

Ensuring the Fulfillment of Contracts in Civil Law

Iryna Y. Puchkovska*, Oleg P. Pechenyi and Arsen M. Isaiev

Department of Civil Law No 1, Yaroslav Mudryi National Law University, Kharkiv, Ukraine

Abstract: The main purpose of the article is to comprehensively describe the main ways to ensure compliance. The main research approach is analytical and legal methodology. Doctrinal and legislative provisions on ensuring the implementation of civil law agreements were analysed. The process of formation of the institute ensuring the fulfilment of contracts was characterised. A comparative analysis of ways to ensure the implementation of agreements on their legal nature and effectiveness, highlighted the signs of their demarcation. The foreign practice of ensuring the fulfilment of contractual obligations was analysed, and the possible directions of its implementation in the domestic legal space were determined. Gaps in legislative regulation and problems of practical implementation in ways to ensure the implementation of agreements were identified. The author proposed the definition of ways to ensure the implementation of contracts. The findings are valuable for legislative initiatives and for the practical activities of the parties to contractual obligations in terms of choosing the most effective way to secure the contracts they enter into.

Keywords: Contracts, performance of contracts, security of performance, security of obligations, methods of security, inheritance, will.

INTRODUCTION

Under each contract, parties not only acquire rights but also bear the corresponding obligations. However, in practice, parties to a contract do not always perform their duties in good faith or do not perform them at all, due to which the other party (parties) to a contract may suffer losses. Failure to perform or improper performance of duties often leads to litigation and sometimes bankruptcy. Therefore, when developing and agreeing on the terms of any type of contract, it is necessary to pay special attention to the legal consequences of a breach of contract, as the measures contained therein may force the counterparty to fulfil its obligations under the contract or compensate for losses.

As a rule, in practice, measures of liability are reduced to the establishment in the contract of a penalty, fees for breach of contract, which by law is one way to ensure compliance. In Art. 611 of the Civil Code of Ukraine lists the legal consequences of breach of obligation, which includes only these methods (penalty, damages and non-pecuniary damage). In addition, there are other ways to ensure the fulfilment of obligations, which D. Meyer interpreted as “artificial methods to give the law of obligations the rigidity that it lacks in its essence” (Meyer 1997: 179). These include such as surety, deposit, pledge, guarantees and sureties, retention of property, trust property, which may also force the counterparty to fulfil its obligations or provide an equivalent replacement for the unfulfilled

obligation under a contract. According to S. Puchkovsky, given that the legal consequences of breach of obligation by their legal nature are means (measures) of protection (Spasibo-Fateeva 2012: 476), the latter can include types of security for the fulfilment of obligations, which are implemented by a creditor only in case a debtor violates a secured agreement (Puchkovsky 2019: 105).

Existing methods of ensuring the implementation of contracts are used depending on the type of contract. Thus, for obligations arising from the loan agreement (loan), the most commonly used methods of security in the form of a guarantee, bank guarantee, contracts for the performance of services, purchase and sale – the establishment of a penalty, a deposit. However, there are universal ways – a penalty, fees or fine can be applied in all types of civil contracts. Securing obligations in any of these ways also creates a binding legal relationship between a debtor and a creditor, which have an additional (accessory) nature and inherit the fate of the main obligation.

LITERATURE REVIEW

First of all, it should be noted that the institution of security is quite old, beginning its development since the time of the Roman Empire (Alyoshin 2019). Along with the penalty and the right of retention, the deposit was already enshrined as a way of securing obligations in the Civil Code of the Russian Empire (Draft Civil Code... 1905). However, in the pre-revolutionary period in the science of civil law, the general doctrine of securing obligations did not exist, and scholars opened discussions about securing only when discussing other legal issues. Thus, S.V. Pakhman believed that the

*Address correspondence to this author at the Yaroslav Mudryi National Law University, Kharkiv, Ukraine; Tel: +380577049249; E-mail: puchkovska@tanu.pro

obligations “by their nature require such means that would guarantee their fulfilment”, which “are directed against the failure of the obligations and serve either as an incentive to fulfil them, or even a full guarantee of fulfilment.” (Pahman 1877: 77–78). K.P. Pobedonostsev noted that “the person to whom the claim belongs, can provide himself with an additional contract that increases the need for performance for the obligated party or prosecutes special, pre-pronounced means and methods of performance” (Pobedonostsev 2003: 250).

