

Opinion Article

ESTABLISHMENT BY CONTRACT OF JUDICIAL METHODS OF PROTECTION OF CIVIL RIGHTS AND INTERESTS: THE UKRAINIAN EXPERIENCE

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Summary: 1. Introduction. – 2. Scientific Views and the Legislative Dimension. – 3. Law Enforcement Practice of the ECtHR. – 4. Significance of the Contract as a Source of Establishing Methods of Protection. – 5. Models of Establishing Methods of Protection in the Contract. – 6. Concluding Remarks.

ABSTRACT

Background: *The issue of choosing an effective method of protection continues to be relevant not only in court but also in contractual practice. This is explained by the fact that in a number of legal systems, contracts act as a source of consolidation of protection methods. As a result, there is a need to define models (options) for the contractual establishment of protection methods and, at the same time, the limits of contractual freedom.*

Methods: *Logical methods were used during the present research: analysis, synthesis, induction, and deduction. With the help of the system method, types of models of the contractual*

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establishment of protection methods were studied. The historical-legal method made it possible to analyse the provisions of national legislation and approaches to establishing methods of protection from a historical perspective.

Results and Conclusions: *The provision in the law of the contract as a source of establishing methods of protection contributes to greater protection of rights holders and allows for timely and adequate responses to complications of legal relations and, as a result, complications of the subjective interests of their participants. The recognition of the freedom of participants in contractual relations in determining the methods of protection and reference to the dispositive basis in the relevant field corresponds to the modern European approach.*

Keywords: *methods of judicial protection; violation of rights and interests; contract; limits of contractual freedom; models of securing methods of protection in the contract; an effective method of protection; judicial control over the fairness of the terms of the contract*

1 INTRODUCTION

Historically, there has been a constant complication and increase in the number of ways to protect civil rights and the interests that can be applied. This trend is associated with the complication of legal relations due to the expansion of their objective composition. As a result, the grounds for the disagreements of the parties in the performance of contractual obligations are diversified, and their subjective interests in the realisation of the respective rights are also complicated.

This situation draws our attention to methods of protection at the doctrinal level. Nevertheless, the issue of methods that have a contractual nature and their relationship with those established by law remains understudied. Also, the relevance of the selected issue is influenced by new approaches in legislation and judicial practice regarding the choice of methods of judicial protection in view of the law enforcement practice of the ECtHR.

2 SCIENTIFIC VIEWS AND THE LEGISLATIVE DIMENSION

In the scientific literature, there has not been a consensus regarding the extension of the principle of freedom of contract to illegal behaviour, in particular, the possibility of contractual establishment of methods of protection of civil rights and interests. Some scholars advocate for the position that the freedom to determine the rules of lawful behaviour by contract should be clearly distinguished from the freedom to determine the consequences of improper behaviour by contract, given the fundamental difference between them. Therefore, as a general rule, the consequences of misconduct must be established by law, and the discretion of the parties regarding such consequences can be allowed only as an exception and within the limits provided by the permitting norms.¹ Other researchers, on the contrary, evaluate the expansion of the boundaries of contractual freedom in the direction of protecting the rights and interests of participants in contractual relations positively.²

As for the legislative dimension of these issues, three main approaches can be distinguished.

1. *The concept of a closed list of methods of protection at the legislative level* – the holder of the

1 Y Popov, 'Freedom of Contract Regarding the Determination of The Consequences of Illegal Behaviour' (2008) 1 *Pravo Ukrainy* 133-136.

2 AV Luts, *Freedom of contract in the civil law of Ukraine* (Shckola 2004) 148.

violated (unrecognised, disputed) right (interest) can use the method of protection provided by the legal norm. That is, the choice of the method of protection here is limited to a legally defined circle of methods that are not subject to extended interpretation at the discretion of the interested parties, including by means of a contractual consolidation of the methods of protection. This concept, for example, is reflected in the Civil Code of the Republic of Lithuania, where Art. 1.138 provides for an approximate list of methods of protection and notes that rights are also protected by other methods provided by law. The same approach is characteristic of the Civil Code of the Republic of Moldova (Art. 16).

