

RIGHTS AND OBLIGATIONS OF THE CONTRACTING PARTIES UPON CONCLUSION OF A LICENSE AGREEMENT IN THE DIGITAL ECONOMY

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Abstract: *The digital economy is a term originally used to denote a new type of economic movement that emerged under the influence of the fourth industrial revolution. The unexpected expansion of modern technology, or rather the use of modern technology, has led to the fact that most of the economy takes place within the digital economy, and therefore the digital economy is not a novelty, nor is it a type of economy, but rather the economy itself. The subject of this research paper aims to determine the importance obligations of the parties responsible for the license agreement, the licensor and the licensee, in light of newly emerging relationships of the modern economy and Industrial Property Rights. The research objectives are primarily related to and expressed through an analysis of the advantages and disadvantages of contractual obligations from the license agreement. This paper will use all methods that could contribute to its higher quality. Primarily referring to methods that are characteristic of social research, in which scientific description and content analysis (with synthesis) will be highlighted, followed by inductive-deductive, historical and comparative analysis. The hypothesis of this paper is that the better regulation of the rights and obligations of the contracting parties under the license agreement leads to a better functioning of the digital economy. The result of the work is to point out the possibilities and legal instruments that, in conjunction with harmonized regulations, can lead to the stimulation of economic development in the new economic reality caused by the multipolar world..*

Key words: *license agreement, rights and obligations of the contracting parties, digital economy*

JEL classification: K22

1. INTRODUCTION

The Law on Obligations clearly defines the obligations of the licensor. These obligations are of an imperative nature, more precisely, it is not possible to agree on anything contrary to the provisions of the law. However, the contracting parties may agree on some additional obligations if they are not contrary to the provisions of the Law, and if their nature is of a supplementary nature. Which actually means that the contracting parties can, given that the law allows them to do so, agree on rights and obligations that are not contrary to the mandatory provisions of general and special legislation regulating this area of law. Considering that this is a bilateral contract, the obligations of the licensor correspond to the rights of the licensee and *vice versa*.

The one who acquires the so-called "latest word in technology" acquires for himself the first place in a certain technological advancement, the method of acquiring this is through the conclusion of a license agreement. Perhaps the question can be reasonably raised as to why the licensee would cede it to the acquirer. The main reason is most often that the licensee does not have enough resources to market the subject of the license and to exploit it economically enough as the licensee himself. Secondly, in modern technologies, licenses are rarely transferred for a completely new product, but rather for a license for a specific modification of an existing product that will set it apart from the same or similar products on the market. According to the Law on Obligations Article 686. a License agreement obliges the licensor to assign to the licensee, in whole or in part, the right to exploit an invention, technical knowledge and experience, trademark, sample or model, and the licensee undertakes the obligation to pay a certain fee in return.

2. RESEARCH GOALS AND METHODS

The research objectives are primarily related to and expressed through an analysis of the advantages and disadvantages of the obligations in Licence agreement. The scientific objective of the research is reflected in the knowledge of the concept, importance and protection of the circulation of industrial property rights, primarily patent rights and license agreements on the basis of which the circulation of industrial property rights is carried out according to domestic legislation. The license agreement is the basic contract through which industrial property rights are transferred. The aim of the research is precisely to analyze this institution in the light of new socio-economic conditions, technological innovations.

The practical goal of the research stems from the fact that although the license agreement is strictly regulated by law, with the advent of new practices and the development of the global economy and the latest technological achievements, legal doubts still arise as to what can be the subject of a license agreement. Therefore, it is necessary to analyze individual positive legal solutions related to the license agreement with the aim of their practical application in domestic legislation. In doing so, the research will be guided primarily by newly emerging, i.e. contemporary social needs in this area, with the experiences of other countries on this issue providing with significant assistance.

This paper will use all methods that could contribute to its higher quality. Primarily referring to methods that are characteristic of social research, which will include scientific description and content analysis (with synthesis), then inductive-deductive, historical and comparative analysis.

3. DISCUSSION AND RESULTS

The licensor's primary obligation is to deliver the subject matter to the licensee. This does not only refer to the physical delivery of the subject matter of the contract, but also the obligation to perform all physical and legal actions on the basis of which the licensee can use the subject matter of the license agreement.

