Fulfillment of Civil Oblegations Durind War: Empirical Findings from Ukraine. Theory and Legal Practice

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UNIVERSITÄT OSNABRÜCK

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OSNABRÜCK RESEARCH FORUM 2023

30 November – 1 December 2023

PROGRAM & MATERIALS

European Legal Studies Institute
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II. PROGRAM

THURSDAY, 30 NOVEMBER

9.30 WELCOME · Christoph Busch, Osnabrück

9.45 **Green dark patterns – protection of consumers between new technologies and ecology** · Aleksandra Olbryk, Lodz

Discussant: Philip Steitz

Fulfillment of civil obligations during war: empirical findings from Ukraine. Theory and legal practice · Anatoliy Kostruba, Paris

Discussant: Lena Hupe

11.15 **(De)merits of the AI Regulation of the EU in Comparison to the UK's Approach** · Cemre Polat, Ankara

Discussant: Jason Tenta

Assigning Civil Liability for Damages Caused by AI in the European Union · Miguel do Carmo Mota, Lisbon

Discussant: Ingvar Daute

12.45 *LUNCH BREAK*

14.30 **»There, and Back Again« – regulating technology-driven contracts amidst personalization and standardization** · Antonio Davola, Bari

Discussant: Julian Pusch

Third State Defendants in EU Courts · Johannes Ungerer, Oxford

Discussant: Maximilian Krenzin

16.00 **Defining Social Media Platforms Under European Consumer Protection Law – A TikTok Case Study** · Laura Aade, Luxembourg

Discussant: Lena Esser

(Dis)intermediating online platforms – demystifying and categorising Dapps on the basis of the EU platform law · Luigi Cantisani, Warwick

Discussant: Daniel Skiebe

19.00 *DINNER (restaurant Joducus, Kommenderiestr. 116, 49080 Osnabrück; find the address by scanning the QR code provided below)*

FRIDAY, 1 DECEMBER

9.30 **Towards a uniform approach on private enforcement** · Sebastian Schwamberger, Rostock

Discussant: Johannes Steiling

»Justice« on Digital Platforms – Internal Complaint-Handling Systems and Mediation in P2B Relationships – a Call for Reform · Ludovica Sposini, Pisa

Discussant: Geelke Wemjes

11.00 **MOCADEM – Another Step Towards the Informalisation of the EU's External Action on Migration?** · Cristina Milano, Viterbo

Discussant: Maximilian Wittenbrock

12.30 *LUNCH BREAK*

15.00 ANNIVERSARY PROGRAM

WELCOME

Prof. Dr. Thomas Groß
Director of the European Legal Studies Institute, Osnabrück University

Prof. Dr. Oliver Dörr
Dean of the Faculty of Law, Osnabrück University

Prof. Dr. Andrea Lenschow
Vice-President of the Osnabrück University

RETROSPECTIVE

Prof. Dr. Dr. h.c. mult. Christian von Bar
Founder of the European Legal Studies Institute, Osnabrück University

Prof. Dr. Jens-Peter Schneider
Founder of the European Legal Studies Institute, University of Freiburg im Breisgau

KEYNOTE ADDRESS

Prof. Dr. Pascal Pichonnaz
President of the European Law Institute, Université de Fribourg

EU Digital Contract Law and its Disruptive Effect on Domestic Law

OUTLOOK

Prof. Dr. Thomas Groß
Director of the European Legal Studies Institute, Osnabrück University

2. Fulfillment of civil obligations during war: empirical findings from Ukraine. Theory and legal practice ▪ *Anatoliy Kostruba, Paris*

The ongoing conflict in Ukraine has rendered it impossible to execute our contractual duties. This circumstance is linked to the military aggression of the Russian Federation against Ukraine. The government is making efforts to partly address this issue through legislative means, and has implemented several amendments to adjust the country's economy to military needs.

For instance, the Ukrainian Law No. 2120-IX, passed on 15th March 2022, "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine Regarding the Validity of Provisions for the Period of Martial Law," introduced paragraph 18 to the section "Final and Transitional Provisions" of the Civil Code of Ukraine, together with other revisions.

This clause states that if the borrower fails to fulfil their monetary obligation under an agreement, which granted them a loan from a bank or other lender, during martial law or a state of emergency in Ukraine and within thirty days after its termination or cancellation, then the borrower is exempt from liability for violating performance terms, and from paying a penalty for such a delay in favour of the lender.

Furthermore, Law No. 2120-IX introduced paragraph 6 to Section IV "Final and Transitional Provisions" of the Law of Ukraine "On Consumer Lending".

This provision outlines that in the event that a consumer defaults on their obligations under a consumer loan agreement during a period of martial law or a state of emergency in Ukraine, or within thirty days of the end of such a period, the said consumer will not be held liable by the lender for any resulting delay.

Furthermore, Law No. 2120-IX appended section 5 to the "Final Provisions" of the Ukrainian "Mortgage Law".

