IMPORTANT NOTICE:

We deeply apologise for not delivering this Quick-Guide other than in its German version only. Anyhow, to give to non-German speaking German residence (an only them: we cannot restrict the upload of this quick-guide from abroad technically, thus: If you are form abroad, please note: this Guide is NOT for you) an idea of what the topics are in German law, we decided to upload this machine translation. Please be terrify aware that the machine did not hold a master of law and that – even the machine would do so – there are significant differences between German law and other Law systems which make them not comparable at all. For instance, even if you think that a term or a concept sounds similar to something you are custom with, maybe from the day back in your childhood in a foreign country, please regard it as NOT true. To make this clear, we inserted the true German terms into the Glossary. As you can see the machine was quite imaginative during the translation process. IN ANY CASE: Do not – under no instance – take NO decision at all on the basis of this machine translation. If you have any legal trouble: Consult your Lawyer immediately!

You should know these terms and concepts.

Act of God

Another word for **force** majeure, but only for the subset of natural disasters (Putin and his war are not an **Act of God**!). The term comes from Anglo-Saxon law.

AGB

AGB is an abbreviation for **General Terms and Conditions** as well as for the individual clause in the sense of a **General Business Condition**. See also **General Terms and Conditions**.

Allgemeine Geschäftsbedingungen (General Terms and Conditions)

If you have a

(1) Clause like this or similar (not visually, in terms of content!) already
(2) have used or intend to use more than 3 times (*Weird!*) and
(3) you have not negotiated the clause with your contracting partner,

!

then it is probably a **general business condition**. The legislator calls them *pre-formulated contract terms*. A clause that is a **general business condition** may and must be examined by the judge as to whether it is fair (*reasonable*, *reasonableness test*).

In case of doubt: All **general terms and conditions that** are economically sexy are legally invalid. As a rule of thumb (but, please, really only as a rule of thumb) you can perhaps remember: The more your clause departs from what the law says, the more likely it is that the judge will consider it unfair (*unreasonable*) (§§ **307**, **310** BGB).

Unfair **general terms and conditions** are completely (i.e. the whole clause) invalid; the judge may not simply cut away the unfair part. Ineffective means that the judge acts as if the clause did not exist. See also **AGB**.

CISG

Other term for **UN Sales Law**, see there.

Commodity

New German for interchangeable standard goods that can be obtained from many suppliers in comparable quality, e.g. grain, potatoes, milk, electricity, gas. Also stands for the entire industry: *Louis Winthorpe III* from the film *The Soldiers of Fortune* (1983), managing director of *Duke & Duke Commodities Broker,* traded in the *commodities* pork bellies and frozen orange juice on the *Chicago Mercantile Exchange*.

In Europe, **commodity** *futures contracts* are traded on Euronext (for agricultural products Euronext MATIF) and - more recently - on the EEX. *Cash market prices* are quoted at the agricultural exchanges or associations, in Germany for example at the *Verein der Getreidehändler der Hamburger Börse e.V.* and at the *Bayrische Warenbörse*, in Austria at the venerable *Börse für landwirtschaftliche Produkte*, and in Italy for example at *l'Associazione Granaria di Milano* or the *A.g.e.r. (Associazione Granaria Emiliana Romagnola) di Bologna.*

Fahrlässigkeit (Negligence) "*He bears responsibility for the mess because he did not do everything that 'Mr Correct' would have done. He was not diligent enough.* " see **fault**, **diligence.**

Force Majeure Another term for **Höhere Gewalt** or hardship, especially in a cross-border context.

Force majeure clause Another term for **Höhere Gewalt clause** or **hardship clause.**

Gattungsschuld (Generic debt) "*Merchandise customary in the market*". A generic debt is the opposite of a **piece debt**. Example: "*Deliver me gas*". This can be biogas, gas from the Netherlands or Putin gas, gas from a regional producer or from the big gas company: as long as you can operate your heating or run your processes, it doesn't matter what gas you get, as long as it is chemically just the usual standard gas. It's only different if you haven't just ordered gas - but who does that?

Hardship Another term for **Höhere Gewalt** (see there) or **force majeure**, especially in a cross-border context.

Hardship clause Another term for **Höhere Gewalt clause** (see there) or **force-majeure clause**