"In addition to the subject matter of the contract, the licensor is obliged to submit technical documentation necessary for the practical application of the subject matter of the license, i.e. materialized knowledge and experience with which the licensee will be able to achieve the results envisaged by the license agreement." (Besarović, 2011, p., 199). Also, if there are third party rights to the subject matter of the contract that would restrict the licensee from exercising their rights, the licensor is obliged to provide the licensee with protection against eviction. „Legality is one of the fundamental legal principles, derived

from the very essence of universal human struggle for freedom, equality and protection“ (Marilović, 2023, p., 373). The licensor's second basic obligation is to provide a guarantee for the technical properties of the subject matter of the license. "In the case of more complex inventions, stronger guarantees are negotiated that are related to the specific physical, chemical, economic and other properties of the product or process obtained by applying the invention." (Marković, 2000, p., 221-222)

There is a lower and higher level of guarantee for the technical properties of the invention depending on the type of subject matter of the contract, but regardless of the complexity of the subject matter of protection, the lowest level of liability must exist. If the licensee expects the subject matter of the license to have special properties, he must also specifically agree on this.

"Technical feasibility can be general (the possibility of obtaining the technical results stipulated by the contract or the usual results in that activity by applying the subject matter of the contract), which is always assumed, and specific (the possibility of achieving specific technical results), which must be separately agreed upon." (Vasiljević, 2006, p., 259) In this case, if the licensee has not expressly agreed on the special properties of the subject matter of the license, he cannot hold the licensor liable for defects in the subject matter of the license.

"If the subject of the contract is secret know-how, the technology provider guarantees its secrecy at the time of conclusion of the contract, as well as for the entire period of validity of the technology transfer contract. Finally, the technology provider guarantees that the technology does not have so-called secondary harmful properties (that its use does not have a harmful effect on the life and health of people, or on things and the human environment)". (Vasiljević, 2006, p., 259) The interests of the contracting parties must not conflict, therefore the licensor will provide as much information as is sufficient to fulfill its legal and contractual obligations.

„Competition policy in the EU and UK is in the process of a significant reconfiguration. Its key postulates, methodologies, and normative goals are being subject to intense discussion and revision. The emergence of *sui generis* ‘new competition tools’ in the area of digital markets—EU Digital Markets Act and UK Digital Markets, Competition and Consumers (bill)—epitomises this trend“. (Andriychuk, 2023, p., 81).

It is therefore obvious that this also includes the licensor's liability for material defects in addition to legal ones. However, what is primarily meant is the licensor's obligation to ensure the validity of the subject matter of the license, that is, to ensure

the validity of the right that is the subject of the license, and therefore the validity of the contract. "Technical applicability is assessed objectively, which means that the subjective expectations that the licensee has from the application of the subject matter of the license are not taken into account. In any case, the licensor is not responsible for the technical perfection, profitability, competitiveness or economic success in the commercial use of the subject matter of the license." (Marković, 2000, p., 222-223) In the above case, it is a means obligation and not an end obligation. The licensee cannot hold the licensor liable if it does not achieve the expected economic success.

"The consequences of liability for material defects are, depending on the seriousness of the defects: an obligation to eliminate the defects or a reduction in the license fee or termination of the contract, with the acquirer in any case having the right to compensation for damages." (Marković, 2000, p., 223)

The consequences are those that apply to all contractual agreements. The obligations on the part of the licensor are listed in detail, i.e. the first obligation is to eliminate the deficiencies, and if this is not possible, then the license fee is reduced. Liability for legal defects is just as important as liability for physical defects in the subject matter of the license. The legal consequences for the licensor in the case of legal defects are far more serious than in the case of material defects. "Liability for legal defects in the performance of a contract (liability for eviction) means that the licensor guarantees to the acquirer that the right from which the license is derived exists, that he is its holder, and that there are no restrictions or encumbrances on it that legally prevent or hinder the use of the subject matter of the license." (Marković 2000, p., 223)

In today's developed economies, there are various types of legal liabilities related to the subject matter of a license agreement. So the licensor can be held liable if "guarantees that there is a monopoly right that is the subject of the contract; that it has the exclusive right to dispose of that right, i.e. that it is the holder of the right that is the subject of that contract and that there are no encumbrances or restrictions on that right in favor of a third party" (Besarović, 2011, p., 201). Which actually means that in this way the licensor guaranteed the existence of a monopoly position to the licensor itself. "Monopoly law may not exist for several reasons: that it did not exist at the time of the conclusion of the contract; which existed and the legal protection for the duration of the contract expired; which the monopoly right was annulled for the duration of the license contract and which the right holder waived the monopoly

right for the duration of the contract". (Besarović, 2011, p., 201).

