with other objects of intellectual property made it possible for individual authors to express a contradictory opinion regarding the consolidation of exclusive rights to know-how. They argue that a special regime may be envisaged in relation to a production secret, that is a regime of actual monopoly guaranteed by special protection measures fixed by the legislation on commercial secrecy [2, p. 126-128].

……Other authors agree in the opinion that the trade secret needs substantial legislative protection. The objects of exclusive rights are the results of intellectual activity, which are directly indicated by the legislator as such and in respect of which the regime of exclusive rights is established [3, p. 197].

Know-how is an important part of intellectual property law. Code of the Republic of Moldova No. 259-XV of 15.07.2004 "On Science and Innovations" [4], art. 38 regulates that: "The object of intellectual property is the result of intellectual activity confirmed by the respective rights of the owner to use it. The objects of intellectual property include: objects of industrial property (inventions, utility models, plant varieties, topographies of integrated circuits, appellations of origin, trademarks and service marks, industrial drawings and models), objects of copyright and related rights (literary works, works of art , science and others, including computer programs and databases), trade secrets (know-how) and others".

Innovation, secrecy, inaccessibility to third parties and commercial value of the information determine its essence. It is also important that the notion of know-how will not be assigned to the information which directly falls under the right to disclosure established by the legislation. We need restrictive, special mechanisms that will be fixed at the legislative level. However, in addition to the state's protection of the right to know-how, first of all, it is necessary to be careful oneself and monitor how fully the secrecy regime is observed, since the commercial secret is initially carried out by the owner of this information, and he/she, like no one else, should be interested in keeping it from other persons presented in this case as competitors in relation to the owner, since free access and dissemination of this kind of classified information may negatively affect and lead to adverse consequences for the owner. Failure to comply with reasonable measures aimed at protecting the secrecy of such information will be a consequence of the unreasonableness on the part of the owner and the helplessness of the legislator in this situation, because the rights to know-how are under the protection of the legislation as long as the trade secret is kept secret.

The need to protect the secret of production has arisen in humans since antiquity. Its importance and value was due to many components. For example, the Greeks very zealously guarded the secret of the origin of the Greek fire, the Chinese kept the formula for the origin of silk in the strictest secrecy. For the sake of possessing special and exclusive right for the secret of production, as well as the advantages in the economic sphere, a person is able to take radical measures.

History tells of many cases when owners and manufacturers of unique inventions and new techniques fell victim to their employers or irrepressible competitors. After all, the owner of the secret of production wanted to be confident that third parties did not have access to his innovation. Full information security at the enterprise should be standardized and under full control all year round, in real time, around the clock [5, p. 7]. There are often cases when production is established and we are talking about good profitability of the enterprise, but dishonest workers secretly transfer information about the secret of production to others, for a previously agreed amount of money or pursuing other benefits, which can ultimately result in a disaster for the owner himself. At the same time, it is not possible to foresee the decency, conscientiousness, sincerity of the people being hired and remains beyond the scope of the desired. In this regard, one way or another, the state should guard the interests of the owner of know-how. This kind of information must be of real value, be presented in such a way as to preserve their confidentiality, and also not constitute a state secret. So, according to Part (2) of Art. 1026 of the Civil Code of the Republic of Moldova No. 1107-XV of 06.06.2002 [6] "Confidential is considered information, the confidential nature of which is known or, as one can reasonably assume, should be known for the person receiving it based on the nature of the information or the circumstances under which it was received. In particular, information is confidential if

it constitutes a commercial secret in the sense of the provisions of Part (1) of Art. 2047 of the Civil Code of the Republic of Moldova, namely: "A person who illegally acquired, used or disclosed a commercial secret (violator) is obliged to compensate for property and moral damage caused to an individual or legal entity that legally controls the commercial secret (the owner of the commercial secret), in accordance with the conditions of this part as part of a chapter". Indeed, according to the legislation, namely part (1) of Article 5 of the Law of the Republic of Moldova No. 171-XIII of 06.07.1994 "On Commercial Secrecy" [7] reads: "Objects of commercial secrets (know-how) are deliberately concealed economic interests and information about various parties and spheres of production, economic, managerial, scientific and technical, financial activities of an economic entity, the protection of which is due to the interests of competition and a possible threat to the economic security of an economic entity».