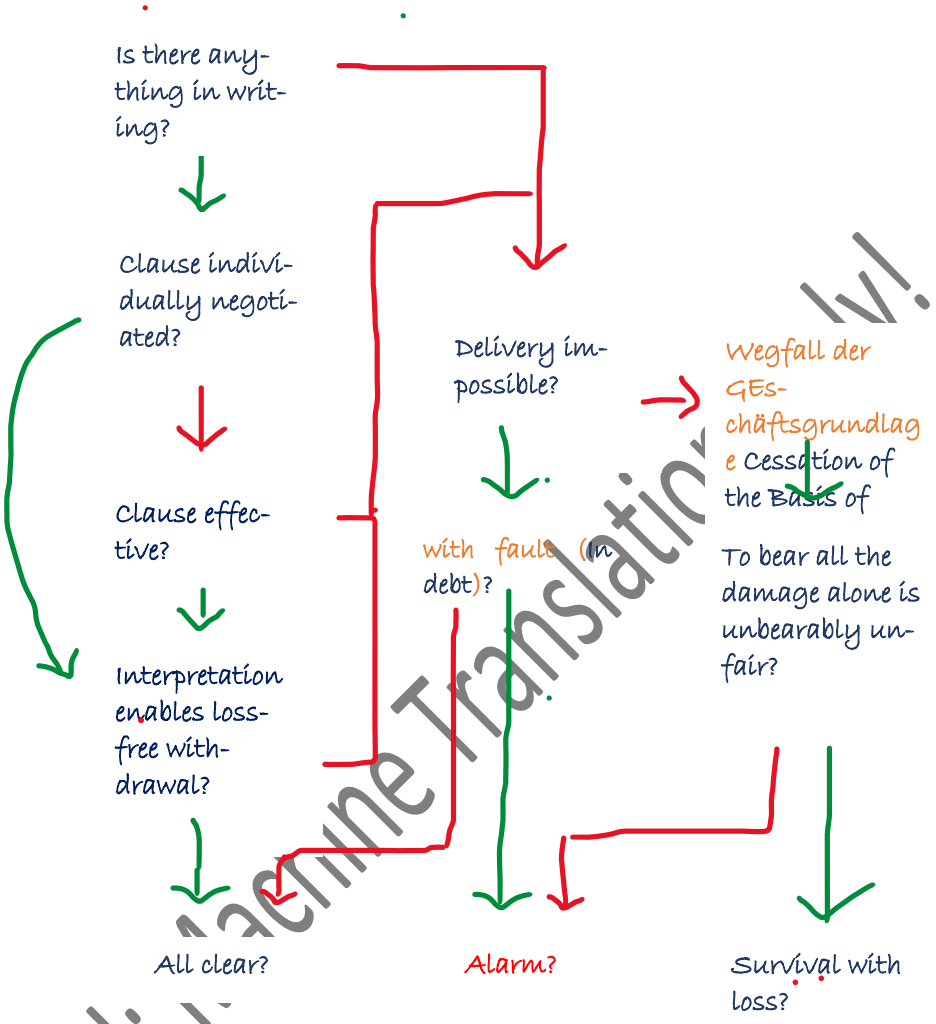
Higher-Violence (1) It might be a good idea to say goodbye to the idea that there is a legal institute called **Höhere Gewalt** or - what you also often hear - that you have to *invoke* this institute. And, while you are at it, you could also take this opportunity to throw overboard your previous idea that if **Höhere Gewalt** existed, you could get out of your contract without loss for that reason alone.

(2) **Höhere Gewalt** appears only sporadically in German law and there is no German standard defining it. The law of sale itself is not interested in **Höhere Gewalt** at all. Incidentally, this is also the case in **UN sales law**, where there is no **Höhere Gewalt either.**

(3) You are right to ask why you are reading this Quick Guide then. Well, the concept of **Höhere Gewalt does** exist (otherwise we would not be discussing it). However, it is ONLY a generic term under which quite different topics are discussed together. If you have a contract governed by non-uniform German law (and this Quick-Guide only deals with this non-uniform German law), then you will quickly find yourself dealing with the following instead of **Höhere Gewalt**:

(a) Unverschuldete Unmöglichkeit (**impossibility without fault**);
(b) Anpassung (Adjustment) of the contract due to the Wegfall der Geschäftsgrundlage (**cessation of the basis of** the contract);
(c) Selbstbelieferungsvorbehalt (**Self-delivery reservation**) if you have agreed it contractually;
(d) Liefervorbehalt **reservation of delivery**, if you have agreed it contractually, and
(e) yes, including **Höhere Gewalt (force majeure)**, but only in the form of a contractual agreement, other than a Selbstbelieferungsvorbehalt (**self-delivery** or **supply)** agreement, which you may (and only may) have entered into and which sets out what events are to be **Höhere Gewalt** (**force majeure**) and what rights you are to have if any of those events occur; and
(f) **General Terms and Conditions**.

(4) You will, if you want to be effective, probably deal with these issues in this order (green = answer is yes, red = answer is no):



The reason why we start differently in the Quick Guide is that the law is the standard for determining whether a clause is effective or not. Our order is therefore only didactic and not logical.

(2) As a rule of thumb (but, please, really only as a rule of thumb):

Höhere Gewalt (Force majeure) exists,

(a) if about you

(i) a natural disaster (flood, earthquake, storm, etc.) or
(ii) a man-made disaster (e.g. war, revolution, attacks, etc.)

has broken in and

(b) you can no longer fulfil your obligations because of this disaster, e.g. you can no longer deliver, and

(c) if it is not your fault and really not your fault at all that you can no longer fulfil your duties, i.e.

(i) you are neither responsible for the disaster as such (if you are Mr Putin, you will be sorry to hear that you cannot claim **force majeure** because of the war in Ukraine)

(ii) nor are you responsible for being left empty-handed because of the disaster, e.g. no longer able to deliver; if, for example, you did not take out commercially sensible insurance or only admired the disaster at the dawn of it but did not also prepare for it, you will probably need good nerves in the near future.

(3) The Federal Court of Justice once defined force majeure in this way, but (CAUTION!) only in the context of liability in traffic accidents and that is probably not really your topic (judgement of 28 February 1975 - I ZR 40/74):

According to German law, force majeure is an extraordinary event affecting the business (...) from the outside, which does not occur with a certain frequency or regularity or is to be expected, cannot be averted by the utmost reasonable care nor can its consequences be rendered harmless and must therefore be accepted.