2. *The intermediate approach* is that the concept of a closed list does not take into account the whole variety of sources of civil law, which are not limited to the law as such. We must not forget such sources of law as contracts and the custom of business turnover. Moreover, the civil legislation of most European countries allows for the conclusion of unspecified contracts. A situation is not excluded when the methods of protection enshrined in legislation will turn out to be inconsistent with the essence of the rights from unspecified contracts or the nature of their violation, and therefore one of the main goals of the law, which is the protection of rights and interests, will not be achieved. That is, the methods of protection can be determined at the level of the law, contracts, or the custom of business turnover.

3. *The dispositive model of the system of methods of protection* lies in the fact that protection is allowed in ways that are not directly fixed but which do not contradict the legal order. An analysis of the Civil Code of the Czech Republic gives grounds for the conclusion that this model is enshrined in it (para. 13): the legislator does not even provide a general approximate list of defence methods, indicating only that a person can count on the fact that his or her case will be resolved in the same way as an identical claim; if the case was decided differently, the plaintiff must justify the difference between the circumstances of the cases. Likewise, the Civil Code of the Republic of Poland does not contain even an approximate list of methods of protection. At the same time, judicial practice has developed in such a way that any method of protection that does not contradict the legislation is considered admissible (in particular, Art. 91 of the Code states that an authorised person can carry out any activity aimed at preserving his right).

If we turn to the legislation of Ukraine, we can see a consistent movement from the concept of a closed list to the establishment of a dispositive model. Thus, the Civil Code of the Ukrainian SSR, which was in effect until 1 January 2004, did not allow the establishment of methods of protection in contracts. Later in para. 12 Part. 2 Art. 16 of the Civil Code of Ukraine of 2003 (hereinafter – the Civil Code), among the sources of determining judicial methods of protection, the legislator directly names contracts along with the law. Further, since the end of 2017, as a result of amendments to the Civil Code, it is assumed that the methods of protection can also be established by the court in cases defined by law. These rules are also reflected in the norms of the Civil Code devoted to binding legal relations: in case of violation of the obligation, the legal consequences established by the contract or the law will follow (Part 1 of Art. 611 of the Civil Code).

Therefore, in the civil legislation of Ukraine, there is a tendency to expand the permissible sources of determining the methods of protection. Today, it can be stated that the legislation of Ukraine is characterised by a dispositive model of the system of methods of protection. However, at the same time, one cannot fail to note the legislative inconsistency: Art. 20 of the Economic Code of Ukraine (hereinafter – the Code of Ukraine) in its current version does not correspond to the above-mentioned provisions of the Civil Procedural Code, since, although it enshrines a non-exhaustive list of them, it gives an indication that others may be established by the law.

3 LAW ENFORCEMENT PRACTICE OF THE ECtHR

Due to the above-mentioned state of national legislation, until 2012, national courts mainly issued decisions on refusal to satisfy claims in cases where the claim was a method of protection not provided for by the current legislation. Back in 2004, the Supreme Court of Ukraine insisted that if the declared method of protection did not correspond to the established contract or law, then the court must reject the claim.³

After 2012, judicial practice showed a tendency to use methods of protection not enshrined in normative legal acts, with reference to the practice of the European Court of Human Rights (ECtHR), where effectiveness was defined as an integral component of protection. The impetus for this was primarily the Resolution of the Armed Forces of Ukraine of 21 May 2012 in case No. 6-20uc11. The Supreme Administrative Court recognised the groundless refusal of the court of cassation to grant the claim on the grounds that the method of defence chosen by the plaintiff is not provided for by law. In the opinion of the Supreme Administrative Court, the court did not take into account that the legislative limitations of material legal methods of protection of a civil right or interest are subject to application in compliance with the provisions of Arts. 55 and 124 of the Constitution of Ukraine and Art. 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms, according to which every person has the right to an effective method of legal protection that is not prohibited by law.⁴