Foreign legislation also defines this sphere. For instance, Art. 1037 of the Civil Code of the Republic of Kyrgyzstan No. 15 of 08.05.1996 [8] establishes that: "The objects of intellectual property include: results of intellectual activity: works of science, literature and art, performances, phonograms and broadcasts of broadcasting organizations, computer programs and databases, topology of integrated circuits, inventions, utility models, industrial designs, selection achievements, undisclosed information (commercial secret), including production secret (know-how)", as well as Art. 980 of the Civil Code of the Republic of Belarus No. 218-3 dated 07.12.1998 [9], namely: objects of the right to intellectual property include:

- the results of intellectual creative activity; means of individualization of participants in civil circulation, goods, works or services.

So, how is it possible to keep the know-how secret? For this purpose, there is a regime in production reserving the secrecy of data that have become known to them, the so-called «commercial secret» regime. It should be noted that various kinds of information are classified as commercial secrets, which include, for example, information about financial activities, information about scientific developments, about the system of material and technical support and others [10, p. 63]. According to the Law of the Republic of Moldova No. 171-XIII dated 06.07.1994 «On Commercial Secrets» [7], Art. 1 the legislator draws attention to the fact that the disclosure of information constituting a commercial secret will lead to undesirable consequences, namely, causing damage; and the Code of the Republic of Moldova No. 259-XV dated 15.07.2004 "On Science and Innovations" [4], Art. 120 stipulates that persons who have the right to this kind of information, in accordance with the concluded agreements, are obliged to maintain confidentiality.

The desire for easy profit by disclosing classified information to third parties exposes the employee as a violator of the law. For example, such persons may be persons to whom information about know-how has been transferred through an agreement concluded between the parties. Due to the fact that there is no legal regulation of such an unnamed agreement as an agreement on the transfer of know-how in the Republic of Moldova, although it is applied in practice, there is a need to regulate this kind of contractual structure, which will legally ensure the protection of the rights of the owner of the know-how by the legislation of the Republic of Moldova.

The legislation of the Republic of Moldova allows the use and transfer of rights, but at the same time without specifying and detailing the process itself, which has a very essential need. For example, the conclusion of an agreement on the transfer of know-how for an agreed fee. However, when concluding a contract for the transfer of know-how, it should be taken into account that if secret information was developed in the conditions of the employee's work activity, as well as through direct instructions from the employer, then in this case we are talking about official know-how and rights in this case arise from the employer.

What is characteristic of this unnamed type of contract? So, firstly, the mutual consent of the parties, expressed in writing, secondly, there is no need to register this type of agreement, and thirdly, no violation of the confidentiality regime itself after the moment of transfer of these rights. As for the payment of remuneration, whether it be a one-time payment or a certain percentage of the proceeds, the parties determine themselves, but if the deadlines or the procedure for calculating remuneration are violated, there is every reason for the application of sanctions. In practice, there are many problems encountered by the parties concluding such agreements on their own, which can lead to unjustified risks. In order to avoid such risks, it would be more expedient to resort to the services of patent attorneys, who will ensure the proper measures regarding the protection of the owner of know-how.

So, the possibility of contractual transfer of the right to know-how is directly related to the legal owner of the trade secret. In the text of the concluded agreement, the essence of know-how and the specific way of its use are disclosed very thoroughly. Together with the transfer of know-how, all the documentation that will be necessary for use is transferred. In order

to preserve confidentiality, it is appropriate to indicate the degree of responsibility for disclosing know-how in the concluded agreement. It is also important to indicate in the contract what information is considered as the object of those obligations regarding confidentiality and what information can be considered as public knowledge. After all, the provisions regarding the confidentiality of know-how should directly embrace in the contract the information that is secret, and not any kind of knowledge that does not constitute know-how. If a party to the contract violates one of the rules, namely, evades payment of remuneration, which was spelled out in the contract itself, it will lead to the recovery of the damages caused, and in the future, to the termination of the contract itself.