Höhere-Gewalt-Klausel Higher violence clause

A contractual agreement by which you try to replace or supplement the legal regulations with your own provisions. The fact that you don't have a **force majeure clause** doesn't mean that you can't invoke **force majeure** - so: don't panic for now! Conversely, just because you have a force majeure **clause** does not guarantee that you can invoke force **majeure.**

Liefervorbehalt (Delivery reservation clause)

A contractual agreement by which you try to replace or supplement the legal regulations with your own provisions. According to the legal regulations, it is none of your customer's business that your supplier has let you down. With the **delivery reservation clause,** you are trying to pass on part of this problem to your customer. The fact that you do not have a **delivery reservation clause** does not mean that you cannot invoke force majeure - so: do not panic for now! Conversely, just because you have a supply reservation clause does not guarantee that you can invoke force **majeure.**

Reichsgericht (Imperial Court) RG

See **RG.**

Reichsgericht **Imperial** Court; the predecessor of the Federal Supreme Court.

Selbstbelieferungsvorbehalt Self-delivery clause

A contractual agreement by which you try to replace or supplement the legal regulations with your own provisions. According to the legal regulations, it is none of your customer's business that your supplier has let you down. With the self-delivery clause you are trying to pass on part of this problem to your customer. The fact that you do not have a self-supply clause does not mean that you cannot invoke force **majeure** - so: do not panic for now! Conversely, just because you have a self-delivery clause does not guarantee that you can invoke Höhere Gewalt force **majeure.**

Sorgfalt diligence

"Do everything that 'Mr. Correct' would do", see also Fahrlässigkeit (**negligence)** and **fault**.

Stückschuld Unit debt

"An object with precisely these characteristics". Stückschuld **Unit debt** is the opposite of Gattungsschuld **generic debt**. Example: *"Deliver me the malting barley stored in the St. Margarethen bulk warehouse, silo cell 425, at the time of the conclusion of the contract. " Stückschuld* **Piece debt** and Gattungsschuld **generic debt** have some fascinating features. If you - lucky you - have won at the lottery booth and have a free choice between screwdrivers, crayons and styrofoam planes, your winnings are still a Gattungsschuld **generic debt**. But as soon as you have pointed to the Spitfire Styrofoam plane on the front right, your Spitfire (now) becomes a Stückschuld **unit debt**.

UN Sales Convention

Other term for: *United Nations Convention on Contracts for the International Sale of Goods.*
Other term: for **CISG**.
Other term for: *United Nations Convention on Contracts* for *the International Sale of Good.*

If your contract partner is located abroad (and you are not a supplier or customer of electricity) and you have not agreed on the applicable law or have only agreed that German law should apply, then your contract is probably not governed by German domestic law, but by German foreign law, the **UN Sales** Convention (United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980, CISG) and subsidiarily (if the CISG is therefore silent on the subject) by the law of the country where the supplier is located (if you are the supplier, therefore subsidiarily by the law at home). April 1980, **CISG**) and subsidiarily (i.e. if the **CISG** says nothing on the subject) according to the law of the country in which the supplier is located (if you are the supplier, i.e. subsidiarily according to the law at your home).

The great thing about the **UN Convention on Contracts for the International Sale of Goods is that** many other countries in the world have the same foreign law. The Russian, the Chinese, the Zambian: everyone knows (or better: should know) what you are talking about and what they have to do or not do.

This includes all major markets except the *United Kingdom* and *India*.

Our *Quick Guide does* **NOT** refer to the UN Sales Convention, otherwise we could not keep your reading time to half an hour. However, we would like to say that we think the **force majeure clause** in the UN Sales Convention is successful and you will find that much of what German jurisprudence has worked out looks as if it has looked at the UN Sales Convention with one or perhaps even both eyes. We therefore want to at least reproduce the corresponding provision of the CISG:

Article 79
(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it; or its consequences;
(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:(a) he is exempt under the preceding paragraph; and(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
(3) The exemption provided by this article has effect for the period during which the impediment exists.
(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Unmöglichkeit
Impossibility

"*Can't be done..*" Why it can't be done, e.g. because it's technically impossible or because it's forbidden, is irrelevant:

*§ **275** Exclusion of the obligation to perform*

(1) The claim to performance is excluded insofar as it is impossible for the debtor or for anyone.

(2) The debtor may refuse performance to the extent that such performance requires an effort which, having regard to the content of the debt relationship and the requirements of good faith, is grossly disproportionate to the creditor's interest in performance. When determining the efforts to be expected of the debtor, it must also be taken into account whether the debtor is responsible for the impediment to performance.

(3) (...)

(4) The creditor's rights shall be determined in accordance with sections 280, 283 to 285, 311a and 326.

verschulden
Fault

"*You bear the responsibility for this mess.*"

You bear "*responsibility for a mess*" if you did not do everything that *"Mr. Correct"* would have done in your place (see **negligence**). You are even more responsible if you saw the mess coming and still preferred to finish your beer, or, even worse, if

you ordered another beer in order to be able to relax and admire the creation of the mess (see **intent**).

Vorsatz
Intent

You saw the mess coming and still prefer to finish your beer (*conditional* **intent**, *dolus eventualis*, perhaps already *knowing intent,* dolus *directus 1st degree*), or, worse, you just ordered another beer to watch the mess unfold live (*intent,* dolus *directus 2nd degree*); see also: culpability.