Later, the corresponding approach was reflected at the legislative level. The legislator, having adopted the provisions of Art. 13 of the European Convention and the relevant ECtHR practice (for example, para. 145 of the ECtHR decision in the case of *Chahal v. the United Kingdom* of 15 November 1996; para. 75 of the ECtHR decision in the case *Afanasiev v. Ukraine* of 5 April 2005), in 1 Art. 5 of the Civil Procedure Code of Ukraine (hereinafter – the CPC) and Part 1 of Art. 5 of the Commercial Procedural Code of Ukraine (hereinafter – the ComPC of Ukraine) established a progressive provision that in the event that the law or contract does not determine an effective method of protection of a right (interest), the court may determine such a method of protection in its decision in accordance with the requirements set forth in the lawsuit that does not contradict the law. Also, Part 2 of Art. 5 of the Code of Administrative Procedure of Ukraine states that protection can be carried out in another way as long as it does not contradict the law and provides effective protection. It follows from the above that a person can protect his/her right (interest) in a way that is established either by law or by contract or is not established by either law or contract but is effective and does not contradict the law.

4 THE SIGNIFICANCE OF THE CONTRACT AS A SOURCE OF ESTABLISHING METHODS OF PROTECTION

When entering into a contractual relationship, a person wants to be sure that the counterparty will fulfil its contractual obligations in a proper manner: in the manner specified by the contract, within the specified time, in the specified city, etc. As a result, in order to prevent or reduce the negative consequences for the creditor of non-fulfilment or improper fulfilment of obligations by the debtor, the parties to the contract are interested in agreeing in advance on

3 Resolution of the Supreme Administrative Court of 13 July 2004 in case No 10/732.

4 Resolution of the Supreme Administrative Court of 21 May 2012 in case No 6-20uc11 (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/24704776>> accessed 2 October 2022.

the unfavourable consequences that should occur for the violator in case of non-fulfilment (improper fulfilment) of the contractual obligation. That is, during the conclusion of almost any civil law contract, its participants usually stipulate different consequences of violation of the obligations accepted by each of them.⁵ Such consequences represent the possibility of applying one or another method of protection.

Therefore, by defining judicial methods of protection in the contract, the parties to the obligation agree on the potential protection of their rights (interests) in court. The general objective of such an agreement is the prevention of violation and the protection of a subjective civil right (interest) in the event of its violation. Unlike other contractual provisions that regulate the behaviour of the parties in a normal situation and begin to operate after the contract enters into force (in some cases, from the moment determined by the parties themselves), any agreement that defines the structure of the protection of rights begins to 'work' only in case of violation (non-recognition or dispute) of subjective civil rights or legitimate interests of the party (parties) of the contractual relationship.⁶

The contractual provision of judicial protection methods is especially important when the legislator does not offer an effective legal protection mechanism within the framework of certain legal relations. A vivid example of this in Ukraine can be the imperfect legislative regulation of the construction of the preliminary contract in the Civil Procedural Code, which does not allow the effective protection of the rights of the party to the preliminary contract in the event that the counterparty evades the conclusion of the main contract.

In particular, in judicial practice, there are questions as to whether it is possible to legally demand the conclusion of the main contract by filing claims to recognise the main contract concluded on the terms established by the previous contract; to oblige the party to conclude the main contract; to recognise ownership of the subject of the main contract, etc. The Supreme Court has developed a practice of refusing to satisfy the claims outlined above, mainly because coercion to an agreement based on a previous contract, in the absence of the consent of the other party, is not provided for by law since for violation of the terms of the previous contract other legal consequences are foreseen, namely, compensation for damages. In addition, Part 3 of Art. 635 of the Civil Code stipulates that the obligation established by the preliminary contract is terminated if the main contract is not concluded within the period established by the preliminary contract. Termination of the obligation from the previous contract as a result of failure to conclude the main contract within the period established by the previous contract makes it impossible to induce the conclusion of the main contract in court, to fulfil the obligation, or to create the main contractual obligation as a legal basis for the acquisition of ownership rights to the property.⁷

The above shows that achieving the goal of the preliminary agreement (conclusion of the main agreement) based on the current wording of Art. 635 of the Civil Code is impossible, and the damages themselves, which are discussed in Part 2 of Art. 635 of the Civil Code, are quite difficult to prove in practice. The outlined legislative imperfection prompts the parties to the previous contract to provide for additional methods of protection in it, namely, fines or security payments, based on the security mechanism of a deposit for cases of evasion of the unscrupulous party from the conclusion of the main contract, which will contribute to the effective protection of the rights and interests of the other counterparty.

