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UDC 347.9
DOI https://doi.org/10.32842/2078-3736/2024.4.63

ON CERTAIN TYPES OF SECURITY INTERESTS UNDER THE CIVIL LEGISLATION OF UKRAINE

The article justifies the expediency of considering a penalty, a surety and a deposit as obligatory types of securing the performance of obligations.

Based on the analysis of the norms of the Civil Code of Ukraine, it is proposed to attribute a penalty to the type of obligations, and to define the concept of a penalty through the closest type of accessory (additional security) obligations. A penalty, unlike a pledge and a retention, is an type of a security interests of obligations' nature.

It is proved that the obligation of a surety is additional (accessory) in relation to the (main) obligation secured by it. Additional security obligations of a surety should be distinguished from the main (security) obligations. This means the need to make changes to art. 556 of the Civil Code of Ukraine, from which it follows that the warrantor performs not the obligation of a surety, but the main obligation.

It is established that the accessory nature of the obligations of a surety is clearly expressed and consistent. At the same time, its accessory nature should not necessarily be associated with such an understanding of securing the performance of obligations, according to which it (security) is aimed at stimulating the performance of the main obligation. The surety ensures the performance of the main obligation in such a way that it provides the creditor with an additional entity that can provide him with actually the same thing that the debtor should have provided, but did not provide, under the main obligation, and an additional source (the property of this entity, the warrantor), at the expense of which the creditor will be provided with actually what the debtor should have provided, but did not provide, under the main obligation.

The legal structure that is the basis for the obligation regarding the deposit is analyzed. It is concluded that the basis for the application of the legal norms established by part one of art. 571 of the Civil Code of Ukraine, it would be appropriate to recognize not a violation of the obligation secured by a deposit, but only one, the most serious type of its violation - failure by any of the parties to fulfill the obligation secured by a deposit, which entailed the termination of this and the counter-obligation in relation to it without their fulfillment.

In this regard, it would be advisable to make appropriate amendments to article 571 of the Civil Code of Ukraine.

Key words: *obligations, relationships of obligations, security for the performance of obligations, penalty, surety, deposit, civil legislation of Ukraine.*

Чанишева А. Р. Щодо окремих видів забезпечення зобов'язань за цивільним законодавством України

У статті обґрунтовується доцільність розгляду неустойки, поруки і завдатку як зобов'язальних видів забезпечення виконання зобов'язань.

На підставі аналізу норм ЦК України запропоновано віднести неустойку до роду зобов'язань, а поняття неустойки визначити через найближчий рід

акцесорних (додаткових забезпечувальних) зобов'язань. Неустойка, на відміну від застави і притримання, є зобов'язальним видом забезпечення виконання зобов'язань.

Доводиться, що зобов'язання поруки є додатковим (акцесорним) стосовно забезпечуваного ним (основного) зобов'язання. Додаткові забезпечувальні зобов'язання поруки слід відрізняти від основних (забезпечувальних) зобов'язань. Це означає необхідність внесення змін до ст. 556 ЦК України, з якої випливає, що поручитель виконує не зобов'язання поруки, а основне зобов'язання.

Встановлено, що акцесорність зобов'язань поруки є яскраво вираженою і послідовною. При цьому акцесорність не варто неодмінно пов'язувати з таким розумінням забезпечення виконання зобов'язань, згідно з яким воно (забезпечення) спрямовується на стимулювання виконання основного зобов'язання. Порука забезпечує виконання основного зобов'язання у такий спосіб, що надає кредитору додаткового суб'єкта, який може надати йому фактично те саме, що мав надати, але не надав боржник за основним зобов'язанням, і додаткове джерело (майно цього суб'єкта, поручителя), за рахунок якого кредитору буде надано фактично те, що мав надати, але не надав боржник за основним зобов'язанням.

Проаналізовано юридичний склад, що є підставою зобов'язання щодо завдатку. Зроблено висновок про те, що підставою застосування правових норм, встановлених частиною першою ст. 571 ЦК України, варто було б визнати не порушення забезпечуваного завдатком зобов'язання, а тільки один, найбільш грубий вид його порушення – невиконання будь-якою зі сторін забезпеченого завдатком зобов'язання, яке потягло за собою припинення цього і зустрічного щодо нього зобов'язання без їх виконання. У зв'язку з цим доцільно було б внести відповідні зміни до ст. 571 ЦК України.

