относятся расходы органа досудебного расследования, связанные с выполненной работой в конкретном уголовном производстве. Например, орган досудебного расследования несет расходы материального характера, связанные с выездом следственно-оперативной группы на место происшествия (стоимость горючего, амортизация транспортного средства), работой, проведенной на месте происшествия (израсходованные материалы, связанные с выявлением и фиксацией следов на месте происшествия), оплатой труда работникам правоохранительных органов, которые в установленном законом порядке были привлечены к проведению следственных действий в уголовном производстве, а также расходов, понесенных в связи с дальнейшим досудебным расследованием. При таких обстоятельствах государство несет колоссальные расходы на содержание и функционирование органов досудебного расследования. На основе вышеприведенного предлагаем дополнить ст. 118 УПК Украины, в частности п. 5 изложить в следующей редакции: «Процессуальные издержки состоят из расходов, понесенных органом предварительного расследования при проведении следственных действий в уголовном производстве».

**Список использованной литературы:**

1. Дьомін Ю.М. Процесуальні витрати за новим КПК України / Ю.М. Дьомін // Європейські перспективи. – 2012. – № 3. – Ч. 3. – С. 47–51.

2. Інструкція про порядок і розміри компенсації (відшкодування) витрат та виплати винагороди особам, що викликаються до органів досудового розслідування, прокуратури, суду або до органів, у провадженні яких перебувають справи про адміністративні правопорушення, та виплати державним спеціалізованим установам судової експертизи за виконання їх працівниками функцій експертів і спеціалістів від 1 липня 1996 року № 710 [Електронний ресурс]. – Режим доступу : http://zakon0.rada.gov.ua/ laws/show/710-96-%D0%BF.

3. Про Державний бюджет України на 2015 рік : Закон України від 28.12.2014 № 80-VIII [Електронний ресурс]. – Режим доступу : http://zakon5.rada.gov.ua/laws/show/80-19.

# PROTECTION NATURE OF THE WAYS OF ENSURING IMPLEMENTATION OF OBLIGATIONS

**Iryna PUCHKOVSKA,**
Candidate of Legal Sciences, Associate Professor
of Civil Law Department № 1 of the Yaroslav Mudriy National Law University

**Summary**

The article is devoted to the protective nature of the ways of ensuring implementation of obligation. Considering the ways of ensuring implementation of obligations as ways of protection, the author shows that distinctive peculiarity of the last is the presence of the ensuring source (definite property, obligation of the third person of implementation of breached by the debtor obligation) at the expense of which it is protection of the creditor's rights has been performed by the ways of ensuring implementation of obligations.

**Key words:** ways of ensuring implementation of obligations, measures of liability, methods of protection, measures of operational impact.

**Аннотация**

Статья посвящена защитной природе способов обеспечения исполнения обязательств. Рассматривая способы обеспечения исполнения обязательств в качестве способов защиты, автор называет отличительной особенностью последних наличие обеспечительного источника (определенное имущество, обязанность третьего лица исполнить нарушенное должником обязательство), за счет которого и осуществляется защита прав кредитора способами обеспечения исполнения обязательств.

**Ключевые слова:** способы обеспечения исполнения обязательств, меры ответственности, способы защиты, меры оперативного воздействия.

The absence of accepted views on the purpose of provisions in the modern doctrine of civil law is largely explained by the fact that in the pre-revolutionary period in the science of civil law there was no general teaching on ensuring obligation; in the Soviet period ways of ensuring implementation of obligations analyzed exclusively when they were used in economic relations [13, p. 21], therefore, only some of them, in particular, forfeit considered in the dissertation for a candidate's degree [1] and the first special monographic research devoted to general teaching on ensuring implementation of obligations has been created only in 1998 [4].

The pre-revolutionary scientists ' judgments on provisions expressed in a laconic form as an introduction before the characteristic of a particular type of ensuring implementation of obligations or in the connection with discussion of other legal problems. So, ways of ensuring implementation of contracts were called by D.I. Meyer as created by legal lifestyle "artificial methods for providing such hardness of law of obligations, which it lacks in essence" [15, p. 179]. S.V. Pahman emphasized that the obligations "by its very nature, need such means that would guarantee their implementation" and "are directed against failure under obligations and serve as an inducement to the execution of them or even a full guarantee of their performance" [17, pp. 77–78]. K.P. Pobedonostsev considered that «person who owns claim can provide himself by the additional contract, strengthening the need for implementation for the obliged party or bringing to responsibility the specific, pre-arranged means and methods of performance» [18, p. 250].