Legal liability actually implies that the licensor is responsible for legal defects in the subject matter of the license, i.e. that there are no third party rights in the subject matter of the industrial property rights transferred by the license agreement. "The licensor is obliged to guarantee to the licensee that the subject matter of the license is free from legal defects. Namely, he guarantees that the right to exploit the subject matter of the license belongs exclusively to him, that there is no encumbrance on it and that it is not restricted in favor of a third party. If the subject of the contract is an exclusive license, the licensor guarantees that the right of exploitation has not been transferred to another person, either in whole or in part. The licensor is obliged to protect and defend the right transferred to the licensee against all claims of third parties. (Velimirović, 2001, p., 536) .

Obligation to make available subsequent improvements to the transferred technology on the part of the licensor is justified, given that the rapid development of technology can cause the license granted by the contract to become "obsolete" in a technological sense in a short time, and for this reason, an obligation can be agreed upon for the technology provider to transfer all improvements to the patent and knowledge and experience to the technology acquirer during the term of the contract.

The obligation to use the subject matter is an obligation that has the character of a *conditio sine qua non*. "The licensee is obliged to use the subject matter of the license in the agreed manner, in the agreed form and within the agreed limits. Using the subject matter of the license in the agreed manner is not only the right but also the obligation of the licensee." (Velimirović, 2001, p., 536-537)

If the licensee fails to use the subject matter of the license in the agreed manner, such conduct or inaction is considered a serious breach of contract and not conduct in accordance with the conduct of *pater familias*. The contract clearly specifies what is meant by the use of the subject matter of the license. The main reason why non-use of the subject matter of the license is considered a breach of contract and a failure to perform an obligation as such is that it is in the interest of the licensor that the subject matter of the license be used, i.e. commercially exploited. "This use must be carried out within the content, subject matter, territorial and temporal framework prescribed by the contract. Exceeding these frameworks by the licensee is not only a violation of contractual obligations, but also a violation of the subjective right of the grantor, from which the license is derived." (Marković 2000, p., 224)

The main problem in the execution of this obligation of the licensee is the occurrence of certain objective circumstances that prevent its execution. Given the specifics of the subject matter of the license agreement, the law is not able to foresee every case that may arise in practice. Therefore, the provisions of the Law on Obligations are used regarding the termination of the agreement due to changed circumstances. This obligation is in accordance with the principles of the Law of obligations, where the contracting parties are required to behave with the care of a good host, in accordance with the principle of conscientiousness and honesty, and that their behavior be in accordance with the preservation of healthy competition *vis-à-vis* the contracting party, i.e. the licensor.

One of the main obligations of the licensee is the payment of a license fee. "Essential ingredients of the contract on licenses are the subject of license and fee" (Mirović, 2004, p. 381). The payment of the license fee is also the main interest of the licensor, for which the license agreement is concluded. The license fee is often defined as "the price of using someone else's industrial property right". (Velimirović, 2001, p., 537). Considering that a license agreement is a contract of obligation, if non-payment of the license fee were agreed upon, such a contract would not be considered a license agreement. However, considering that it is a commercial contract, for which the rule applies that if the price is not determined, it is sufficient that it was determinable at the time of conclusion of the contract, the contract will be considered concluded.

However, given the great specificity of determining the price, i.e. the license fee, this rule would apply from contract to contract, but this would be extremely rare. The license fee is paid in annuities, although there are no legal obstacles to paying it in advance, the licensee is usually not able to pay it all at once, but in installments. "Monetary compensation can take the form of direct or indirect compensation. Direct monetary compensation is most often defined as: a pre-calculated lump sum paid at once or in installments; royalties, i.e. a fee calculated in proportion to the physical volume of use of the subject matter of the license, or to the economic effect of use, and paid periodically and permanently; a combination of a lump sum and royalties". (Marković, 2000, p., 225).