Ключові слова: *зобов'язання, зобов'язальні відносини, забезпечення виконання зобов'язань, неустойка, порука, завдаток, цивільне законодавство України.*

Introduction. The issues of the law of obligations, including the security interests that are used to enforce the fulfilment of obligations, are studied in the doctrinal works of Ukrainian civilists T.V. Bodnar, N.Yu. Golubeva, S.D. Hrynko, A.B. Hrynyak, O.V. Dzera, I.O. Dzera, I.S. Kanzafarova, T.S. Kivalova, O.S. Kizlova, A.O. Kodinets, V.M. Kossak, N.S. Kuznetsova, R.A. Maidanyk, O.O. Otradnova, I.V. Spasibo-Fateeva, Y.O. Kharitonov, O.I. Kharitonova, O.S. Yavorska and others.

One of the important theoretical and applied problems in this area is the problem of determining the types of security interests under the civil legislation of Ukraine. Analysis of the norms of the Civil Code of Ukraine [1] provides grounds for distinguishing the obligatory type of security for the performance of obligations, including, in particular, a penalty, surety, and deposit.

The aim of the article is to justify the feasibility of considering a penalty, surety and deposit as types of security interests of obligatory nature.

Presentation of the main material. In the doctrine of civil law, the recognition of a penalty as a monetary amount or payment is often combined with the desire to avoid examining the penalty as an additional obligation. However, the analysis of the norms of the Civil Code of Ukraine allows us to attribute the penalty to the type of obligations, and to define the concept of a penalty through the closest type of accessory (additional security) obligations.

According to part one of art. 549 of the Civil Code of Ukraine, the debtor "must transfer to the creditor" as a penalty a monetary amount or other property. The wording "must" in legislative and other regulatory legal acts establishes the legal obligations of the participants in the relevant legal relationship. Thus, the debtor is obliged to pay the penalty or transfer certain property as

a penalty. The creditor is granted a subjective right to receive the amount of the penalty. This right of the creditor corresponds to the specified obligation of the debtor. From the moment of its occurrence, the specified subjective right acquires the nature of a claim. Therefore, in part two of art. 258 of the Civil Code of Ukraine, the requirement to collect a penalty (fine, penalty) is mentioned, and in art. 266 of the Civil Code of Ukraine, this requirement, among others, is called additional.

If there is an obligation to pay a penalty and a corresponding subjective right that takes on the nature of a requirement, then there is a legal relationship, the content of which is the specified obligation and right. This legal relationship falls under the definition of an obligation in part one of art. 509 of the Civil Code of Ukraine. Therefore, it is an obligation, and therefore a penalty, unlike a pledge and a retention, is an obligatory type of security for the performance of obligations. Thus, I.O. Protsenko attributed a penalty to the material types of security for the performance of obligations [2, p.63]. Therefore, there is such a type of obligation as an obligation to pay a penalty. The requirements that exist in these obligations, in Art. 266 of the Civil Code of Ukraine are called additional, which gives reason to call the obligations in question also additional (accessory).

The obligation to pay a penalty as additional is clearly separated from the obligations secured by it. In principle, no one denies the existence of additional obligations to pay a penalty. As is self-evident, O.O. Otradnova calls a penalty an accessory obligation [3, p. 557]. At the same time, both law-making bodies and scientists in most cases avoid using the term "obligation to pay a penalty".

The obligation to pay a penalty is, of course, an additional security (accessory) obligation. It cannot arise if there is no main obligation. However, the term "main" (obligation), which is used in part one of article 548 of the Civil Code of Ukraine, which deals with the establishment of security by law or contract, is purely conditional. This term in this case has a completely different meaning than the term "main obligation". Any obligation secured by an additional obligation to pay a penalty is the main one. And any obligation can be secured by an additional obligation to pay a penalty - main, auxiliary, additional.

If the security for the performance of an obligation by a penalty is established by a contract that is the basis for the secured obligation, then this contract is a legal fact that initiates the formation of a legal structure that is the basis for the emergence of an accessory obligation to pay a penalty. From the moment the contract is concluded and the secured obligation arises, the parties are not bound by subjective rights and the corresponding obligations in the accessory obligation. The formation of a legal structure ends - the basis for an accessory (from the point of view of current legislation) obligation to pay a penalty is a violation of the main obligation, which (violation) is provided for by law or contract. From the moment the formation of the specified legal structure is completed, the accessory obligation in question arises.

The issue of the moment of occurrence of the obligation to pay a penalty established by law (legislation) is resolved in a similar way. From the moment of conclusion of the contract, only the main and auxiliary obligations secured by a penalty arise. These obligations are subject to the relevant legal norms. Some of them directly establish the rights and obligations of the parties, determine their dynamics, in particular the moment of transformation of a subjective right into a claim. And other legal norms come into force from the moment of occurrence of the circumstances established by civil legislation, which complete the formation of the relevant legal structure. They constitute the regulatory basis for accessory obligations to pay a penalty.