In Soviet times, methods of ensuring implementation of obligations turned out to be practically unclaimed. Under the conditions of planned economy and the priority action of the principle of the real implementation of obligations and the use of such methods as bail or surety was significantly obstructed and to a certain extent risky, [2, p. 70–71]. The functioning of deposit was limited by relationships between citizens. Unclaimedness of ways of ensuring obligations (except for forfeit) openly was reflected in Soviet literature [9, pp. 157–158] which could not hinder the

development of this institution in the science of civil law. Forfeit has received rapid development, "flourished" in four forms and as it is rightly noted by N.S. Kuznetsova, was recognized the "queen" among the ways of ensuring implementation of obligations in the conditions of planning and distribution economy [24, p. 663] that can be explained only by its nature as a measure of civil liability. Payment of the penalty does not relieve commodity producers of implementation of their obligations in kind, at the same time punishing for a breach of the contract. The sums have been paid to counterparties and received from the latter it is fines and penalties characterized the work of the legal service of the enterprise. And the question of the strengthening of the contractual discipline and, therefore, liability for a breach of economic contracts, was binding on the agenda of the state forums of any level.

During the period of transition to the market economy, summarizing the developed on the base of doctrine results for the passing three decades concerning the nature and place of the institute of ways of ensuring implementation of obligations in civil law system has been summarized by B.M. Gongalo. The scientist has identified the ways of ensuring implementation of obligations as an ensuring measures of property character existing in the form of accessory obligations stimulating the debtor to implement obligations and (or) otherwise guaranteeing protection of the property interests of the creditors of the debtor in case of failure [5, p. 40]. Accordingly, among the functions of ensuring have been distinguished by B.M. Gongalo such as following: stimulating and protective and divided the ways of ensuring implementation of obligations on those which are as follows: 1) stimulate the debtor to implement his obligations ( forfeit and deposit); 2) protect the property interest of the creditor in the case of a failure of the debtor (guarantee, bank guarantee), and 3) stimulate the debtor to implement his obligation and in the case of its failure they protect the property interest of the creditor (pledge, retention) [5, p. 9]. A.V. Latyntsev is convinced that for assigning one or the other of the legal mechanism of methods of ensuring implementation of contractual obligations it is necessary that it had simultaneously both mentioned above features (protective and stimulating). He considers that the absence of any of them does not permit to qualify legal institute as the method for ensuring [14, p. 8].

N.Yu. Rasskazova considers that the rules of ensuring « are directed not to stimulation of the debtor to performance of his obligation but to the protection of the creditor against the risk of its default [22, p. 46] that is evidence that among scientists specialized in the research of the problems of the ways of ensuring implementation of obligations (at the level of master's and doctoral theses) there are still no common views on functions of ensuring and, accordingly, the assignment of this institute is still absent.

But, only recently, that contemporary researchers underlying that ensuring has stimulating and protective functions, even more often consider importance of these measures from the point of view of the creditor interests [8, p. 12]. Changing of the accents in the process of the investigation of the specific ways of ensuring implementation of obligations from the person of the debtor to the creditor, though without explanations by the researches, the fact itself is evidence that independently of each other, they "feel" the importance of ensuring, especially , for the creditor rightly linking action of the latter with a breach of the secured obligation and some of them quite consciously emphasizes their protective function. In particular, A.Yu. Pokachalova ensuring of property interest of the creditor considers as the main function of the ways of ensuring implementation of obligations and stimulation of a debtor to implementation of his obligation – as an additional one[19, p. 85].

As to the author opinion results of the achievements of civil law science in the process of the investigation of the measures of operating influence [11, p. 23] and measures of civil liability [10, 16, 20] give us the possibility – even today – to look in a new way at what this institute of the ways of ensuring implementation of obligations is intended for making a conclusion of its protective nature.