Wegfall der Geschäftsgrundlage
Cessation of the basis of business

"If we had known that, to be fair, we would never have concluded the contract like that. There has to be a change, for God's sake!"

*§ Section **313** Disturbance of the Basis of the Contract*

(1) If circumstances which have become the basis of the contract have changed seriously after the conclusion of the contract and if the parties would not have concluded the contract or would have concluded it with different content if they had foreseen this change, adjustment of the contract may be demanded insofar as one party cannot reasonably be expected to adhere to the unchanged contract, taking into account all circumstances of the individual case, in particular the contractual or statutory distribution of risk.

(2) A change of circumstances shall be deemed to have occurred if essential ideas which have become the basis of the contract turn out to be false.

(3) If an adjustment of the contract is not possible or not reasonable for one part, the disadvantaged part may withdraw from the contract. The right of withdrawal shall be replaced by the right of termination for continuing obligations.

WGG

Undifferentiated reference to Wegfall der Geschäftsgrundlage **cessation of the basis of the transaction** and **313.**

275

Undifferentiated reference to Wegfall der Geschäftsgrundlage Unmöglichkeit **impossibility** and economic **impossibility.**

313

Undifferentiated reference to **cessation of the basis of the transaction** and **WGG.**

You need to know these principles.

One world, many rights.

Germany is small and the world is big. There is a high probability that your contract will therefore not be governed by German law but by the law of the country in which your contract partner is located or, if your contract does not provide for this, by the United **Nations** *Convention on Contracts for the International Sale of Goods* (**CISG**).

This Quick-Guide refers ONLY to German law, i.e. neither to the **UN Convention on Contracts for the International Sale of Goods** nor to foreign law. The key words to call out to your legal department in this context are: *Choice of Law!* and *IPR*!

AGB and abroad.

Do you work with standard contracts, standard clauses or even with small print? The probability that what you have regulated there does not apply at all is quite high, in any case,

(1) if your customer is located abroad (yes: Austria, Switzerland and South Tyrol are also foreign countries) and you have only sent him an order confirmation, for example, but have forgotten to send him
(2) also **actively** provide your standard contract, standard clauses and/or small print (even if it is of course bizarre that your contractual partner does not employ a staff member who proactively collects the GTC of his business partners, outrageous!).

Incidentally, this also applies *vice versa* to your customer and his **T&Cs**.

GTC and fairness control - many clauses are not effective .

If German law applies (other countries are more generous, sometimes MUCH more generous), the likelihood is high that any clauses of interest will be invalid or effective but significantly less *sexy*. Please refer to **General Terms and Conditions**.

Forget about liability limitations in general terms and conditions.

Please forget (from an economic point of view) **limitations of liability** in **GTCs**, which are to be assessed according to German law.

Even in dealings between companies and even in dealings between merchants, it is the steely, immovable and criticism-proof line of the BGH that if you want to sign yourself free for *gross* **negligence**, *injury to life and health* and/or *breach of cardinal obligations* (these are the most important obligations you entered into with the contract, so actually for whatever), it is mandatory that you **negotiate this with** your contractual partner in advance in a concrete and **open-ended manner.**

If you do not do this, your limitation of liability is null and void, at least from an economic point of view: there are of course a few more grounds for liability that can be excluded, but, hand on heart, do you really care about them?

Moreover, you cannot get rid of liability for **intent** even by negotiation, at least not before the damage has occurred, § **276**(3) BGB.

Wheel of Fortune Interpretation.

Every clause, even the one you think is crystal clear, can and must be interpreted by a judge.

When you know that a judge has to take all the circumstances of the individual case into account for the interpretation, right down to what the customer's buyer told the supplier's sales representative on the phone about yesterday's pizza, it is clear that nothing is clear and no one can predict what content a judge will take from your clause.

Workshop 1

What does clause 10 mean in the following example (special contract for electricity for consumers):

10. When is Y. not obliged to deliver?

Y. shall take all possible measures to supply you with electricity at the end of the grid connection. However, in the event of disruptions to the operation of the grid, including the grid connection, Y. shall be released from its obligation to perform. This shall also apply if Y. is prevented from supplying electricity due to force majeure or other circumstances, the elimination of which is not possible or cannot be expected of Y. economically.

Who can I contact if my electricity supply is interrupted?

If an interruption or irregularity in the supply of electricity occurs as a result of a disruption in the operation of the grid, including the grid connection, you can assert your resulting claims directly against the grid operator. Upon request, Y. Upon request, Y. will immediately provide you with information on the facts relating to the cause of the damage by the grid operator, if they are known to Y. or can be clarified by Y. in a reasonable manner. Y. is directly liable to you if Y. has your supply interrupted without justification.

If you have come to the conclusion that you no longer have to deliver in the event of force majeure and also do not have to pay damages, then - you guessed it - you were wrong! The clause means in a special contract for electricity customers (consumers), straight away in the words of the BGH (BGH, ruling of 14 March 2012 - VIII ZR 202/11):

Contrary to the opinion of the Court of Appeal, however, this examination shows that clause no. 10 only contains a limitation of the defendant's obligation to deliver, but not at the same time a regulation of the legal consequences resulting from this for the customer.

You see, it never gets boring!

You do not have a self-delivery or force majeure clause in your contract.
in your contract.

As a supplier, can you also survive the crisis without losses?