5 MA Rozhkova, *Means and Methods of Protection of The Parties to a Commercial Dispute* (Walters Kluwer 2000) 416.

6 Ibid.

7 Resolution of the Supreme Court of Ukraine of 14 November 2018 in case No 638/21295/15-uc (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/77870620>> accessed 2 October 2022.

The importance of legally unspecified means of protection also lies in the fact that the legislation of most European countries allows for the conclusion of unspecified contracts. A situation is possible wherein the methods of protection enshrined in legislation will turn out to be inconsistent with the essence of the rights in unspecified contracts or the nature of their violation, and therefore, one of the main goals of the law – the protection of rights and interests – will not be achieved.

Enshrining judicial methods of protection in the contract in advance ensures, as a rule, the protection of binding rights. However, there are cases when the contract regulates the methods of protection of absolute rights. This is because individuals can conclude a contract after the violation of such rights has already occurred. The corresponding contract is aimed exclusively at achieving the goal of the tort obligation – compensation or reimbursement for the damage caused to the victim. Thus, according to the general rule of Art. 1166 of the Civil Code, the damage caused to the victim is compensated in full. Meanwhile, Part 4 of Art. 1195 of the Civil Code allows for an increase in the scope and amount of compensation for damage caused to the victim by mutilation or other health damage. The parties can also agree on the method of compensation for damage (in monetary or other material forms), the procedure for compensation (instalment or postponement of performance), the termination of the delict obligation by their agreement if it does not contradict the mandatory norms of the law, etc.⁸ Thanks to such agreements, legal certainty is achieved: the contract simultaneously acts as a ‘specifier’ of the legal relationship that arose as a result of the violation.⁹ In such a case, the dispute is usually resolved without going to court or, conversely, after it, when the agreement on the means of protection is fixed in the settlement agreement of the parties to the dispute.

5 MODELS OF ESTABLISHING METHODS OF PROTECTION IN THE CONTRACT

Agreements on the establishment of methods of protection can hardly be considered a separate category of contracts. Provisions on the protection of the rights (interests) of counterparties are usually reflected in the main contract document. The corresponding rights and obligations have a secondary character compared to the constitutive rights and obligations that determine the essence of a particular contract. Defensive rights (rights to use defence methods) provide the creditor with a certain ‘advantage’ to its main contractual capabilities. If the method of protection is also a method of ensuring the fulfilment of the obligation (penalty, deposit, etc.), then the relevant provisions can be embodied in an independent contractual structure. Also, in cases where the methods of protection are aimed at protecting non-negotiable rights (that is, the contract was concluded after the violation, non-recognition, or dispute had already taken place), then such contracts should be classified as a separate type of contract not mentioned in the Civil Code.

The establishment of judicial methods of protection in the contract can take place according to three models: 1) transfer to the contract of the method of protection, which is fixed precisely for such a case of violation (non-recognition or dispute) at the legislative level; 2) specification in the contract of the legally proposed method of protection; 3) provision in the contract of such a protective structure, which is absent at the legislative level. Let us consider each of these options in more detail.

8 O Otradnova, ‘Contracts Between Subjects of Tortious Obligations: Principles, Possibilities, Limits’ (2012) 9 *Pravo Ukrainy* 174-184.

9 Resolution of the Cassation Civil Court of the Supreme Court of 1 March 2021 in case No 180/1735/16-uc (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/95532945>> accessed 2 October 2022.

If the method of protection is defined by law, it is applied automatically, and its designation in the contract is not required. Nevertheless, when this method of protection is transferred to the contract, the effect of the preventive function of the obligation law is strengthened: it is suitable both for the purpose of preventing the violation of the rights and interests of the creditor and for the purpose of subsequent protection.

The second model of contractual consolidation of the methods of protection is due to the fact that the need for contractual specification of the method of protection may follow from the legislative provisions. At the same time, the parties are guided by the opportunities provided to them by civil legislation, taking into account the dispositive nature of most norms of civil law. For example, when the amount of the penalty is established in the contract, the method of protection is specified, the construction of which is proposed at the legislative level.