Reviewing critically mentioned in Article 546 of the Civil Code ways of ensuring implementation of obligations with the aim of revealing of their common features and comparing them with operational measures and measures of civil liability we will see that measures of operational influence so as ways of ensuring implementation of obligations and measures of civil liability among them are realized exclusively in the case of a breach of the contractual obligations. Herewith, these measures in the scientific literature have no clear differentiation between them. The researchers either mix together measures of operative influence, measures of liability and ways of ensuring implementation of obligations between themselves or absorb one of them by others or point out to the dual nature of these measures. I n particular, forfeit and deposit are considered in doctrine of civil law as a the way of ensuring implementation of obligations so as measures of civil liability [3, s. 484; 24, s. 662; 26, p. 33] and retention that reasonably recognized as measure of operative influence, in the new Civil Code of Ukraine (further – CC) has taken place in Article 546 of CC among the ways of ensuring implementation of N.Yu. Rasskazova considers that the rules of ensuring «are directed not to stimulation of the debtor to performance of his obligation but to the protection of the creditor against the risk of its default [22, p. 46] that is evidence that among scientists specialized in the research of the problems of the ways of ensuring implementation of obligations (at the level of master's and doctoral theses) there are still no common views on functions of ensuring and, accordingly the purpose of this institute is still absent.

But only recently that contemporary researchers, underlying that ensuring has stimulating and protective functions, even more often consider importance of these measures from the point of view of the creditor interests [8, p. 12]. Shifting of the accents in the process of the investigation of the specific ways of insuring implementation of obligations from the person of the debtor to the creditor though without representing reasons by researches but the fact itself is evidence that independently of each other, they «feel» the importance of

ensuring ,especially , for the creditor rightly linking action of the latter with a breach of the secured obligation and some of them quite consciously emphasizes their protective function. In particular, A.Yu. Pokachalova ensuring of property interest of the creditor considers as the main function of the ways of ensuring implementation of obligations and stimulation of a debtor to implementation of his obligation – as an additional one[19, p. 85].

As to the author opinion results of the achievements of civil law science in the process of the investigation of the measures of operating influence [11, p. 23] and measures of civil liability [10; 16; 20] permit us – even today – to look in a new way at what this institute of the ways of ensuring implementation of obligations is intended for making a conclusion of its protective nature.

Critically reviewing named in Article 546 of the Civil Code ways of ensuring implementation of obligations with the aim of revealing of their common features and comparing them with operational measures and measures of civil liability we will see that measures of operational influence so as ways of ensuring implementation of obligations and measures of civil liability among them are realized exclusively in the case of a breach of the contractual obligations. With this these measures in the scientific literature have no clear differentiation between them. The researchers either mix together measures of operative influence, measures of liability and ways of ensuring implementation of obligations between themselves or absorb one of them by others or point out to the dual nature of these measures. I n particular, in the doctrine of civil law forfeit and deposit are considered as a the way of ensuring implementation of obligations so as measures of civil liability [3, p. 484; 24, p. 662; 26, p. 33] and retention that reasonably recognized as measure of operative influence, in the new Civil Code of Ukraine (further on – CC) has found its place in Article 546 of CC among the ways of ensuring implementation of obligations that gave the possibility for the researchers the measures of operative influence relate to unnamed ("others") (Article 546 of CC) ways ensuring implementation of obligations [6, p. 53], established by law or the contract (Part 2 Article 546 of CC).

The research of measures of operational influence and measures of liability permitted to see their directionality to stimulation of the debtor to performance of the contract that pointed out to implementation by them of stimulating functions and protection of the creditor's rights in the case of a breach by the debtor of his contract obligations Stimulating function of ways of ensuring implementation of obligations always has been stressed by researchers in the definitions of these measures, and often under the name of ensuring ones they have been considered as the main function of the ways of ensuring implementation of obligations. "It is clear – writes B.M. Gongalo – when speaking of stimulating function then we are talking on forfeit as the way of ensuring implementation of obligation". If, however, as the purpose of forfeit it is pointed out compensation for losses by the creditor then it is meant recovery of forfeit, that is, civil liability [5, p. 55].

Herewith, considering mentioned methods of ensuring implementation of obligations (Article 546 of CC) it is impossible not to pay attention to their protective function since the last ones are realized ("work", "switched") only in case of a breach of obligation by the debtor. They are adapted for the protection of a breach rights of the creditor, that is fixed in the concept of each of them.