The process of forming the institution of ensuring the implementation of contracts in the Soviet period did not develop, and the works that considered it, did so mainly from the standpoint of economic law (Pronina 1977; Konstantinova 1989). During this period, ways to ensure compliance in practice were largely unclaimed. This unclaimed methods of securing obligations (except for penalties) have been noted in every way in the literature (Genkin 1950: 458–459; Ioffe 1975: 157–158). The planned economy and the high level of discipline of fulfillment of obligations did not provide an opportunity to use such methods as a pledge or pledge, the scope of the deposit was limited only by relations between citizens.

Penalty received more attention in doctrinal circles at that time (Artemenko 1986). This is largely due to its spread in practice. N.S. Kuznetsova called her the “queen” of ways to ensure the fulfilment of obligations in a planned and distributive economy (Dzera and Kuznetsova 2002: 663). The spread of the penalty is also due to its nature as a measure of civil liability. As the first specialised systematic study of the implementation of contracts can be noted the work of B.M. Gongalo (1998). He understood the means of securing the fulfilment of obligations as security measures of a property nature, existing in the form of accessory obligations that encourage a debtor to fulfil the obligation and (or) otherwise guarantee the protection of the creditor's property interest in case of insolvency of a debtor.

Among modern domestic researchers in this area should be noted I.Y. Puchkovskaya, who in her dissertation research substantively analysed the concept, legal nature, functions and features, peculiarities of the implementation of types of obligations (Puchkovska 2018). In his dissertation, B.M. Gongalo raised an issue that remains very controversial, highlighting the stimulating and protective functions of the commitment system. According to

these functions, he classifies ways to ensure the fulfilment of obligations: to encourage a debtor to fulfil the obligation (penalty and deposit); to protect the property interest of a creditor in case of failure of a debtor (surety, bank guarantee); to encourage a debtor to fulfil the obligation, and in case of he fails to protect the property interest of a creditor of detention.

This view is disputed by some scholars. Thus, A.V. Latyntsev believes that to attribute the legal mechanism to ways to ensure the fulfilment of contractual obligations, it must have two of these features. The absence of a protective or incentive sign is a reason not to consider this legal institution as a way to secure obligations. N.Yu. Raskazova does not recognise the incentive function of security, believing that it is “not aimed at encouraging a debtor to fulfil the obligation, but to protect a creditor from the risk of default.”

Researchers who recognise the existence of collateral stimulating and protective functions, to a greater extent, consider them in terms of the interests of a creditor. Thus, A. Pokachalova calls securing the property interest of a creditor the main function of ways to ensure the fulfilment of obligations, and stimulating a debtor to fulfil the obligation – additional (Pokachalova 2010: 82–87). In this direction I.Y. Puchkovska notes that the comparison of ways to ensure the fulfilment of obligations with measures of responsibility and measures of operational influence allows seeing both their protective nature and identify their defining feature – the presence of a source of fulfilment of the violated obligation (Puchkovska 2013: 137). Thus, scientists have not reached a consensus in determining the functional affiliation of the institution to ensure the fulfilment of contractual obligations.

MATERIALS AND METHODS

The methodological basis of the study was analytical and legal methods of analysis. General scientific and special methods were used. The set research tasks were solved in the study, analysis and synthesis of scientific literature on the research problem. The main provisions of the legal framework at the international and national levels were studied. The methodology used allowed to develop the main directions of optimisation of the system ensuring the implementation of contracts. The methods used allowed to obtain reliable and substantiated conclusions and results.

The comparative method was used to compare the provisions of the domestic legal framework with the legal framework for regulating the object of study in other countries. The descriptive method allowed presenting the results of the study in a logical sequence. The study also used methods of legal analysis, synthesis, analogy, system and classification. One of the methodological tools used was the typological method, which gave the opportunity to identify all kinds of ways to ensure the implementation of contracts, to find similarities and differences between them and to study their possible links in the application. The typology used can further serve as a basis for further research. The integration method allowed analysing the degree of integration into the scientific context of legal materials and some legal data that reflect the features of the object of study, which were not previously subject to scientific generalisation. The method of synthesis allowed to solve the research problems through its application to primary sources on this issue. The application of the analytical method to these primary sources made recommendations in terms of optimising the national contractual security system; identify the main areas of experience of reform and the conditions that justify the use of certain methods. Methods of induction and deduction were used to analyse the content and structure of legislative texts, the characteristics of legal norms in the context of the research topic. In the process of analysis, the historical method was used, which allowed studying the process of formation of the institution ensuring the implementation of contracts.