However, the application of legal provisions to such methods of protection does not always seem unambiguous. Thus, in judicial practice, a significant number of issues arose in relation to the penalty, such as: the possibility of determining a fine in the form of a fixed monetary amount; the establishment of a penalty for violation of a non-monetary obligation; the simultaneous collection of a penalty and a fine for one and the same violation. Regarding the last item, it should be recalled that at one time, at the level of the Armed Forces of Ukraine, various court chambers expressed opposing positions with a slight gap in time.¹⁰

Within the framework of this contractual model, it is also worth determining whether the parties to the contract have the right to limit the use of any method of protection of rights or to provide for the use of only one method that is allowed by law for the corresponding contractual violation. The answers to these questions lie within the relationship between the contract and the law and relate to the limits of contractual freedom, which in itself requires a thorough separate analysis.

At the legislative level, the issue of the limits of permissible freedom, including the establishment of methods of protection in the contract, are regulated by Art. 6 'Acts of Civil Legislation and The Contract' and Art. 627 'Freedom of Contract' of the Civil Procedural Code. Part 3 of Art. 6 of the Civil Procedural Code states that the parties to the contract cannot deviate from the provisions of acts of civil legislation in the event of the existence of one of the following grounds: 1) if these acts explicitly state this; 2) if the binding nature of the provisions of acts of civil legislation for the parties follows from their content or from the essence of the relationship between the parties.

In the scientific literature, it has been repeatedly argued that civil law regulations rarely contain direct prohibitions. Most often, the binding nature of the provisions of acts of civil legislation for the parties follows from their content, which is established by analysing the relevant norm in each individual case using different methods of interpretation. Such an obligation is often evidenced by indications of the nullity of the deviation from certain legal provisions. Examples of this are the rule on the nullity of a deed, which cancels or limits liability for intentional breach of an obligation (Part 3 of Art. 614 of the Civil Code); the rule in Part 2 of Art. 661 of the Civil Code on the nullity of the provision of the contract regarding the release of the seller from liability or regarding its limitation in the event of a claim of the goods from the buyer by a third party; the prescriptions of Part 4 of Art. 698 of the Civil Code on the invalidity of restrictions on the rights of the individual buyer compared to the rights established by the Civil Code and legislation on the protection of consumer rights.

10 The current judicial position on this matter is given in the Resolution of the Supreme Court of Ukraine of 1 June 2021 in case No 910/12876/19 (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/98524309>> accessed 2 October 2022.

The binding nature of acts of civil legislation for the parties can be ascertained even when the norm is formulated as imperative, although it does not contain direct prohibitions. For example, is it possible to establish in the contract the release of the debtor from compensation for damages, in other words, to exclude the use of the appropriate method of protection? It seems that an obstacle to this is the imperative rule on the obligation of the debtor to compensate for damages caused by the violation of the obligation (Part 1 of Art. 623 of the Civil Code). In other words, it seems that when solving this problem, the decision should not be based on the principle of freedom of contract since the presence of a contractual prohibition on the use of a method of protection grossly violates the balance of interests of the participants of the binding legal relationship. In the contractual procedure, it is lawful only to change the principle of full compensation, for example, by establishing that damages are compensated in some proportion or only real damages are subject to compensation.

A similar conclusion can be reached when answering the question of whether the application of a legal penalty can be excluded by the contract. Taking into account the fact that Part 2 of Art. 551 of the Civil Code only provides for the possibility of increasing or decreasing the legally established penalty (except for cases provided for by law), it is wrong to talk about the lawfulness of its contractual exclusion.

In the context of the imperativeness of the norms of the Civil Code, one cannot fail to mention the establishment of damages in a fixed amount in the contract. Until 2015, Part 5 of Art. 225 of the Commercial Code provided such opportunity (there is no such provision in the Civil Code). It established the right of the parties to an economic obligation by mutual agreement to determine in advance the agreed amount of damages in a fixed amount or in the form of interest rates, depending on the amount of the unfulfilled obligation or the terms of the breach of the obligation by the parties. The exclusion of the specified norm in 2015 indicates a tendency against these possibilities for the parties, even taking into account the principle of freedom of contract. The update of procedural and civil legislation at the end of 2017 also did not result in the return of the category of solid damages to the legislation.