Thus, forfeit – a sum of money or other property which the debtor is obliged to transfer to the creditor in the case of a breach of his obligation by the debtor (Art. 549 of CC); in the case of a breach of the obligation by the debtor , secured by the guarantee, the guarantor bound to pay to the creditor the amount of money in accordance with the terms of the guarantee (Article 563 of CC); the deposit remains with the creditor, if a breach of obligation due to the fault of the debtor .. If a breach of obligation was the fault of the creditor he is obliged to return the deposit to the debtor and in addition to pay the sum in the amount of the deposit or its cost (Article 571 of CC); In virtue of pledge the creditor is entitled to, in the case of failure by the debtor of implementation of his obligation, secured by collateral, obtain satisfaction at the expense of the mortgaged property (Article 572 of CC); the creditor in case of failure to implement his obligation by the debtor is entitled to retain the thing of the debtor until the debtor's implement of his obligation (Art. 594of CC).

As can be seen, the legislator used different formulation s in respect of each of the methods of ensuring implementation of obligation but they are united by the fact that the implementation of the particular ensuring is connected with a breach of the ensured contract and it is made in the interest of the creditor.

Herewith, the use by the legislator such phrases as "the guarantor gives guarantee to the creditor on implementation by the debtor of his obligation", "the bondsman gives surety to the creditor of the debtor on implementation by him of his obligation", "the bondsman is liable for a breach", "the guarantor is liable for a breach" from one side it is complicated the elucidation essence of the ways ensuring implementation of obligations, and from the other one gives evidence on similar (or even identical) of purpose of the ways of ensuring implementation of obligations and measures of civil liability. If we consider the implementation of such ensuring as a guarantee, we will see that "guarantee" of implementation of his obligation by the debtor to the creditor is carried out by the guarantor by the way of payment of amount of money in accordance with the guarantee terms (p.1 Article 563 of CC), that is, he acts for the debtor, but does not guarantee the implementation by the debtor that is of fundamental importance. No ways of ensuring implementation of obligation or any other legal measures are unable to ensure the very performance of an obligation. It is impossible for one person to guarantee the implementation of his obligation by another person, because even if there is a great desire by the debtor to perform his obligation properly, it does not always depend on him, and, all the more so, taking into account the possible unfairness of the latter. Accordingly, the provisions of Part 3 of Article 14 of CC in respect

of ensuring implementation of civil obligations by means of encouraging and by responsibility can be viewed only as stimulating of the debtor to perform his obligations, and not as their guarantee taking into account the impossibility of the latter.

In Part 3 of Article 14 of CC the responsibility is represented by the legislator as an instrument for implementation of civic obligations and in Chapter 49 of CC as ways of ensuring implementation of obligations as instruments of ensuring identical purpose of these measures, in particular, in relation to ensuring implementation of obligations in ensuring.

As a result of comparison of the measures of civil liability, measures of operational influence and ways of ensuring implementation of obligations it is possible to make the conclusion of their common assignment and, accordingly, on their common performance of the same functions, such as stimulating and protective one as components of security function of law at regulation of contractual relations.

Herewith, it is important to emphasize that stimulating function is performed equally by the ways of ensuring implementation of obligations, measures of operational influence and measures of liability and that it is simply their presence in the contract or in law encourages the debtor to the proper implementation of his obligations and, accordingly, to make difference between these measures with the help of this feature is not possible.

All of them are aimed to stimulate the debtor to implement his obligations under the contract. Also, all the above mentioned measures provide protection of the breached rights of the creditor, if their presence has not prevented a breach of the contract.

So mentioned institutes are carried out both stimulating and protective functions. Purpose of these institutes – to stimulate the debtor to the proper performance of contractual obligations and in case of its breach – to protect the rights of the creditor. Purpose of these institutions – to stimulate the debtor to proper performance of contractual obligations and in case of its breach – to protect the rights of the creditor. B.M. Gongalo, taking into account the importance of the functional approach in evaluating the directivity of ways of ensuring implementation of obligations, rightly considers that it is impossible to admit its absolutization, as it is, precisely, by the absolutization in the system of ways of ensuring implementation of obligations, measures of operational influence etc. has been explained [5, p. 35] that from one side is evidence of general purpose of institutes of ensuring implementation of obligations ,measures of operational influence and measures of civil liability, and from the other one it emphasized that only the functional approach is not sufficient to distinguish between these measures.