The analysis of the scientific literature on the problem of research using these methods allowed to give some recommendations in terms of terminology; identify the factors and conditions that determine the use of certain methods.

RESULTS AND DISCUSSION

The latest version of the Civil Code of Ukraine for the first time contains general provisions on ensuring the fulfilment of obligations (paragraph 1 of Chapter 49 of the CCU, Articles 546-548). The traditional list of methods of security (penalty, surety, deposit and pledge) is supplemented by the latest methods – guarantee and retention. In addition, according to paragraph 2 of Art. 546 other ways provided by the law or a contract can be specified. That is, it can be argued that the general rules for ensuring the performance of obligations do not restrict parties in establishing another type of security for the performance of a

contract, which can be determined by them independently in a contract. A similar practice is supported by the Russian legislator (Article 329 of the Civil Code).

In contrast to the current Civil Code of Ukraine, Article 178 of the Civil Code of the Ukrainian SSR provided for an exclusive list of ways to secure obligations: penalty (fine, fee), pledge, guarantee and surety. A similar list was contained in paragraph 22 of the Regulation of the National Bank of Ukraine “On Lending” (Regulation of the National Bank... 1995). Thus, the Civil Code, which came into force on January 1, 2004, gave parties to civil relations more opportunities to apply the methods of securing obligations under contracts and the opportunity to choose not listed methods at their discretion.

In 2019, the Civil Code was supplemented by another way to ensure the fulfilment of obligations, but only under credit agreements – the right of trust property (Law of Ukraine “On Amendments... 2019). The right of trust property as a way to ensure the fulfilment of obligations restricts a creditor who received the property in trust property (Article 597-2 of the CCU) to alienate it, except for foreclosure on it, as well as its redemption for public needs in the manner prescribed by law. It should be noted that the Civil Code of Ukraine does not contain a definition of ways to ensure the implementation of contracts. In the authors’ opinion, it is most correct to present it in such wording – measures to protect the rights and interests of the parties to the obligation, aimed at ensuring its implementation, and compensation for property losses to the injured party in case of default. From this situation I.Y. Puchkovska concludes that the legislator did not provide mandatory features of the types of security (Puchkovska 2020: 37).

Thus, the wording of ways to ensure the fulfilment of obligations differ from each other, have different interpretations in doctrinal and legislative practice, but their common feature is the connection with the breach of the secured contract and implementation in the interests of a creditor. It is needed to define the legal content of each of them. In accordance with Part 1 of Art. 549 of the Civil Code of Ukraine the penalty means a sum of money or other property, or other property that the debtor must transfer to the creditor in case of breach of obligations by the debtor. Penalty is the most common way to ensure the fulfilment of obligations, especially in relation to bank credit agreements – it is contained in almost all standard forms of credit

agreements concluded by commercial banks of Ukraine. This method further burdens a debtor, increases his financial dependence on a creditor. But in conditions of low solvency of a debtor or in case of bankruptcy or loss of permanent employment, the penalty only increases the amount of debt without ensuring its repayment.

A surety agreement contains a guarantor's obligation to a debtor's creditor to fulfil his obligation. In essence, it acts as a contract concluded with an additional debtor, when the contractual obligations of a debtor in violation of them performed by a guarantor. The terms of the guarantee provide for the payment by a guarantor to a creditor of a sum of money in case of breach by a debtor of the obligation under a contract secured by a guarantee (Part 1 of Article 563 of the Civil Code of Ukraine). Obligations that arise in the future may be the subject of the guarantee. Guarantees and sureties are most common in banking and financial institutions, but without any restrictions they can be used as collateral in other contracts. However, the use of the guarantee as a way to ensure the fulfilment of contractual obligations is hampered by legislative gaps. So according to Art. 560 of the Civil Code of Ukraine, a guarantor can only be a bank or other financial or insurance institution. In Art. 2 of the Law of Ukraine "On Banks and Banking" (Law of Ukraine "On Banks... 2000) bank guarantee is defined as a type of bank loan. As the provision of a guarantee is related to a credit transaction, this method will require the use of additional collateral. This legislative inconsistency leads to a decrease in guaranteed loans.