The licensee is most favored by paying the license in the form of royalties, because the amount of the license fee he pays monthly would depend on his payment capacity, which is conditioned by the use of the subject matter of the license in a given period of time. "When the license fee is agreed

depending on the volume or economic effect of the use of the subject matter of the license, the acquirer has an obligation to account to the licensor, i.e. to provide him with the data necessary for the accurate calculation of the license fee." (Marković, 2000, p., 227)

This obligation of the licensee is clearly indicated by legal regulations, according to Law of obligations Article 702. "if the fee is determined depending on the scope of exploitation of the subject matter of the license, the licensee is obliged to submit to the licensor a report on the scope of exploitation and calculate the fee every year, unless the contract stipulates a shorter deadline."

As with the execution of any contract, changes in circumstances may occur during the execution of a license agreement that affect the performance of the obligation of both parties. Such changes in circumstances are resolved according to the rules of the law of obligations.

„Obvious disproportion between the agreed license fee and the income that the acquirer earns from using the subject matter of the license. This disproportion can be manifested in two ways: the first is that the acquirer's income is disproportionately small in relation to the agreed license fee; the second is that the acquirer's income is disproportionately large in relation to the agreed license fee. In the first case, the disproportion is borne by the licensee; in the second case, it is borne by the licensor.

Our legislator, however, has provided a special rule for a license agreement, according to which an obvious disproportion, regardless of whose burden it is, constitutes a basis for the affected party to request a revision of the contractual provisions on the license fee. With this provision, the legislator expressed his desire to strengthen the guarantees for maintaining the equivalence of mutual acts in the license agreement, that is, to reduce the influence of obvious aleatory elements in this agreement." (Marković, 2000, p., 227-228).

Also „in the matter of intellectual property rights, some international legal sources explicitly state that sanctions in the event of infringement of intellectual property rights, and thus compensation for damages, have a preventive function“. (Ivanović, 2017, p., 677).

In addition to paying a license fee, the licensee is required to pay a fee for services and technical assistance. "The technology user is required to pay the technology provider separately for personnel training services, services related to job introduction and market placement assistance, as well as technical assistance services." (Vasiljević, 2006, p., 260.)

This obligation of the licensee corresponds to the obligation of the licensor to provide services and

technical assistance to the licensee. In practice, there will rarely be cases where the licensor is obliged to transfer only the subject matter of the license and receive a license fee for it, but due to the existence of such a possibility, the payment of the license fee and the fee for services and technical assistance are separated as separate obligations on the part of the licensee. Otherwise, there is no obstacle to including the payment for the provision of services and technical assistance in the license fee. „As the application and interpretation of law often makes recourse to its objectives, the analysis must start by recalling the two purposes of damages actions for breaches of the European antitrust rules“. (Wurmnest, 2023, p. 105). There is also a reporting obligation if the fee is determined depending on the scope of exploitation of the subject matter of the contract. The technology user is obliged to submit to the technology provider a report on the scope of exploitation and to calculate the fee every year, unless the contract specifies a shorter period for this. (Vasiljević, 2006, p., 260.) This obligation is provisional in its nature, and does not always occur in license agreements, except when the calculation of the license fee is agreed upon depending on the use of the subject matter of the agreement.

Obligation to use further improvement, "the Law on Obligations excludes the authorization of the technology user to exploit subsequent improvements to the transferred technology, unless otherwise determined by a special law or contract." (Vasiljević, 2006, p., 260.) This obligation is of a dispositive nature, defined in a certain way in the law. Especially if it is known that the licensor's obligation is to transfer to the licensee subsequent improvements to the subject matter of the license agreement, unless it concerns new technological achievements.

Mainstream competition law has failed to protect competition in core digital platform markets. This is partially due to enforcement agencies' current commitment to proving the investigated conduct's actual effects on competition and consumer welfare on the basis of in-depth assessments of each case's individual circumstances before intervening in the market. While reducing the likelihood of erroneously prohibiting conduct that is not actually harmful, this approach is too time- and resource-consuming to protect competition in digital markets prone to tipping“. (Witt, 2022, p., 670). Therefore the rights and obligations of the contracting parties can become much different than they used to be.