In the process of performing by mentioned institutes of their protective functions , first of all , noteworthy is the fact that the measures of responsibility and measures of operational impact officially recognized by the legislator as the ways of protective rights , which has been fixed in Part 2 of Article 16 of CC. Realization of the ways of ensuring implementation of obligations we will not find neither among the consequences of a breach (Art. 611 of CC) or among the ways of rights protection (Article 16 of CC) that is the evidence of the perception of the latter by the legislator only as measures stimulating a debtor to perform his obligations, despite the fact that each of the ways of ensuring implementation of obligations has the protective mechanism.

Ways of ensuring implementation of obligations are not considered from the perspective of the ways of protection even by researches. Researchers give name to ensuring as “specific”, “special”, “additional”, “accessory”, etc. measures, first of all, emphasizing their stimulating function, and don’t point out that with the help of ways of ensuring implementation of obligations and, exactly so, as due to the measures of responsibility and measures of operational impact it is protection of the creditor’s rights that has to be implemented in the case of a breach of contractual obligations by a debtor. And “peculiarity”, “specialty”, “additionality” “accessory” of the ways of implementation of obligations can be explained by their assignment, namely, protection of the rights of the creditor in the case of a breach of the contract by the debtor at the expense of created for this purpose source of implementation of the breached obligation. One only occasionally can meet individual statements in support of this opinion in literature. In particular, A.P. Sergeev writes that “as an example of other methods of protection can be called foreclosure by pledge on the debtor’s property” [7, p. 552]. And V.L. Yarotsky notes that “The example of fixing of the method of self-protection by provisions of the civil legislation acts is deduction (Article 594 of CC)” [25, p. 267].

It is comparison of the ways of implementation of obligations with measures of responsibility and measures of operational impact permits us to see as the protective nature of the ways of implementation of obligations so reveal their defining feature – the presence of an ensuring one.

In the case if the above-mentioned measures of stimulating of the debtor is implemented by the same way, the result of this is their full identification by as researchers so by the legislator then protection of the creditor’s rights with the help of the ways of implementation of obligations are implemented by only their own specific way – through a specially created for this purpose ensuring source.

Establishment of certain method of implementation of obligations implies that on request of the creditor by the debtor it is created ensuring source (by size equal or exceeding the size of the claim of a creditor secured by the contract) at the expense of which the creditor in case of a breach his obligation by the debtor will receive implementation, that is, implementation in the order of protection.

Such a source may be as a certain property (in the presence of pledge or retention) so obligation of a third party to perform obligation of the debtor (in the presence of surety or guarantee).It is the presence of this source gives the possibility to demarcate the institute of the ways of implementation of obligations from such similar institutes as measures of civil liability and measures of operational impact which perform protection of the creditor otherwise.

**Literature:**


1. Артеменко М.С. Роль неустойки в обеспечении исполнения планово-договорных обязательств в новых условиях хозяйствования : автореф. дисс. … канд. юрид. наук / М.С. Артеменко. – М., 1986. – 21 с.

2. Белов В.А. Поручительство. Опыт теоретической конструкции и обобщения арбитражной практики / В.А. Белов. – М. : ЮрИнфор, 1998. – 234 с.

3. Брагинский М.И. Договорное право / М.И. Брагинский, В.В. Витрянский. – 3-е изд., стереотип. – М. : Статут, 2001. – Кн. 1 : Общие положения. – 2001. – 848 с.

4. Гонгало Б.М. Гражданско-правовое обеспечение обязательств : автореф. дисс. … докт. юрид. наук / Б.М. Гонгало. – Екатеринбург, 1998. – 42 с.

5. Гонгало Б.М. Учение об обеспечении обязательств / Б.М. Гонгало. – М. : Статут, 2002. – 222 с.

6. Гражданское право : в 2 т. / отв. ред. проф. Е.А. Суханов. – 2-е изд., перераб. и доп. – М. : Волтерс Клувер, 2004. – Т. 2. – Полутом 1 : Учебник. – 2004. – 704 с.