There are also certain restrictions on the guarantee during its legal implementation. In the event of a claim against a guarantor for the performance of the security obligation, it may be challenged. Thus, the legal wife of a guarantor may challenge the actions of the body collecting the debt, on the grounds that she did not give personal written consent when drawing up the surety agreement. Thus, the institution of property, in particular the joint property of the spouses, contradicts the institution ensuring the fulfilment of obligations. In this aspect, a guarantee is considered the most liquid collateral for the loan obligation. Regarding the legal mechanism of using the guarantee for the domestic legal field, the experience of the United States is interesting, where banks use two types of guarantees:

- in case of doubtful or precisely uncertain financial stability of a guarantor, the secured guarantee is applied (the subject of the security

is the pledge of the guarantor's property), i.e. the guarantee is supplemented by a pledge obligation;

- in case of a high level of financial stability of a guarantor, an unsecured guarantee is used.

A deposit is in the form of a sum of money (or movable property), which the debtor transfers to a creditor in the account of the obligations under the contract in accordance with Part 1 of Art. 570 of the Civil Code of Ukraine. It is both a confirmation of the obligation and a means of ensuring its fulfilment. Civil law until 1917 did not contain provisions on the deposit as a way to secure the obligation, only certain rules regulated its application to certain contracts: sales, government contracts, supply, sale by auction (Makarenko 2008: 220).

The deposit is one of the most common ways to ensure the fulfilment of obligations under contracts of sale of real estate, but is widely used in contracts of sale of other objects, lease, services, leasing and others provided by civil law. The deposit should be separated from the advance, which should be done on the following grounds: the deposit goes to repay payments on the main obligation; the deposit is proof of the conclusion of a contract; the main purpose of the deposit – securing the obligation.

The absence of the last two features turns the deposit into an advance. In particular, in the case No. 6-17570sv10 the Supreme Court of Ukraine found that the transfer of funds, which was not accompanied by a conclusion of a contract of sale, the court of the first instance erroneously qualified as security for obligations, while it is an advance (Decision of the Supreme Court... 2011). Therefore, the rule of Art. 571 of the CCU applies only in the case of the conclusion between the parties of a deposit agreement in case of breach of the principal obligation by any party. The application of this method of security depends on the fault of parties. Thus, in case of non-fulfilment of the terms of a contract with the consent of the parties or due to objective reasons without their fault, the deposit is returned. If the obligation is not fulfilled in the presence of the fault of a party who gave the deposit, it remains with the other party, and otherwise (a party who received the deposit is guilty of breach of the obligation), a recipient pays the other party double the amount of the deposit. Pledge is one of the oldest ways to ensure the fulfilment of obligations, dating back to Roman law, and is widespread today, especially in the

activities of banking and financial institutions. This is also evidenced by the fact that the regulation of this method of security in addition to the rules of the Civil Code is a number of special laws (Law of Ukraine "On Pledge"... 1992). The pledge allows a creditor (pledgee) in case of default by a debtor (mortgagor) of the obligation it provides, to obtain satisfaction at its expense (Civil Code of Ukraine... 2003). This method can also provide requirements that will penetrate in the future (Article 573 of the Civil Code of Ukraine). Thus, securing the fulfilment of the contract with pledge satisfies the property interests of the creditor the best.

Violation by a debtor of an obligation secured with a pledge leads to foreclosure on the mortgaged property, which may occur: based on a court decision, based on a notary's writ of execution, out of court in separate proceedings for movable and immovable property (Law of Ukraine "On Mortgage"... 2003; Law of Ukraine "On securing..." 2003). A subject of the pledge can be any property: things (except for withdrawn from circulation), property rights (claims), securities, property that will become the property of a mortgagor in the future (Kusherets 2014). The pledge can be in the following forms:

Mortgage – the mortgaged property remains in the possession and use of a mortgagor or a third party. Property that can be mortgaged includes: businesses, buildings, structures, apartments in an apartment building, vehicles, goods in circulation and other property that is not withdrawn from civil circulation. Thus the mortgage of real estate and vehicles is subject to registration in the bodies which are carrying out registration of such objects.