When an obligation to pay a penalty arises, the creditor also has a subjective right to receive the corresponding monetary amount. However, the moment when the creditor has a subjective right to receive the penalty amount from the debtor and the moment when this right acquires the character of a claim under the civil legislation of Ukraine do not coincide. The obligation to pay a penalty is one whose term of performance is not established by law. The rule of part one of art. 222 of the Commercial Code of Ukraine, according to which participants in economic relations who have violated the property rights or legitimate interests of other subjects are obliged to restore them, without waiting for a claim to be filed against them or an appeal to the court, cannot be interpreted as establishing a term for the performance of the obligation to pay a penalty or to

perform another obligation that is part of the content of the obligation within which civil liability is realized. Therefore, this obligation must be performed within seven days after the creditor presents the claim (part 2 of article 530 of the Civil Code of Ukraine). It follows that the subjective right to receive the amount of the penalty from the moment of its occurrence does not yet have the nature of a claim. This also applies to the right to receive a penalty: since the penalty is accrued for each day of delay, the subjective right to receive the amount of the penalty arises on the part of the creditor every day.

However, from the date of the occurrence of the subjective right and even from the day when it acquired the nature of a claim, the limitation period does not begin to run. This period begins from the day when the person learned or could have learned about the violation of his right (part 1 of article 261 of the Civil Code of Ukraine). The right in relation to the obligation to pay a penalty is understood not as a subjective right in the main obligation, the violation of which became the basis for the additional obligation to pay a penalty, but as the subjective right of the creditor to receive the amount of the penalty, which is included in the content of the specified accessory obligation. It is quite obvious that the right to receive the penalty amount becomes violated when the above-mentioned seven-day period has expired, and the penalty has not been paid by the debtor at the creditor's request. The limitation period will begin to run after the expiration of not only the specified seven-day period, but also the period necessary for the transfer of the penalty amount.

The surety obligation is additional (accessory) to the (main) obligation secured by it. The accessory nature of the surety obligations is clearly expressed and consistent. However, the accessory nature should not necessarily be associated with such an understanding of securing the performance of obligations, according to which it (security) is aimed at stimulating the performance of the main obligation. The surety ensures the performance of the main obligation in such a way that it provides the creditor with an additional entity that can provide him with essentially the same thing that the debtor should have provided, but did not provide, under the main obligation, and an additional source (the property of this entity, the surety), at the expense of which the creditor will be provided with essentially what the debtor should have provided, but did not provide, under the main obligation. However, legally, the actions of the warrantor to provide the creditor with the relevant property (usually money) will not be identical to the actions that the debtor should have taken and did not take, because the warrantor and the debtor are connected to the creditor by different obligations.

The obligation of the surety is a single one. It cannot be divided into an obligation to pay the principal debt, an obligation to pay a penalty, an obligation to pay interest - a fee (for example, for a bank loan), an obligation to pay interest - a liability provided for in part two of article 625 of the Civil Code of Ukraine, an obligation to compensate for losses. For the debtor, these are different obligations. And for the warrantor, this is a single obligation, the amount of which is determined by the rules for each of the above types of obligations of the debtor, including taking into account the statute of limitations: if the statute of limitations is missed, for example, on a claim for payment of a penalty, this only reduces the amount of the surety's obligation, and does not mean that the warrantor was obliged to pay the penalty.

The surety cannot be included in the main obligation, somewhat complicating the latter, and thus giving the warrantor the legal status of a co-debtor. The opinion about a single obligation, which includes the obligation secured by the surety and the obligation of the surety, can be justified to some extent by referring to the law. The Civil Code of Ukraine (part 1 of article 554) recognizes that the main debtor and the warrantor are liable to the creditor as joint and several debtors. If we try to bring the obligation secured by the surety under art. art. 541, 543 of the Civil Code of Ukraine, then one must definitely conclude that there is a single obligation consisting of an obligation secured by a surety and an obligation of a surety.