7. Гражданское право : [учебник] : в 3 т. / [Е.Н. Абрамова, Н.Н. Аверченко, Ю.В. Байгушева и др.] ; под ред. А.П. Сергеева. – М. : РГ-Пресс, 2009. – Т. 1. – 2009. – 1008 с.

8. Жуков А. О правах кредитора-залогодержателя в процедуре банкротства / А. Жуков // Предпринимательство, хозяйство и право. – 2001. – № 11. – С. 16–18.

9. Иоффе О.С. Обязательственное право / О.С. Иоффе. – М. : Юрид. лит., 1975. – 880 с.

10. Карапетов А.Г. Неустойка как средство защиты прав кредитора в российском и зарубежном праве / А.Г. Карапетов. – М. : Статут, 2005. – 286 с.

11. Карпов М.С. Гражданско-правовые меры оперативного воздействия / М.С. Карпов. – М. : Статут, 2004. – 141 с.

12. Кізлова О.С. Застава в цивільному праві України (концептуальні засади та правова природа) : автореф. дис. ….. докт. юрид. наук : спец. 12.00.03 / О.С. Кізлова. – Одеса, 2011. – 38 с.

13. Константинова В.С. Гражданско-правовое обеспечение исполнения хозяйственных обязательств : автореф. дисс. … докт. юрид. наук / В.С. Константинова. – Свердловск, 1989. – 32 с.

14. Латынцев А.В. Обеспечение исполнения договорных обязательств / А.В. Латынцев. – М. : Лекс-Книга, 2002. – 285 с.

15. Мейер Д.И. Русское гражданское право : в 2 ч. / Д.И. Мейер. – По исправленному и дополненному 8-му изд. 1902 г. – М. : Статут, 1997. – Ч. 2. – 1997. – 455 с.

16. Меры обеспечения и меры ответственности в гражданском праве : сборник статей / рук. авт. кол. и отв. ред. М.А. Рожкова. – М. : Статут, 2010. – 413 с.

17. Пахман С.В. Обычное гражданское право в России / С.В. Пахман // Юридические очерки. – СПб, 1877. – Т. 1. – 1877. – 447 с.

18. Победоносцев К.П. Курс гражданского права : в 3 т. / К.П. Победоносцев ; под редакцией В.А. Томсинова. – М. : Зерцало, 2003. – Т. 3. – 2003. – 608 с.

19. Покачалова А. Поняття та правова природа забезпечення зобов'язань / А. Покачалова // Юридична Україна. – 2010. – № 10. – С. 82–87.

20. Примак В.Д. Цивільно-правова відповідальність юридичних осіб : [монографія] / В.Д. Примак. – К. : Юрінком Інтер, 2007. – 432 с.

21. Пронина М.Г. Стимулирующая функция гражданско-правовых санкций / М.Г. Пронина. – Мн. : Наука и техника, 1977. – 200 с.

22. Рассказова Н.Ю. Вопросы общей теории обеспечительных обязательств / Н.Ю. Рассказова // Правоведение. – 2004. – С. 41–59.

23. Сарбаш С.В. Право удержания как способ обеспечения исполнения обязательств / С.В. Сарбаш. – 2-е изд., испр. – М. : Статут, 2003. – 251 с.

24. Цивільне право України : [підручник] : у 2 кн / [О.В. Дзера (керівник авт. кол.), Д.В. Боброва, А.С. Довгерт та ін.] ; за ред. О.В. Дзери, Н.С. Кузнєцової. – К. : Юрінком Інтер, 2002. – Кн. 1. – 2002. – 720 с.

25. Цивільне право України : [підручник] : у 2 т. / [В.І. Борисова (кер. авт. кол.), Л.М. Баранова, І.В. Жилінкова та ін] ; за заг. ред. В.І. Борисової, І.В. Спасибо-Фатєєвої, В.Л. Яроцького. – К. : Юрінком Інтер, 2004. – Т. 1. – 2004. – 480 с.

26. Цивільне право України : [підручник] : у 2 т. / [В.І. Борисова (кер. авт. кол.), Л.М. Баранова, І.В. Жилінкова та ін] ; за заг. ред. В.І. Борисової, І.В. Спасибо-Фатєєвої, В.Л. Яроцького. – К. : Юрінком Інтер, 2004. – Т. 2. – 2004. – 552 с.