It should be noted that even in the presence of the specified norm in the Civil Code, higher court authorities made decisions on the refusal to collect 'solid damages' (albeit in a smaller amount), which was motivated by the lack of a full composition of a civil offence, by which the courts understand illegal behaviour (action or inaction of a person); the harmful result of such behaviour (damages); the causal connection between the wrongful conduct and the damages; the guilt of the offender.¹¹

However, responsibility must include the reality of negative consequences for the violator, and the state of the current legislation raises doubts about this. After all, it is common knowledge that proving the amount of damages (especially in the form of lost profits) has always been quite problematic. Establishing damages in a fixed amount in the contract is one of the ways to ensure the principle of guarantee of responsibility.¹²

The question of the imperativeness of certain civil law norms in judicial practice also arose within the framework of the institution of invalidity of transactions, namely, can the parties to a contract qualify the contract as invalid and foresee the consequences of invalidity (including nullity) at their own discretion. It was precisely such problems that had to be solved by the United Chamber (UC) of the Cassation Civil Court (CCC) of the Supreme Court of Ukraine within the framework of case No. 355/385/17. The Supreme Court quite rightly came to the conclusion that the interpretation of Arts. 215 and 216 of the Civil Code

11 I Spasbio-Fateeva, 'Contours of civil-law responsibility: review and critical analysis' in AG Didenko (ed), *Civil Law. Articles. Comments. Practice.*, Issue 50 (Almaty 2017) 130-131.

12 Ibid 130-131.

indicates that participants in civil relations cannot, at the level of a particular contract, qualify it as invalid (null or contested) or determine the legal consequences of the nullity of the deed. By agreement of the parties, only the legal consequences of the disputed deed can be changed.¹³

Taking into account the above, the following logical question arises: what if the contract specifies a method of protection in violation of mandatory legal rules (with the exception of contractual freedom), and the party to the dispute insists on the application of these contractual provisions, justifying the claim with them or, on the contrary, stating objections to claims with reference to the provisions of Art. 629 of the Civil Code on the binding nature of the contract?

Judicial practice is based on Art. 629 of the Civil Code, which establishes one of the foundations on which civil law is based – the binding nature of the contract. The addressees of this imperative are both the parties to the contract, who must fulfil their obligations, and the bodies of justice, which are entrusted with the function of enforcing the concluded contracts. Non-fulfilment of obligations established by the contract may occur in the event of: (1) termination of the contract by mutual agreement of the parties; (2) termination of the contract in court; (3) unilateral withdrawal from the contract in the cases stipulated by the contract and the law; (4) termination of the obligation on the grounds contained in Chapter 50 of the Civil Code of Ukraine; (5) invalidity of the contract (nullity of the contract or recognition of its invalidity on the basis of a court decision).¹⁴ It follows from this that in order not to apply the contractual provisions on the method of protection, they must be qualified as null and void or declared invalid in a court of law.

However, case law has long been established in such a way that courts can simply ignore contractual provisions if they conflict with the law. A vivid example is the non-application of a penalty in an amount that exceeds the double discount rate of the National Bank of Ukraine (hereinafter – the NBU; the corresponding limitation is contained in the Law of Ukraine 'On Liability for Late Payment of Monetary Obligations'). At the same time, the penalty is awarded in the amount of the maximum limit specified in the law. That is, the court simply does not apply them without recognising the contractual provisions as invalid, without ascertaining their nullity (for the latter, there are no grounds in the example given), and without providing any justification in view of the norm of Art. 629 of the Civil Code on the binding nature of the contract.

From an applied point of view, the reluctance of the counterparty in such a situation to invalidate the contractual provision on the basis of Part 1 of Art. 203 of the Civil Code (the content of the deed cannot contradict acts of civil legislation) is often explained by the expiration of the statute of limitations for this requirement. Understanding that the specified term has been missed, the plaintiff in the statement of claim or the defendant in the response to the lawsuit (instead of filing a counterclaim) simply insists on the inconsistency of the provisions of the contract with the requirements of the law and expects the court to disapply them as contrary to the law. However, it should be emphasised that there is no provision in the law that would establish a rule for the court to ignore contractual provisions in the event that they contradict the legislative prescriptions. Therefore, under such conditions, a simple indication of the inconsistency of the content of the contract with the law is not enough.