In any case, this is not completely out of the question, but often a question of **piece debt** or **generic debt.**

In the case of a **piece debt**, if you have only described the goods in your contract in a petty enough way, **impossibility** can occur quite easily and then you can probably also hope quite confidently that you will at least no longer have to deliver in real terms (read § **275** BGB). - However, this saves little, apart from a little transport costs, if your obligation to deliver has simply turned into an obligation to pay damages (read § **275**(4) BGB).

This is often the case, but not always. If you are not responsible for the **impossibility**, it can look quite good for you (read § **275**(4), 280(1) 2nd sentence BGB).

It is even not completely impossible that you - on top - still get your purchase price without having delivered a single kilowatt nanosecond, namely if it is your customer's fault that you can no longer deliver (read § **326**(2) BGB).

Often, however, before you get too excited, the goods that have to be delivered are **generic debts**, where there is often no **impossibility.**

Epic battles have already been fought over the question of **piece debt** or **generic debt.** To give another example of the magic of these debts, a generic debt can also turn into a piecemeal debt, for example, if you take too long to decide between the Styrofoam Spitfire and the strawberry-scented crayon and the lottery ticket seller has already counted you in.

You keep reading about the insecurity plea - what is it and does it do anything for you.

If the conditions for a *plea of uncertainty are met*, you only have to make payment concurrently. You also have the right to terminate the contract.

However, both are not very spectacular at first. Unless you have exceptionally agreed that you will not get your money until you have delivered, or that you have to pay first before you get your goods, it is self-evident that you only have to perform *concurrently*. And if your supplier does not deliver or your customer does not pay, it is also not unusual that you can withdraw from the contract.

The defence is therefore probably only interesting for you if you have agreed that you must first deliver before you get your money, i.e. you have customers in the territories of the two warring parties. It may be enough that your buyer is in the war zone that you can get out of the contract without loss after a few spells.

Can there be impossibility in generic debts?

At least as long as the goods are still traded on the market: As a rule, no.

Please read the **Lammzinn case of** the Reichsgericht, but bear in mind that the Reichsgericht no longer exists and that the law has changed quite a bit since then.

Can there be impossibility with money debts?

No.

Can there be impossibility with piece debts?

Yes.

Example 1: If you have sold malting barley from a specifically named silo cell and the barley is destroyed in a fire, you probably do not have to deliver the barley again (but this does not say anything about whether you might not have to pay damages instead, perhaps because you left a gas valve open, for example).

Example 2: If Ukrainian wheat with the provenance *Mariupol Rajon*, harvest 2022, was purchased, it becomes clear that this wheat will never exist and, if this is confirmed, it will presumably be **impossible to** deliver this wheat, if one follows the opinion that the provenance substantiates the goods, which is not seen that way by everyone (but this does not say anything about whether you might not have to pay damages instead; this is quite certainly the case, for example, if you are Mr Putin: Sorry, Mr Putin.)

If delivery is not impossible for you, but only at ludicrous prices - is all lost?

In any case, it is not excluded that under certain circumstances you can at least demand an adjustment of the contract, in extreme exceptional cases even terminate the contract.

! It is not known when an adjustment can be requested, and if so, which one.

We know that the judge who has to decide on an adjustment has to write a kind of reflection essay. In it, he has to weigh the *pros and cons on your* side with the *pros and cons* on the side of your contractual partner.

We also know that it is probably **not possible for anyone to reliably predict whether and which adjustment** you **can demand.**

We also know a few elements that can occur in this balancing:

With every iota with which you as a supplier approach "*Mr. Correct*", you also approach the probability of being allowed to demand an adjustment. And vice versa: the more carelessly you behave, the more your prospects dwindle.

Don't speculate: If you have speculated, you may not need to get prescription pills yet, but at least take some valerian tablets with you next time you go weekend shopping.

Against this you will be able to relax a little,

- if you have concluded a cover transaction;
- if you have not concluded a cover transaction, but have at least taken care of sufficient stockpiling at the dawn of the crisis, even accepting bitter losses;

- if you have not been asleep, but have been watching the events in the world so neatly that you have seen the dawn of the crisis coming and have taken countermeasures.

We know, however, that it is not necessarily easy for *"Mr. Correct" to* get an adjustment either, because the starting point is that contracts have to be respected.

Even if you are a customer, you should not sit back and do nothing. At least, if your supplier approaches you with reasonable ideas, it might be a good idea for you to listen to him and consider whether one or the other consideration, possibly even accepting your own losses, might not be a solution. We lawyers discuss this mainly under the term contributory negligence.

Workshop 2

Please reflect on these two statements:

(a) It is dramatic for you as a supplier when your procurement prices suddenly go through the roof.

(b) It is dramatic for you as a customer if you no longer receive essential raw materials.

Please try to answer the following questions for yourself:

(i) Did you have to buy on the spot market or would it not have been better if you had stocked up in good time?

(ii) If you had no storage capacity: Couldn't you have bought the goods before but left them with your supplier until you needed them?

(iii) They did not want to pay storage costs, insurance and other things; that is understandable, but: Would it not then have come into consideration to buy a *future* or to enter into some other *forward transaction to* hedge the price risks?

(iv) The cost of a *Future is* also too high: Couldn't you discuss this with your contractor? Lower price, against waiver of fixed price? Or the other way round: Higher price against delivery guarantee?

With all the mutual understanding that you have for yourself and your contractual partner, please still try to internalise the following iron principle and, if you are the supplier, swallow this toad:

Pacta sunt servanda - contracts must be honoured!