The aforementioned paragraph temporarily suspends specific stipulations of the Law of Ukraine "On Mortgage" relating to the mortgagee's ability to attain ownership of the mortgaged property, the mortgagee's right to dispense with the mortgaged property, and the removal of tenants from mortgaged residential buildings and premises.

Based on the analysis of the changes outlined above, it can be inferred that the effects of postponing an obligation in a field of great public significance are now adequately regulated.

Along with the aforementioned legal frameworks, there are many other civil law

contracts, such as contracts for sale and purchase, leases, and contractors. Situations concerning legal relations under such agreements differ substantially. The absence of specific legal regulation during wartime by the legislator means that, unlike loan agreements, the parties involved in other agreements must rely on general principles for proving facts supporting their position. In simpler terms, the concerned party must demonstrate that the liability exemption is justified due to martial law, in order to avoid liability. However, in this case, it cannot be presumed that force majeure is applicable. The force majeure institution, commonly referred to as force majeure, is among the factors that enable contract obligations to be adjusted. The use of this legal construct empowers a party to argue that there has been a substantial alteration in the circumstances of the contractual relationship. Article 617 of the Civil Code of Ukraine provides an exemption from liability for breaching obligations due to an accident or force majeure.

The Supreme Court has established the components of force majeure as follows:

- they are of an exceptional nature and do not rely on the parties' volition in civil relations;
- they are inevitable;
- they render it impracticable to fulfil the obligations under the prevailing conditions of commercial activity.

In essence, force majeure is deemed to be an event that is beyond the control of the obligated party. The domestic legal system acknowledges armed conflict, military operations, and undeclared war as force majeure circumstances.

In compliance with Clause 6.2 of the Rules, the Ukrainian Chamber of Commerce and Industry certifies force majeure events (insurmountable circumstances) upon request by the appropriate party for individual contracts. Following the aforementioned provision, in February 2022, the Chamber of Commerce opted to streamline the certification process for force majeure during martial law and released an official letter on the certification of force majeure on their website. Without a doubt, this document cannot be regarded as conclusive evidence of their existence since it fails to specify the conditions of force majeure in a particular instance.

Thus, military aggression alone cannot be an absolute condition for exemption from liability due to force majeure. The obligor must prove not only the existence of force majeure itself, but also that these circumstances constitute force majeure for that particular contract.

The court's reasoning confirms the validity of individualising the exemption from liability

issue and assessing if the impossibility of performance is a result of particular force majeure circumstances.

Between March and November 2023, the courts issued approximately 300 verdicts on cases pertaining to the subject matter at hand. Approximately 50 of these decisions were subsequently reviewed by the appellate courts. In 90% of the cases, the arguments given by the first instance and appellate courts were upheld, as per the specified criteria.

The court has determined that there is no direct causal link between the war and the failure to fulfil obligations in cases No. 910/4001/22, No. 910/7967/22, No. 910/7141/22, and No. 910/7134/22.

Additionally, the letter from the Ukrainian Chamber of Commerce and Industry has been deemed as not meeting the requirements for force majeure certificates based on statutory criteria in cases No. 910/4879/22, No. 917/353/22, and No. 912/2427/21. Finally, the court found that there was a lack of proper notification of force majeure in case No. 912/507/22.

The assessment carried out by the Supreme Court via the Resolution of 28th October 2022, in the case No. 904/3910/21, and the Resolution of 14th September 2022, in the case No. 420/143/22, evaluated the implementation of martial law in Ukraine and the presence of force majeure in regard to the sufficiency of justification for the missed procedural deadlines.

The court declared that the simple implementation of martial law, without proving the causal connection between its introduction and the missed procedural time limit, does not imply the validity of the reasons for the lapse, and hence does not provide a basis for its renewal.

In the case No. 917/1053/18, the Resolution of the Supreme Court on 16th July 2019 established that force majeure events are not inherently prejudicial. When a party argues that such events render them unable to fulfil their obligations, they must prove that the specific circumstances surrounding their case constitute a force majeure event. In addition to proving existence, proof of the particular event's force majeure status is required.

The court did not consider the defendant's force majeure arguments, supported by a letter from the Chamber of Commerce, as this evidence fails to establish that the defendant was unable to fulfil contractual obligations due to the military aggression of the Russian Federation against Ukraine, which caused the imposition of martial law. The implementation of martial law within Ukraine's territory does not inherently prevent

the accused from pursuing business operations and obtaining monetary resources. The defendant failed to present proof that the company ceased operations because of martial law. There is no evidence that all or some of the employees, the company's director, or other officials have been mobilised and are now part of the Armed Forces of Ukraine, and that they are unable to perform their professional tasks due to military operations. Additionally, there is no confirmation that part or all of the company's movable property is involved in activities that would hinder its business operations during martial law.

It is crucial to adhere to the prescribed procedure for notifying the counterparty of force majeure circumstances stipulated in the contract. Breaching such a procedure could forfeit one's legal entitlements to force majeure.

Force majeure is a legal concept that requires evidence and appropriate legal formalities to be presented in court proceedings. The mere existence of such exceptional and unavoidable circumstances does not absolve a party from its obligations or liability for breach thereof.