The way out of this controversial situation is seen in the recognition that art. 541 of the Civil Code of Ukraine cannot apply to surety obligations (and therefore, to obligations secured by a surety), and art. 543 of the Civil Code of Ukraine should apply to the relations "creditor - debtor" and "creditor - warrantor" by analogy. Therefore, the liability of the debtor for the main obligation

and the warrantor as joint and several debtors does not mean that the accessory obligation of the surety has become part of the main (secured by a surety) obligation, but only gives the creditor the right to choose not the debtor (out of several) in this obligation, but the obligation in which his claim must be satisfied. Having chosen such an obligation, the creditor also chooses the person (debtor) who must satisfy this claim. Taking this circumstance into account, O.M. Mykhalnuk correctly notes that the wording of part one of art. 554 of the Civil Code of Ukraine "the debtor and the warrantor are liable to the creditor as joint and several debtors" cannot be interpreted as meaning that there is a single joint and several obligation with multiple persons on the debtor's side [4, p. 592]. It should be added that in the case under consideration, the use of the legal construction of a joint and several obligation is also unacceptable because the joint and several obligation provides that after its execution the costs of its execution must be divided between the joint and several debtors, which is not the case when the warrantor performs his own obligation to the creditor. A different situation arises on the basis of part three of art. 554 of the Civil Code of Ukraine, according to which persons who jointly gave a warranty are jointly and severally liable to the creditor, unless otherwise established by the suretyship agreement. In this case, one suretyship obligation arises with two persons (warrantors) on the debtor's side. Application to obligations arising on the basis of part three of art. 554 of the Civil Code of Ukraine, the provisions of art. art. 541, 543 of the Civil Code of Ukraine will be quite correct.

The warrantor performs in favor of the creditor under the main obligation his own obligations, which are included in the content of the accessory obligation of the surety. The content of these obligations, due to the accessory nature of the surety obligation, is determined in part two of art. 554 of the Civil Code of Ukraine by indicating the content of the main obligation secured by the surety (to pay the principal amount of the debt, interest, penalty, compensate for losses). Since the warrantor's performance of his obligations under the surety obligation cannot terminate the main obligation, the latter continues to exist. In it, only in accordance with part two of art. 556 of the Civil Code of Ukraine, the replacement of the creditor is carried out. Since the debtor's performance of the main (secured by a surety) obligation after the warrantor's performance of the surety obligation would lead to the unjustified acquisition of the creditor's property, and the debtor's release from the main obligation would lead to the unjustified retention of the property by the debtor, the legislator quite reasonably provided for the transfer to the warrantor of all the creditor's rights in the secured obligation. The legislator only made a mistake in determining the basis for such a transfer. Such should be recognized as the performance by the warrantor of an obligation not secured by a surety, as indicated in part two of article 556 of the Civil Code of Ukraine, but of the surety obligation. This transfer is an assignment, expressly provided for in part one of article 512 of the Civil Code of Ukraine.

The latest approach to the content of the surety obligation, in principle, excludes imposing on the surety the obligation to perform exactly what the debtor was obliged to do in the main obligation.

In doctrinal and educational literature, a deposit is recognized as one of the ways to secure obligations (security interests). Although in the future it would be advisable to refuse to recognize a deposit as a way to secure the performance of obligations.

The deposit is subject to the action of Art. 547 of the Civil Code of Ukraine, which recognizes the written form as mandatory for any transaction to secure the performance of obligations, and violation of this requirement entails the nullity of such a transaction. Therefore, the first legal fact that initiates the formation of the legal structure - the basis for the occurrence of an obligation to provide a deposit is a written agreement on the provision of a deposit. The law does not require that this be a separate agreement. Therefore, the condition (conditions) on a deposit can also be included in the agreement that is the basis for the main obligation secured by a deposit. However, the deposit agreement itself does not give rise to any obligation.

In science, determined attempts have been made to substantiate the consensual model of the deposit agreement. However, according to Part One of Art. 570 of the Civil Code of Ukraine, the deposit is also "issued", which corresponds to the definitions of real contracts in the Civil Code of

Ukraine and does not correspond to the definitions of consensual contracts, according to which the party "obliges" to transfer property or money.

As for the prospects for improving civil legislation, the consensual model contradicts the very essence of the deposit, because it must necessarily have an inherent payment feature (it is issued against payments that the party issuing the deposit must make). A consensual deposit agreement will provide the opportunity to collect the deposit amount from the debtor who was supposed to issue the deposit to the other party. And this does not make any sense, because then it would be more expedient to demand the collection of the entire payment amount under the main contract.

Since the de lege lata deposit agreement is real and should remain so in the future, actions to issue a deposit are carried out not in fulfillment of an obligation, the basis of which could be a deposit agreement, but within the framework of a civil legal relationship, which is not an obligation. And the right to issue a deposit is secondary, which is exercised by the debtor under the obligation secured by the deposit at his discretion and is part of the content of the said legal relationship. These are typical legal relationships regarding the conclusion of a real civil law contract. But the actions of each party to such a legal relationship in the exercise of their secondary rights entail certain legal consequences, including for the other party. The transfer of the deposit exhausts the actions to which the right was the content of the said legal relationship.