The BGH has formulated this very clearly and very unambiguously:

In view of the paramount importance attached to the principle of contractual loyalty, the invocation* of *a change or a* lapse of the basis of *the contract is only admissible if this appears to be unavoidable in order to avoid an intolerable result which is incompatible with law and justice and thus unreasonable for the party concerned.

Why, of all people, should the one who promised the service not suffer any loss, while his customer goes over the edge? As we have just seen, the distribution of risk is exactly the other way round: the client can insist on compliance with his contract and does not have to accept any adjustment.

Just imagine what would happen if this principle did not exist, especially in times of crisis: A bit of war or a bit of a pandemic, everyone breaks away from their contracts, supply chains collapse and in the end the whole economy crashes!

Now reflect on your case again:

How did you behave, how did your customer or supplier behave? What would a third party probably consider fair?

Prices go through the roof - That's what case law says.

Perhaps a little butter on the fish, even if there is not much butter:

Lamb's Tin Case of 1916

Price increase: 100 % in wholesale? Far too little, according to the **Imperial Court** in World War I.

What had happened?

The procurement costs for lamb tin had risen from 301 to 309 Reichsmarks per unit to 650 Reichsmarks per unit, the supplier no longer delivered, the customer sued for damages.

What did the **Reichsgericht** mean?

In wholesale trade with goods traded on the market, it is always and only the supplier who suffers, no matter how absurdly and unpredictably the price rises if the goods are still traded on the regular market.

It was not to be decided whether, without there still being a regular market, the supplier can/must also be expected to pay fantasy prices for remaining stock.

What reasons did the **Reichsgericht** give?

- In wholesale, the customer's interest in the delivery is equivalent to the cost to the supplier of obtaining a replacement.
- Injustice in the supply chain: The first in the chain will have the greater loss compared to the last in the chain when prices rise on the due date. Should the first one, because he might just have a sufficiently dramatic gap, now be allowed to redeem himself, but the last one already not?
- The speculator cannot invoke good faith I: The cautious would be punished, the hooligan rewarded: For he who had already covered the commodity when he sold it can deliver, while he who only buys the commodity on the spot market can (could) plead that he cannot afford it (any more).

- The speculator cannot invoke good faith II: He who, when war breaks out, overprices himself hopelessly, but at least at a price that causes him a bitter loss, but at least allows him to survive economically, would be worse off than the one who has put his hands in his lap.

Milk Case of 1917

What had happened?

A landowner had to deliver between 800 and 1000 litres of milk per week. With the outbreak of war, the landowner had delivered less. The customer claimed compensation from him for this. The shortfall was due to an illness in the livestock, drought and an explosion in the price of concentrated feed.

What did the **Reichsgericht** mean?

This is sufficient, according to the **Reichsgericht** (RGZ 91, 312-313), the owner of the property does not have to pay damages.

What reasons did the **Reichsgericht** give?

- Sold is (attention, interpretation!) what the good can yield.
- A landowner is not a (wholesale) merchant: he does not have to pay absurd prices for concentrated feed just to be able to deliver an agreed quantity of milk.

Blanka Zinn Case of 1919

What had happened?

The price of Blanka pewter had gone through the roof. Unfortunately, the decision does not say by how much. The supplier did not deliver, the customer sued the supplier for damages.

What did the **Reichsgericht** mean?

The **Reichsgericht** confirms its decision in the **Lamm-Zinn case**: The wholesaler cannot plead aberrant price increases (RGZ 95, 41-45).

What reasons did the **Reichsgericht** give?

- The wholesaler is a businessman, he should pay for his risk: The wholesaler has already taken price fluctuations into account as a risk when calculating

prices. It is up to the wholesaler to protect himself against price explosions caused by war by including war clauses in the contracts with his customers.

- War is not an unexpected event (for a wholesaler): especially in foreign trade, acts of war are to be expected. This is already shown by the war clauses that are agreed on everywhere there, but also occasionally in domestic transactions.

- Legal uncertainty: There is already no yardstick for the amount of damage above which the supplier no longer has to deliver.

The 1500 % decision

The Munich Commentary on § **313** marginal nos. 305 and 306 reports on a decision of the **Reichsgericht** according to which a 1500% (!) price increase was not sufficient. We were unable to read this decision, the reference of which was not quoted.

Oil crisis case of 1978

What had happened?

A German city in the north had stocked up on 15.3 million units of light heating oil, among other things. The market price rose from 100 German marks per unit to a peak of 613 German marks per unit. The supplier stopped deliveries, 2 ½ months before the regular end of the contract. The city claimed damages from him.

What did the Federal Supreme Court mean?

In this decision, the Federal Supreme Court denied a right of adjustment in the result, but in its reasoning it almost raised more problems and created more legal uncertainty than it solved and eliminated.

New uncertainties

- The BGH raised the question, but did not answer it, whether the agreement of a *fixed price* is an independent regulation of the subject of the cessation of the **basis of** the contract and thus leaves no room for the statutory regulations, or whether a fixed price only covers ordinary price fluctuations not far above the 100%.

- The BGH raised the question, but did not answer it, whether a contract adjustment could possibly be justified even if cover purchases at the dawn of a disaster would already have led to a threat to existence.

- The BGH raised the question, but did not answer it, of how long a term of a contract must be, and how long the expenses must significantly exceed the remuneration for a contract adjustment to be demanded.