- Pledge of rights – a subject is property rights that can be alienated (the right to receive rent, the right to share in the property of the business entity, debt claims, copyright, invention and other property rights).
- Pledge of a bank deposit – a subject is the rights of a depositor under the bank deposit agreement, the transfer of which he notifies a bank in writing with information about the pledgee.
- Pledge of securities is regulated by the relevant provisions of the legislation on the securities market.
- Pledge of goods in circulation and processing – the goods remain with a mortgagor, he has the

right to change its composition and natural form, provided that their total value is not reduced.

- Pledge – a pledge of movable property transferred to the possession of the pledgee or a third party. It can be taken as collateral for personal use, can be taken as collateral for short-term loans (pawnshops, consumer credit banks).

With regard to the use movable property of citizens as pledge, the provision of credit for its acquisition with the simultaneous transfer of property acquired at their expense to a debtor leads to a situation where under the influence of natural wear, technical aging or damage or breakage of property values are significantly reduced, and a mortgagee will no longer be able to sell it at the original price.

In contrast to the world experience, where in the agricultural sector the main way to secure obligations is the mortgage of agricultural land, domestic legislation did not allow the use of this method. According to part 5 of Art. 133 of the Land Code of Ukraine (Land Code of Ukraine... 2001) and Part 3 of Art. 575 of the Civil Code, the rules of pledge of land must be determined by a special law. But today such a law has not been adopted. The current Law "On Mortgage" contained a provision that precluded until January 1, 2005 the extension of its effect on the pledge of agricultural land (Law of Ukraine "On Mortgage"... 2003). After that time, only state-owned or communally-owned lands that were not subject to privatisation remained an exception for mortgage use. The Law on Mortgage also amended Part 4 of Art. 133 of the Land Code, which determined that the pledgee of agricultural land can only be banks (Law of Ukraine "On Mortgage"... 2003).

In addition, banks are reluctant to accept land as the subject of securing the implementation of credit (financial) agreements. This is due to the difficulty of valuing land and selling it in case of default, i.e. low liquidity (compared to transport or other real estate). The division of collective agricultural enterprises into shares has led to a significant number of owners of small plots of land, most of which are used by agricultural enterprises on lease. Since, according to the law, a mortgagor can only be its owner, and the right to lease cannot be pledged, these land plots also fall out of the list of objects that can be a subject of the pledge.

It is possible to extend this way of providing through norms of Art. 407 of the Civil Code, which regulates

that the right to use someone else's land for agricultural purposes (emphyteusis) can be alienated, and therefore transferred as pledge. However, the implementation of this norm is blocked by the inconsistency of the norms of the Civil and Land Codes. Pledge, like other means of security, has no independent existence. The pledge agreement is tied to the main agreement, to ensure the implementation of which it is concluded by a mortgagor and a mortgagee. The pledge provides a creditor's claim in the amount formed before the actual satisfaction, and includes the amount of principal, compensation for damages caused by delay, penalty, fine, fee, maintenance costs of the mortgaged property, collection costs. In practice, pledge as a method of security is most often applied to credit agreements, as well as to contracts of sale, contract, commission, storage and others governed by the Civil Code. Bail is also often used in other areas of law, such as customs authorities to pay customs duties and other charges, and to enforce fines or the value of goods and vehicles for violating customs regulations.

Thus, a pledge is a method of security that guarantees a creditor real protection in the event of a breach by a debtor of the obligation at the expense of the mortgaged property. The main advantages of a pledge as a way to ensure the implementation of contracts: ensures the availability and preservation of pledge until the time of the debtor's settlements with a creditor; provides a mortgagee with the opportunity to satisfy their claims at the expense of an object of pledge mainly to other creditors; the real danger of loss of property encourages a debtor to fulfil his obligations properly.