Subsequently, the legal structure is accumulated, which is the basis for the obligation to pay the deposit. The deposit can be transferred only if an agreement is concluded, which is the basis for the obligation secured by the deposit and the emergence of at least that simple obligation in which the debtor is obliged to make a cash payment for goods, works, services or transfer movable property in exchange for their payment. The absence of such an obligation will mean that there is no essential sign of a deposit - the issuance of a deposit in exchange for payments due to the creditor in the specified simple obligation. If this sign is absent, then in accordance with part two of article 570 of the Civil Code of Ukraine, the transferred amount of money or movable property will be considered an advance. In this regard, one should agree with the opinion of I.O. Dzera that the obligation secured by the deposit must exist at the time of the transaction on the deposit [5, p. 623]. So, we have the third legal fact, which is an element of the factual structure, which is the basis of the obligation regarding the deposit, - the presence of the main (secured by the deposit) obligation.

The formation of the legal structure - the grounds for legal relations regarding the deposit is completed by the violation of the obligation secured by the deposit by the party that received the deposit. If the obligation secured by the deposit was violated by the party that issued the deposit, the accessory obligation regarding the deposit does not arise at all.

The circumstances that complete the formation of the legal structure, on the basis of which the legal structure of the deposit is "included in the work", if the legislator seeks to ensure that the legal structures created by him are actually used in civil turnover and serve the stability of this turnover, must be clearly described in the law and the contract. Currently, they are described in part one of article 571 of the Civil Code of Ukraine extremely broadly. Any circumstances covered by the concept of breach of the main obligation (secured by a deposit) by the party that received the deposit may be the basis for the emergence of accessory (additional security) obligations of the deposit. As for the concept of breach of an obligation, it is defined in art. 610 of the Civil Code of Ukraine as its non-fulfillment or fulfillment in violation of the conditions determined by the content of the obligation (improper fulfillment). In principle, this formulation can be recognized as satisfactory for the purposes of law enforcement. But the terminology used by the legislator raises concerns. What is meant is "conditions determined by the content of the obligation". Conditions are a concept that characterizes the content of the contract. And the content of the obligation is the subjective rights and obligations of the parties. Therefore, a breach of obligation in the context of art. 571 of the Civil Code of Ukraine would logically be to recognize the non-fulfillment or improper fulfillment by the parties of the obligations that constitute the content of the obligation secured by the deposit.

Conclusions. Based on the analysis of the acts of civil legislation of Ukraine, it seems

appropriate to consider a penalty, a surety and a deposit as obligatory types of security for the performance of obligations.

Analysis of the norms of the Civil Code of Ukraine allows us to attribute a penalty to the type of obligations, and to define the concept of a penalty through the closest type of accessory (additional security) obligations. If there is an obligation to pay a penalty and a corresponding subjective right that takes on the nature of a claim, then there is a legal relationship, the content of which is the specified obligation and right. This legal relationship falls under the definition of an obligation in part one of article 509 of the Civil Code of Ukraine. Therefore, it is an obligation, and therefore a penalty, unlike a pledge and retention, is an obligatory type of security for the performance of obligations. The requirements that exist in obligations to pay a penalty, in art. 266 of the Civil Code of Ukraine are called additional, which gives grounds to call the obligations in question additional (accessory).

The obligation of a surety is additional (accessory) in relation to the (main) obligation secured by it. Additional security obligations of a surety should be distinguished from the main (security) obligations. This means the need to amend art. 556 of the Civil Code of Ukraine, from which it follows that the warrantor performs not the obligation of a surety, but the main obligation. If the warrantor performed the main obligation, then in the event of such performance the warrantor could not take the place of the creditor in the main obligation, and the subrogation provided for in part 2 of art. 556 of the Civil Code of Ukraine would become impossible.

It is necessary to textually enshrine in the Civil Code of Ukraine the general rule that the obligation of a surety is monetary in content, unless the parties to the surety agreement have agreed otherwise.

The basis for applying the legal norms established by part one of art. 571 of the Civil Code of Ukraine should not be the violation of the obligation secured by the deposit, but only one, the most serious type of its violation - the failure of any of the parties to fulfill the obligation secured by the deposit, which entailed the termination of this and the counter-obligation in relation to it without their fulfillment. In this regard, it would be advisable to make appropriate amendments to Art. 571 of the Civil Code of Ukraine.

By its essence, the deposit should in the future be recognized as a type of civil liability, as well as a penalty. The legal construction of the deposit has all the features of a type belonging to the type of civil liability. In particular, it imposes an additional burden on the debtor in the relevant obligation, which is an essential feature of civil liability as a type. Such an understanding of the essence of the deposit contradicts some provisions of the current civil legislation and even the structure of the Civil Code of Ukraine.

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