- It left open whether and under what conditions contributory negligence must be imputed to a customer who did not respond to his supplier's proposals for a solution.

What reasons did the Federal Supreme Court give?

In the specific case, the BGH had refused the supplier an adjustment of the contract in the case of a price increase of 270% because

- an oil trader (the decision concerned the supply of light heating oil) must (and?) foresee warlike developments in the Middle East because
- an oil trader is obliged, when concrete price increases become apparent, to undertake cover purchases in good time (and?),
- an oil trader who is a billion-dollar company can withstand such cover purchases (and?)
- the contract has already expired 2 ½ months after the delivery was stopped.
- Presumably in general and also not only together with other factors, it has taken the view that "The invocation of a change or a lapse of the basis of the contract (...) should in principle only be possible in the case of long-term contracts".

! ***"In view of the paramount importance attached to the principle of fidelity to the contract, the invocation of a change or a lapse of the basis of the contract is only admissible if this appears to be unavoidable in order to avoid an intolerable result which is incompatible with law and justice and thus unreasonable for the party concerned."***

Workshop 3

Please compare the BGH's criteria with Art. 79 CISG and the BGH's aversion to exemption from liability if you are to blame for a mess.

You HAVE a self-delivery or force majeure clause in your contract.

Well, that sounds quite good for a start! There are two variants. Your clause is a **GTC**, which would not be quite so nice, because then you can probably get into trouble at least if you have not behaved like *"Mr. Correct"* (variant 1) or you have negotiated with your contractual partner about the clause you want to invoke, or perhaps you have only used it very few times; then the situation might not look so bad (variant 2).

Variant 1: Your clause falls under the fairness control (is a GTC)

Impossibility and adaptation?

Please see the chapter above. Ideally, your clause works for you and not against you.

Depending on the wording, however, it may be that a judge interprets your clause in such a way that you wanted to replace the statutory regulations on impossibility and adjustment with your clause; then presumably only your clause would apply and you would not be able to additionally defend yourself with the law as well.

Does what is written in a clause always apply?

No.

Please read up: **GTC and fairness check - many clauses not effective** and **Wheel of Fortune interpretation.**

Is every clause you find in your contract documents effective against your contractual partner?

No.

Please read up: **One World, Many Rights.** and **GTC and Abroad.**

If you have not sent your **GTC** or the parts of the contract containing the clause you want to rely on to your contractual partner or made them comparably actively accessible, you should be comfortable with the possibility that you will not be able to rely on this clause.

Mini-Relieve: Arbitration courts are very happy to ignore this fact. In particular, the arbitration courts of the German Commodity and Product Exchanges for Agricultural Products do not consider it necessary to send out the Standard Terms and Conditions in the German Grain Trade (yes, the terms and conditions are GTC). And you might also be lucky with some ordinary courts. Older judges in rural courts in particular, for all their brilliance by the way, have little experience with cross-border contracts.

But they are wise and will not build on it.

General Terms and Conditions clause Reservation of self-delivery

If you are a supplier, you might just be happy about this clause:

"Correct and timely self-delivery remains reserved". !

Coal trading case from 1984

Such a clause in **GTCs** was considered "OK" by the Federal Supreme Court in the coal trade case of 1984, at least between merchants. So your joy is not unfounded, but before you get too excited too soon: the Federal Supreme Court did not criticise the clause as such, but limited its scope by interpretation. Assuming that the Federal Supreme Court would still rule in this way today, it would probably apply:

(1) First of all, you must have concluded a cover contract in the first place. If you have not procured the required quantities in the first place, you probably do not need to think more intensely about a defence with the argument of *lack of self-supply.* Presumably not every contract will suffice. In the coal case, the Federal Supreme Court demanded that the contracts actually cover each other (are *congruent*). This is supposed to be the case only if the covering contract
(2) on the same goods;
(3) of at least the same quantity and
(4) goes over the same quality and
(5) the delivery or unloading times correspond; and
(6) the performance of the cover contract is not subject to a condition. that only belongs to your backyard. The BGH had also demanded something more in the coal trade case.
7) So you probably should not know anything adverse about your pre-supplier, at least nothing from which you can conclude that they do not deliver or deliver uncertainly. And
(8) If you do not know your supplier, you should at least have made the usual enquiries; a bank or credit report from the usual services will probably not always suffice. !

Reflection

If you are now having *déjà vu*, please do not worry that you will soon no longer be able to enjoy your steak. In the case of the **loss of the basis for the business,** about whose preconditions and legal consequences we unfortunately do not know much, similar criteria do indeed seem to come into play. The catastrophe is quickly replaced by the - much less catastrophic - case that your cover purchase falls through. Here as there, however, your more or less extensive exemption depends on the fact that you are not to **blame for** the mess. If you now take a closer look at the criteria for the **self-supply clause**, you will see that you come pretty close to what "*Mr. Correct*" would do (you must have stocked up on the goods in good time and must not have speculated, you must not have bought blindly from anyone, you must look carefully if something seems strange to you).

In the **1994 authorised dealer GTC case**, the BGH examined the clause *"in accordance with its delivery possibilities"* and there succinctly came to the point:

The delivery reservation *"does not grant the seller carte blanche, but is essentially only intended to protect him from liability for impossibility through no fault of his own in the case of generic goods".*

Please read **Forget liability limitations in T&Cs.**

AGB clause
Delivery reservation

!

