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ESTABLISHMENT OF THE INSTITUTE OF OBLIGATION ENSURING PERFORMANCE IN UKRAINE

The existence of humanity in the obligatory relations of the creditor has always been interested in the issue of ensuring the preservation and protection of property. The current legislation promotes creation of favorable conditions for prevention of improper fulfillment of civil obligations or their non-fulfillment. The institute concerns ensuring performance of obligation.

The issue of the essence of ensuring the fulfillment of obligations is drawn to the attention of both academics and practices. In the legal literature, this institute is the subject of research by M. I. Braginsky, V. V. Vitryansky, B. D. Gongalo, A. S. Joffe, L. A. Yesipov, D. I. Meyer, O. S. Kizlov, I. B. Novytsky, I. O. Pokrovsky, V. M. Sloma, E. O. Kharitonov, G. F. Shershenevich and other scientists.

The institute of obligation ensuring performance had been formed for a long time. It was initiated by Roman lawyers who created a system of legal means such as pledge, deposit, mortgage and penalty. O. Ye. Charytonov believes that the institute of ensuring performance of obligations has arisen as « the creditor seeks to be sure both in the real and untimely ensuring of the obligation itself, and in the real possibility of refundment of losses caused by non-fulfillment of the obligation. In addition he wants to have legal means that would force the debtor to voluntary and timely offensive negative consequences» [5].

The main types of ensuring performance of obligation are pledge, mortgage, deposit, guarantee and penalty and attachment (art. 546 Civil Code of Ukraine). Pledge, mortgage, deposit and penalty, attachment are accessory (additional) types, which must ensure performance of the main obligation. Exception is guarantee. This kind of ensuring doesn't depend on the discharge invalidity of the main one.

As the result of reception of Roman law, it has spread in many European countries. Soborne ulozhenia (1607 year) is one of the most important monument of feudal law. This document contains the first mention of ensure performance of obligation. It allocated such concepts as payment of a penalty, mortgage (movable and unmovable property) and pledge [1, c. 162].

Prava za yakymy sudytsya malorosiyskui narod (1793 year) allocated such means of ensuring performance of obligations as pledges, sureties, pledges and also certain elements of the right of attachment to protect the rights of the creditor [1, p. 364-365].

In the Civil Code of Eastern Galicia in 1797 the question of how to secure rights and obligations such as deposit, pledge and mortgage was set out in a separate Chapter 2. Since the creditor must be sure of the obligated person (her property status, place of residence).

Zibrannya malorosiyskyi prav (1807 year) allocated the rules concerning the means of ensuring the fulfillment of obligations, in particular, pledge, attachment, deposit and mortgage [1, p. 300].

The provision of treaties and obligations was regulated by a separate Section II in the Zbog zakoniv czyvilnyi Rosiiskoi imperii of 1832. Mutual agreement of the parties to the contractual obligations was the legal basis for the provision of such an obligation. The creditor was provided with the right of attachment to enforce certain contracts [1, p. 325].

Pledge, a penalty, a mortgage movable property, mortgages of unmovable property were legally enshrined in the Zvod mischeych zakoniv Zahidnoi hubernii of 1837.

In the Civil Code of the Ukrainian SSR in 1922 the property pledge was related to the real rights; the payment of the penalty was considered a legal consequence of improper performance or non-fulfillment of the contract. The Civil Code of the Ukrainian SSR in 1963 provided the following types of enforcement of obligations as pledge, deposit, guarantee, penalty, attachment [2].

The Institute of ensuring performance of obligations was enshrined in the Central Committee of Ukraine in 2003 in a separate Chapter 49 [4].

Thus, the Institute of ensuring performance of obligations is a traditional institution of civil law of a long-standing origin. Characteristic features of how to ensure fulfillment of obligations:

- property content;
- additional character (exception - guarantee);
- are established by law or agreement;
- aimed at encouraging the debtor to properly discharge the obligation;
- can provide only valid obligations.

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Nowadays the development of the legal system requires profound study and reflection of historical experience. The avoidance of the legal definition of marriage is typical for the national sources of law in many states. The questions of marriage and family relations in the process of development and establishment of our state are the most relevant, since they have become the basis of the formation and development of society as a whole.