Obligation of the same quality of products or services in a trademark license, is in the interest of the licensor of the trademark that the goods marked with the trademark are of the same quality as the goods produced by the licensee. "When the

subject of the contract is the assignment of a trademark license, the licensee has an obligation to ensure that its products (or services) are of the same quality as the licensor's. The licensee may place goods and merchandise marked with the trademark that is the subject of the license only if he ensures the same quality as the licensor. Any agreement between the parties that would provide something else will not have legal effect." (Besarović, 2011, p., 207). This solution of the legislator is justified, given that if the licensed goods marked with a trademark did not have the same quality as the goods of the licensor, consumer confidence would be irretrievably lost. This is most often the case "when, along with the license for production, a license for the use of the trademark is also granted". (Velimirović, 2001, p., 536). Because it would not make sense for the licensee either, given that by obtaining a license to use the trademark, he intends to safely market his products that already have verified customers. Although it is quite certain that the licensee will state that the product in circulation was produced under license, this automatically creates an image among the end users of the given product of the quality of the manufactured goods, as a special rule to label products under license. When we talk about harmonization in this certain area of law „we may mean quite different things. There is a close, yet often unclear, relationship between minimum harmonisation and mutual recognition on the one hand, and between full harmonisation and the country of origin principle on the other hand“. (Klamert, 2015, p. 360).

Therefore, the licensee is obliged to adhere to the standards and technical regulations of the licensor, who, in turn, has the right to inspect and control the quality of the licensee's products (or services). The licensor "borrows" its name and reputation on the market and is not indifferent to what products will be sold under its trademark. (Besarović, 2011, p., 207). The licensee's obligation to ensure that products produced under the license are of the same quality is sublimated, with the obligation to mark the products under the license, thereby increasing legal certainty for the licensor, and for the consumers themselves, i.e. buyers of such goods, to be marked with a genuine trademark.

"This protects the interests of consumers, so the buyer must be truthfully informed about the origin of the product he has purchased. Marking an item produced under license can also have commercial effects for the licensee, especially if it concerns goods produced under license from famous manufacturers" (Velimirović, 2001, p., 537). If the aforementioned obligation is not respected, the licensee will be deemed to have violated the license agreement "especially considering the

characteristics of international trade transactions.” (Popović and Vukadinović, 2010, p., 23).

The licensee is obliged to keep secret the subject matter of the license, which consists of unpatented inventions or secret technical knowledge and experience. There is no obligation to keep secret a registered industrial property right, because their protection is available to the public.” (Velimirović 2001, p., 537) This obligation of the licensee is inherent in the very nature of unprotected industrial property rights, i.e. those that are in the application process, and its non-compliance leads to termination of the contract with mandatory compensation for the resulting damage. "This obligation exists for the entire duration of the contract, and even after the contract." (Vasiljević, 2006, p., 261).

Even though the contractual relationship ends, the obligation to keep confidential information remains in force, based on the previous contract that obliges both parties to preserve business reputation.

In the case of a dispute related to any of obligations of contract parties if the contracting parties originate from different legal sovereignties „one the significant changes in the landscape of international law in recent decades has been the increase in the number of international courts and other forms of international dispute settlement. The EU has pushed for the inclusion of dispute settlement chapters in its trade and investment agreements, it has joined multilateral treaties that include dispute settlement mechanisms, and it has proposed the establishment of multilateral investment court. The Court of Justice of the European Union has shown a more guarded approach in recent years towards international dispute settlement“. (Odermatt, 2023, p., 88).

CONCLUSION

A license agreement is a commutative contract. This means that the amount of the obligations of the contracting parties is known at the moment of conclusion. Since it is an equivalent contract, it is not subject to the institute of excessive damages *laesio enormis*.

However, regardless of this equality between the parties' giving, although the license agreement is not of an aleatory nature, like any contract, the license agreement also contains a certain risk that the license as such does not bring the expected property benefit and that the licensee still has to pay a fee, or that after the conclusion of the contract, an innovation appears on the market that puts existing innovations in the background, and the licensee himself cannot meet his obligations to the licensee, because the subject of the contract does not bring him the expected property benefit. In the above case, such a risk does not affect the

level of obligations of the contracting parties, since the licensor is not obliged to take into account the market situation and to be aware of whether new innovations have appeared in a certain field of technology, and whether the subject matter of the license agreement is "obsolete" in relation to new discoveries. This risk is fully borne by the licensee himself.

By its legal nature, a license agreement is permanent. This type of agreement is concluded for a long term, which is inherent in the exploitation of the subject matter of the license. It is permanent agreement since the exploitation of the subject matter of the license cannot be carried out once, but for a longer period of time, i.e. as long as the licensee derives economic benefit from this agreement. Therefore the obligations of the both contracting parties are susceptible to certain changes in digital economy market, but they are usually assigned to the subject of the Licence agreement itself.

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