13 Resolution of the Supreme Court of Ukraine dated 23 January 2019 in case No. 355/385/17 (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/79472438>> accessed 2 October 2022.

14 Resolution of the Cassation Civil Court of the Supreme Court of 23 January 2019 in case No 355/385/17 (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/79472438>> accessed 2 October 2022.

Neglecting the relevant contractual provisions (provided that they are not void) requires additional reasoning, which is absent in court decisions.

As for cases where the binding nature of acts of civil legislation follows from their essence, this circumstance is not a logical conclusion of para. 2 Part 3 Art. 6 of the Civil Code. Such considerations are due to the fact that Art. 6 of the Civil Code is devoted to regulating the relationship between acts of civil legislation and the contract and not their correlation with the essence of the relationship between the parties. After all, the essence of these relations lies in their contractual nature.¹⁵ Therefore, its application is possible only in the presence of any of the two previous grounds, that is, a direct instruction or if the binding nature of the provisions of the act of civil legislation follows from its content. This is exactly the path that was taken by the Slovak legislator, who stated in para. 2 (3) of the Civil Code that participants in civil law relations can regulate their mutual rights and obligations with a derogation from the law, if this is not expressly prohibited by law and if from the provisions of the law it does not follow that it cannot be avoided.

The third model of the contractual establishment of protection methods is the contractual establishment of such a protective structure, which is not provided for at the legislative level. At the same time, two options are possible here: 1) the method of protection is not typical for this type of violation; 2) the method of protection chosen by the parties, which is not mentioned at all in the current legislation (the so-called methods of protection ‘invented’ by the counterparties).

An example of the first option is a method of protection, such as recognition of the right. In Art. 392 of the Civil Code, it is fixed as having the right-affirming value in relation to the right of ownership. Recognition of the right of ownership is most often used as a classic method of protection in resolving property disputes, but this does not give grounds to assume the impossibility of its application in binding legal relations. In contractual practice, for example, there are cases when the recognition of ownership rights as a means of protection moves into the sphere of binding legal relations: in a construction investment contract, it is established in the form of recognition of the investor’s ownership right to an object of unfinished construction, if there is a violation of this contract on the part of the developer (for example, violation of the terms of construction of the object). That is, despite the fact that contractual relations have formed between the parties, the dispute is resolved with the help of such a method of protection as the recognition of the right of ownership. At the same time, this method no longer has a right-affirming but rather a law-establishing character and is aimed at protecting rights that are binding in nature. The property rights of investors are a classic manifestation of the right of claim, which has a relative nature: the investor is opposed by the developer, whose duty is to ensure that the investor is granted the right of ownership of the relevant real estate in the future.¹⁶

The methods of judicial protection not mentioned in the Civil Code, which can be reflected in the contract, should include, for example, the recognition of the contract as terminated¹⁷

15 MM Sibilyov, *The Civil Code of Ukraine: A Scientific and Practical Commentary (Explanations, Interpretations, Recommendations Using the Positions of Higher Courts, the Ministry Of Justice, Scientists, Specialists)* (Vol 1: General provisions ed IV Spasbio-Fateeva, Series ‘Comments and analytics’, FOP Kolisnyk AA 2010) 320.

16 YV Mytsa, ‘Property Rights of Construction Investors: Some Aspects of Legal Nature and Dynamics’ in IV Spasbio-Fateeva (ed), *Real Estate Law: through the Prism of Judicial Practice: A Monograph* (EKU 2021) 71.