Detention of a thing as a type of security has been enshrined in domestic civil law quite recently, in contrast to European law. Although this institution has been known since Roman law. In this regard, M.M. Agarkov notes that Soviet law did not know either the general civil rules on the right of retention, or common to all credit institutions rules on retention of the debtor (Agarkov 1994: 117–118). However, there are sufficient grounds to claim that this institution is known to civil law in an indirect form. So according to Art. 408 of the Civil Code of the Ukrainian SSR a commissioner had the right to deduct the sums belonging to him under a contract of the commission from all sums which he got at the expense of a committent. Thus, the Merchant Shipping Code of Ukraine (Article 163) provides that a carrier does not give delivery until a recipient pays the amount of costs (simple, transportation costs, freight, emergency fee or provision of security, etc.). A carrier

has the right to detain the goods and when getting them to the warehouse for storage, he must notify a recipient. Similar rules on the right of detention are contained in the civil legislation of Kazakhstan:

- Art. 624 of the Civil Code: a contractor has the right to keep the results of work belonging to a customer, his equipment, transferred for processing, the remains of unused materials and other property of a customer;
- para. 4 of Art. 697 of the Civil Code: a carrier has the right to detain the goods and luggage being transported;
- Art. 795 of the Civil Code: a warehouse has the right to retain the stored goods – until a debtor fully fulfils the obligation to pay for services rendered;
- para. 2 of Art. 871 of the Civil Code: a commission agent has the right to detain the thing of a committent that he has.

Thus, adherence to its enshrinement in the Civil Code of Ukraine in 2003 among the methods of security had little use in contracts of commission, transportation, storage and contracting, so there were objective grounds for its allocation as a means of security in a separate article. This method of security is that a creditor who holds the thing to be transferred to a debtor or a person specified by him, in case of non-compliance with the terms of a contract has the right to keep it until the relevant obligation is fulfilled by a debtor. A creditor does not lose the right to retain the thing even after the rights to it have been acquired by third parties.

It should be noted that such a way of ensuring the implementation from others, as the emergence only based on law (a contract is not the basis). It does not require the conclusion of a separate contract or special registration of the right of retention, is realised by notifying a debtor of the retention of a thing by a creditor. According to Part 2 of Art. 594 of the Civil Code of Ukraine, other claims of a creditor may be secured by retention of the thing. The latter means that arising from one obligation, the lien may secure the creditor's claims arising from another obligation between the same parties. The right of retention can protect the violated rights of a creditor in two ways:

- by encouraging a debtor to fulfil the latter's breached obligation due to the inability to own

and use their property (Article 594 of the Civil Code of Ukraine). A debtor is interested in returning his property held by a creditor, and therefore will try to fulfil the violated obligation as soon as possible at the request of a creditor;

- by granting a creditor the right to recover the debtor's detained property according to the rules provided for collateral (Article 597 of the Civil Code of Ukraine), if the detention did not lead to the debtor's performance of the violated obligation.

Regarding the methods of securing the fulfilment of obligations under contracts that are not specified in the legislation, and which parties can establish independently, it is necessary to pay attention to such a common way in foreign practice to ensure repayment of loans as purchase and sale agreements with the obligation to repurchase at a pre-agreed price and on time. The property will be purchased at a certain price with a simultaneous obligation to sell it in due time at a higher price. These differences cover the amount of interest on the loan, and the property from the resale agreement is the subject of security for loan repayment.

This agreement is essentially similar to a repo banking operation, only a subject can be only securities. However, in domestic practice, resale agreements are not included in the list of permitted banking operations, except for repos with securities. According to Part 3 of Art. 48 of the Law of Ukraine "On Banks and Banking" one of the restrictions on the activities of banks is trade (Law of Ukraine "On Banks... 2000). In this perspective, a contract of resale of property as a way to secure a loan is a prohibited activity. In the authors' opinion, this provision would allow to intensify investment processes and increase the volume of secured lending to businesses, and therefore requires approval in the list of possible for banking institutions. In domestic practice, primarily in the field of banking, the most widespread is such a method of insurance as insurance of banking risks (Shimon 2019: 62–66) (primarily non-repayment of loans). This method is costly for banks (Zhila 2009), but has almost the same efficiency as a guarantee. As a rule, banks enter into general insurance contracts with an insurance company, within which credit agreements are drawn up simultaneously with one-time insurance agreements. It should be noted that the construction of enforcement can be used in relation to the contractual structures used in inheritance law. It is also permissible

to use security in the execution of a testamentary disclaimer, which by its nature is a binding legal relationship. In this regard, O.P. Pecheny believes that for the execution of the will by a testator property can be identified and legally separated as a means of security, which will primarily satisfy the interests of heirs entitled to a mandatory share, so that the property specified in the will passed to an heir of the will as a whole. Thus interests of necessary heirs are satisfied at the expense of the hereditary property defined as security. The author calls this method "testamentary security" (Pecheny 2015: 52).