Thus, the specificity of the trade secret is such that, unlike other objects of intellectual property, the exclusive right to know-how arises due to the fulfillment of all the requirements prescribed by the Law of the Republic of Moldova "On Commercial Secrets" [11, p. 61]. It should be noted that the lack of an appropriate approach and inattention to the protection of their interests in the field of intellectual property is a consequence of causing colossal losses to numerous companies and firms, since it is for them that the regime of commercial secrets is the most effective and reliable method of protecting and defending their own interests in the field of intellectual activity. The exercise of the right to know-how is of a civil nature. In this case, the copyright holder has the opportunity, through the concluded agreement on the transfer of know-how, to exclude the unlawful receipt of a production secret by third parties, by means of the fact that the concluded agreement on the transfer of know-how will contain conditions for the secrecy of the information that represents the production secret.

At the moment, the picture of regulation of know-how transfer is presented in the form of a limited number of norms chaotically scattered in the normative acts that regulate know-how. This is evidenced at the time when the scale of the spread of know-how is so significant for the entire world economy. All of the above suggests that the inclusion of new provisions regarding know-how in the Civil Code of the Republic of Moldova, as well as the proposal of separate developments for the regulation of know-how, is based on the existing practice in the Republic of Moldova, as well as on the implementation of foreign experience in this area. However, it is also appropriate that the benchmarking of the regulatory framework of the Republic of Moldova to the foreign one by updating and amending it should be based on the general principles of contract and obligations law as a whole.

Most countries in the world lack a precise legal definition of the term know-how. However, its widespread use and distribution is obvious and ahead of it by decades. Know-how is used in various areas of industry and all modern business activities, which allows one to expand new horizons for investment in various directions, but at the same time requires legal regulation.

Summing up the above we come to the conclusion that modern science, through all transformations in the field of intellectual property, is being modified and at the same time the secret of production itself is transformed into an independent object of contracts, at the same time, expanding the scope of use of know-how in various spheres of economic activity. The problems that have arisen in practice in the field of know-how are explained by insufficient attention on the part of the legislator, as well as the lack of a unified view of the regulation of know-how against the background of those insignificant studies carried out in the Republic of Moldova in such areas.

The procedure for determining the legal protection of know-how is established by the Directive (EU) 2016/943 of the European Parliament and of the Council dated 06/08/2016 [12] "On the protection of undisclosed know-how and commercial information (trade secrets) against their illegal acquisition, use and disclosure ".

It is suggested to implement legal protection at the legal level by a new agreement on the transfer of know-how, where the object of know-how will be covert data, such as: scientific, technical, economic, production data, as well as information not available to third parties. Such a unique possession by the owner of his/her inherent rights can only be secured until they are kept secret. It is the agreement on the transfer of know-how that imposes on the copyright holder an obligation related to the transfer of a unique right to know-how (to the transferee), instead of monetary payments, the procedure for payment of which is prescribed by the agreement, which should also include: the object, the period for transferring of the information, the procedure for transfer of the confidential information, price, purpose of use, methods of use, liability of the parties under the contract, accompanied by compensation for harm caused.

It should be noted that the qualifying conditions of this agreement are: a special object inherent in this agreement, the purposefulness and commercial value of information, price, time, place of transfer and their further secrecy.

Thus, taking into account the need to improve the legislation of the Republic of Moldova with the prospect of further widespread use of the trade secret

through the legislatively enshrined legal protection of the trade secret, which excludes the illegal receipt and use of the trade secret, we propose to supliment the existing system of the named contracts with a type of unnamed contracts, namely, an agreement on transfer of know-how. With the appearance of such an agreement, it will be possible to simplify and at the same time update and supplement the system of agreements in the Republic of Moldova.

The consequence of this will be the establishment of legal protection for know-how and elimination of gaps in this area. In this regard, we propose to complete the Civil Code of the Republic of Moldova in such a way that the conclusion and execution of the agreement on the transfer of know-how would have a legal basis.

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