17 Resolution of the Supreme Court of Ukraine of 23 January 2019 in case No 372/3/16-uc (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/79516582>> accessed 2 October 2022.

and the recognition of the contractual debt as groundless.¹⁸ In modern judicial practice, the methods of protection indicated here are most often considered permissible because the list of legally established methods of protection is not exhaustive, and the court can protect the right (interest) with an unspecified method of protection, if it is effective. Nevertheless, fixing such methods of protection in advance in the contract is also possible and expedient. However, law enforcement practice is not clear about the admissibility of claims for recognition if they relate to the legal assessment of disputed legal relations. On the one hand, the plaintiff is trying to achieve legal certainty and exclude possible disputes in the future, and on the other hand, requirements for a legal assessment of legal relations can lead to abuse of persons, when such a method of protection is used to legalise certain relationships or states and turn into 'competition' of court decisions that contain different (including mutually exclusive) legal assessments of the situation, or such an assessment (as one that allegedly has prejudicial significance) may affect the resolution of a legal dispute, the circumstances of which were not the subject of consideration in the case where the appropriate method of protection was used.

6 CONCLUDING REMARKS

The analysis of the application of contractual methods of protection allows us to assert that they must meet such a criterion as *lawfulness* (primarily the legally established limits of contractual freedom). As for *relevancy*, the test for this criterion is not required since, as was demonstrated above, the parties to the contract can choose a method of protection that is not typical for disputed legal relations. In turn, the criterion of *proportionality* must necessarily work for methods of protection that require contractual specification. It finds its manifestation, for example, in the provision of Part 3 of Art. 551 of the Civil Code on the right of the court to reduce the amount of fine. Requirements for compliance with the criterion of the *effectiveness* of the method of protection established in the contract are not contained in the current legislation. Moreover, as was mentioned above, neither the civil doctrine nor the law enforcement practice provides a justification for the non-application of contractual provisions by the court unless they are void or declared invalid in accordance with the procedure established by law.

It seems that in order for the courts not to follow the lead of the plaintiffs, whose contractual imagination can sometimes be impressive in its width (recognition of accounting documents as invalid, recognition of contractual periods as expired, etc.), in order to avoid going to court with claims that do not actually protect rights (interests), and are used, as it were, with a prejudicial purpose in other cases,¹⁹ the criterion of effectiveness must be put forward, including those methods of protection that have a contractual nature.

At the same time, it can be clearly stated that if the contract provides for a method of protection, and the plaintiff has chosen another one and proved its effectiveness in contrast to the one established in the contract, then the court can apply the method of protection that the plaintiff insists on (of course, if it meets the criterion of propriety and does not contradict the law). This conclusion follows from Part 1 of Art. 5 of the Civil Code and Part 1 of Art. 5 of the Code of Civil Procedure. The same conclusion is contained in Item 1 of the 'Review of problematic issues of the application of certain provisions of the Civil Procedure Code of Ukraine by courts based on the results of meetings, seminars, round tables with local and

18 Resolution of the Verkhovna Rada of the Supreme Court of 26 October 2021 in case No 766/20797/18 (*Unified State Register of Court Decisions of Ukraine*) <<http://www.reyestr.court.gov.ua/Review/101829988>> accessed 2 October 2022.

19 Popov (n 1) 135.

appellate courts' dated 10 July 2019.²⁰ These concise considerations regarding the criteria that must be met by the methods of protection established by the treaty can serve as a basis for further scientific research in the relevant direction.

Summarising the general points, we note that the provision in the law of the contract as a source of establishing methods of protection contributes to greater protection of rights holders and allows for the timely and adequate response to complications of legal relations and, as a result, complications of the subjective interests of their participants. The recognition of the freedom of participants in contractual relations in determining the methods of protection and strengthening the principles of dispositiveness in the relevant field corresponds to the modern pan-European approach. However, a simple indication of the possibility of enshrining methods of protection at the level of the contract in national legislation is clearly not enough. There is a need both for the development at the legislative level of general provisions on the methods of protection, which have a contractual nature and for the improvement of special provisions devoted to individual protective structures.

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²⁰ 'Review of problematic issues in the application of certain provisions of the Code of Criminal Procedure of Ukraine by courts based on the results of meetings, seminars, round tables with local and appellate courts' (10 July 2019) <https://supreme.court.gov.ua/userfiles/media/Ogljad_GPK_07_2019.pdf?fbclid=IwAR2GBTi07XJbvBTK2N3qdNFcL4BDnFaiB28p1rxtul96BwQ77zDk6-gH9bo> accessed 2 October 2022.