In addition, in inheritance law, there are legal relationships that are not obligations in the "pure" form, but may necessitate their implementation. To them O.V. Pecheny includes the will and its execution. The will assumes the possibility of occurrence in the future, after the opening of the inheritance of rights and obligations, the heirs, recipients, other persons that can be realised in relation to the estate. At the same time, there may be situations when the execution of the testator's orders, especially when it provided for the actual execution, required security. For example, a will provides for the transfer of a certain part of the inheritance in the form of individually determined property to the heir A., in the presence of several heirs (B. and C.), entitled to a mandatory share in the inheritance. In this case, the mandatory share will be formed, including at the expense of the property specified in the will, which will, as a general rule, lead to the emergence of a legal regime of joint partial ownership. This will to some extent violate the will of a testator, aimed at the transfer of certain property as a whole to an heir to a will. Therefore, in this situation, the potential of certain ways to ensure compliance can be used.

Thus, the application of one or another method of ensuring the implementation of contracts depends primarily on a type of a contract, because the implementation of not all contracts is legitimate to provide in some ways. As practice and analysis of scientific sources show, there is no universal and most effective way to provide. The case law shows the largest number of disputes regarding the collection of penalties, the implementation of sureties and guarantees, as well as pledges (mortgages).

CONCLUSIONS

The basis for the implementation of civil law agreements is the emergence of mutual obligations

between the parties to a contract, which must be fulfilled by them in accordance with applicable law. However, in practice, counterparties do not always perform them properly, honestly and on time. Therefore, in order to ensure the property interests of a creditor in advance and provide him with guarantees of proper performance of the debtor's obligations, the legislator has created an institution of ways to ensure the fulfilment of obligations. Ways to ensure the fulfilment of obligations – a set of measures that, when established by contract or law, encourage a debtor to properly fulfil the obligation, and in case of violation – protect the creditor's property interests by foreclosure on certain property or fulfilment by a third party of the obligation violated by a debtor, in particular a guarantor or suretor.

REFERENCES

- Agarkov, Mikhail M. 1994. *Fundamentals of Banking Law. Course of Lectures. The Doctrine of Securities*. Moscow: Publishing house BEK.
- Alyoshin, Vasyl V. 2019. "The genesis of the civil law institution of the deposit." *Collection of scientific works of HS Skovoroda Kharkiv National Pedagogical University "Law"* 30: 61–71.
- Artemenko, Marina S. 1986. *The Role of Penalties in Ensuring the Implementation of Planned and Contractual Obligations in the New Economic Conditions*. Moscow: Plekhanov Russian University of Economics.
- Civil Code of Ukraine: Law of January 16, 2003, No.435. 2003. Retrieved August 6, 2020 (<https://zakon.rada.gov.ua/laws/show/435-15>)
- Decision of the Supreme Court of Ukraine of 16.02.2011. Case No. 6-17570sv10. 2011. Retrieved August 8, 2020 (<http://reyestr.court.gov.ua/Review/14405555>)
- Draft Civil Code of the Russian Empire of 1905. 1905. Retrieved August 10, 2020 (<http://constitutions.ru/?P=4930>).
- Dzera, Oleksandr V. and Natalia S. Kuznetsova. 2002. *Civil Law of Ukraine*. Kyiv: Yurinkom Inter.
- Genkin, Dmitry M., ed. 1950. *Soviet Civil Law*. Moscow: Nauka.
- Gongalo, Bronislav M. 1998. *Civil and Legal Security of Obligations*. Yekaterinburg: Ural State Law Academy.
- Ioffe, Olympiad S. 1975. *Obligatory Law*. Moscow: Yuridicheskaya literatura.
- Konstantinova, Valentina S. 1989. *Civil Law Enforcement of Economic Obligations*. Sverdlovsk: Ural State University.
- Kusherets, Daryna. 2014. "Ensuring the fulfilment of contractual obligations as a guarantee of protection and defence of property rights." *Journal of Civilisation* 17: 76–79.
- Land Code of Ukraine: Law of October 25, 2001 No. 2768-III. 2001, Retrieved August 10, 2020 (<https://zakon.rada.gov.ua/laws/show/2768-14>)
- Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Stimulation of Investment Activity in Ukraine" of September 20, 2019 No. 132-IX. 2019. Retrieved August 8, 2020 (<https://zakon.rada.gov.ua/laws/show/132-20#Text>)
- Law of Ukraine "On Banks and Banking" of December 7, 2000. No. 2121. 2000. Retrieved August 10, 2020 (<https://zakon.rada.gov.ua/laws/show/2121-14>)
- Law of Ukraine "On Mortgage" of June 5, 2003. No. 898-IV. 2003. Retrieved August 6, 2020 (http://search.ligazakon.ua/l_doc2.nsf/link1/T030898.html)
- Law of Ukraine "On Pledge" of October 2, 1992, No. 2654. 1992. Retrieved August 8, 2020 (<https://zakon.rada.gov.ua/laws/show/2654-12#Text>)
- Law of Ukraine "On securing creditors' claims and registration of encumbrances" of November 18, 2003. No. 1255-IV. 2003. Retrieved August 9, 2020 (<https://zakon.rada.gov.ua/laws/show/1255-15>)
- Makarenko, Galyna V. 2008. "History of the institution of ensuring the fulfilment of obligations." *Current Issues of State and Law* 38: 216–220.
- Meyer, Dmitry I. 1997. *Russian Civil Law*. Moscow: Moscow State University.
- Pahman, Semyon V. 1877. *Ordinary Civil Law in Russia. Legal Essays*. St. Petersburg: Nauka.
- Pecheny, Oleg P. 2015. "On the question of the possibility of ensuring the execution of the will." *Protection of Private Rights: Problems of Theory and Practice* 1: 52.
- Pobedonostsev, Konstantin P. 2003. *Civil Law Course*. Moscow: Zertsalo Publishing House.
- Pokachalova, Alona. 2010. "The concept and legal nature of collateral." *Legal Ukraine* 10: 82–87.
- Pronina, Maria G. 1977. *Incentive Function of Civil Sanctions*. Minsk: Nauka i Tehnika.
- Puchkovska, Iryna I. 2013. "On the protective purpose of methods of ensuring the fulfilment of obligations (collateral)." *Scientific Sheets of Belgorod State University. Series: Philosophy. Sociology. Law* 23: 132–138.
- Puchkovska, Iryna Y. 2018. *Theoretical Problems of Securing Obligations*. Kharkiv: Yaroslav Mudryi National University of Law.
- Puchkovska, Iryna Y. 2020. "On the main purpose of the types of security for the fulfilment of obligations." *Problems of Legality*, 148, 36–44. <https://doi.org/10.21564/2414-990x.148.195125>
- Puchkovsky, Sergii. 2019. "On the implementation of types of security as legal consequences of breach of contractual obligation." *National Legal Journal: Theory and Practice* 4(38): 105–107.
- Regulation of the National Bank of Ukraine "On Lending" dated 28.09.95 N 246 (Regulation repealed on the basis of the Resolution of the National Bank dated 18.02.2004 No. 54). 1995. Retrieved August 9, 2020 (<https://zakon.rada.gov.ua/laws/show/v0246500-95>)
- Shimon, Liudmyla S. 2019. "Named and unnamed personal security." *Actual Problems of Domestic Jurisprudence* 4: 62–66. <https://doi.org/10.15421/391914>
- Spasibo-Fateeva, Inna V., ed. 2012. *Civil Code of Ukraine: Scientific and Practical Commentary (Explanations, Interpretations, Recommendations Using the Positions of Higher Courts, the Ministry of Justice, Scientists, Experts)*. Vol. 7: *General Provisions on Obligations and Contract*. Kharkiv: Yaroslav Mudryi National University of Law.
- Zhila, Anna S. 2009. *Insurance as a Way to Secure Obligations in the Civil Legislation of Ukraine*. Odessa: Odessa National Law Academy.

Received on 20-11-2020

Accepted on 18-12-2020

Published on 31-12-2020

DOI: <https://doi.org/10.6000/1929-4409.2020.09.370>

© 2020 Puchkovska *et al.*; Licensee Lifescience Global.

This is an open access article licensed under the terms of the Creative Commons Attribution Non-Commercial License (<http://creativecommons.org/licenses/by-nc/3.0/>) which permits unrestricted, non-commercial use, distribution and reproduction in any medium, provided the work is properly cited.