It can be reassuring to include in one's GTC the clause

"subject to delivery" or *"subject to its delivery possibilities".*
to find. Rightly so, but the clause should still not reassure you too much. The BGH had ruled in the

Authorised dealer GTC case from 1994

I have taken a closer look at such clauses. And what sounds like a carte blanche for everything is in fact only a small exemption. So the clause "*delivery reserved*" only exempts you if

(1) you have concluded a covering transaction with your supplier; please refer to self-supply **reservation**. Furthermore, it shall be necessary,
(2) that you are unable to procure the goods elsewhere; and
(3) that the non-delivery really surprised you as an experienced merchant.
(4) Under no circumstances may you be at fault for the non-delivery.

The delivery reservation *"does not grant the seller carte blanche, but is essentially only intended to protect him from liability for impossibility through no fault of his own in the case of generic goods".*

Please read **Forget liability limitations in T&Cs.**

AGB clause
Higher violence clause

Volcanic eruptions in the Eifel, Corona pandemics in Mainz or wars in Ukraine are, measured against one human life, not quite as frequent, at least not as frequent as the dispute about how much maintenance you owe for Torben or by how much you can reduce the travel price if there are smells in your hotel (if you are interested: by 5-15%). This circumstance is also reflected in the case law of the highest courts, which has occasionally already dealt with force majeure, but to date has dealt with a force majeure clause exactly once (1x). Please refer to **Workshop 1**. However, the decision is probably not very suitable for contracts between merchants.

However, we will probably not have to leave you completely out in the cold. In any case, we can tell you that WURMNEST, a respected expert who writes in the equally respected *Munich Commentary,* says that under the same conditions under which delivery reservations in GTCs are permissible, force majeure clauses are also permissible if you cannot be charged with "organisational fault" (we believe that he does not mean the organisation of your business but the procurement of the goods) or similar. We don't know whether the BGH will see it that way in the end. But WURMNEST is an expert after all.

We would also like to remind you that the Federal Supreme Court reacts almost "allergically" to any attempt to use general terms and conditions clauses to remove oneself from liability for damage that one has caused oneself.

In the **1994 authorised dealer GTC case**, the BGH examined the clause *"in accordance with its delivery possibilities"* and succinctly came to the point there:

The delivery reservation *"does not grant the seller carte blanche, but is essentially only intended to protect him from liability for* impossibility *through no fault of his own in the case of generic goods"*.

Please read **Forget liability limitations in T&Cs**.

Variant 2: Your clause does NOT fall under the fairness control (no GTC)

Impossibility and adaptation?

Please see the previous chapter. Ideally, your clause works only for you and not against you.

Depending on the wording, however, it may be that a judge interprets your clause in such a way that you wanted to replace the statutory regulations on impossibility and adjustment with your clause; then presumably only your clause would apply and you would not be able to additionally defend yourself with the law as well.

In individual contracts, the many things possible!

We know that you can agree a lot in individual contracts.

We know that delivery obligations can be defined almost without limitation in individual contracts.

We know that liability can be widely excluded in individual contracts.

However, there are also limits to individual contracts: for example, you probably cannot guarantee delivery and then exclude damages again for breaking your guarantee promise. You cannot, in a further secured way, exclude your liability for **intent in** advance. We know that the law prohibits certain agreements (it would go too far to list them all here, but they may not be particularly important for delivery failures either) and we know that certain agreements may violate regulatory or criminal law provisions and are then invalid.

Otherwise, however, as I said, quite a lot is possible. In the case of individual agreements, you are freed from many of the fetters that the fairness control imposes on you in the case of general terms and conditions.

!

Please be aware once again that there is no such thing as THE higher-violence clause! The International Chamber of Commerce currently recommends this version:

1) "Force Majeure" means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: [a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.

2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

3. a party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach

of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.

Now just compare the definition of the BGH and the one that has just been printed here. They are just not the same.

In particular, you should also compare the legal consequences. Look at Clause 10 in Workshop 1 AND Clause 3 of the clause just printed here, AND here below the clause in Section 30(1) of the Uniform Conditions AND the provision in Rule 13 of GAFTA No. 49 (also here below): Do you think these clauses are even similar? No, they are not!

A good tip: Check your contracts now, i.e. really IMMEDIATELY, to see whether you have any information obligations towards your contractual partner that are subject to deadlines and FULFILL them!

Downside of interpretation

What your force majeure or other rescission/termination/ or release from liability clause actually brings you now, the **interpretation** will show.

Please read about this in **Workshop 1.**

Workshop 4:

You now (hopefully) have a basic idea of what can matter in the individual contract.

Now, to conclude, please try to take a broader focus and answer the following questions for yourself:

In relation to your supplier:

Have you considered and checked what you may have to do very quickly now in order to retain your rights, especially your rights to compensation for damages? Are there time limits in your contracts (this will probably be the case) that are set for all kinds of actions and whose default can lead to the destruction of your claims, e.g. (particularly dangerous) preclusion periods, limitation periods, forfeiture periods, periods for filing suit, arbitration action and arbitration request periods, conditions subsequent, short contract terms, etc.? (If you have not already done so, it is probably high time you did!)

What is your supplier's latest balance sheet? Does he have assets that you can enforce if necessary? Are they assets of your supplier or do the assets belong to a holding company that you will not be able to access? Do you have collateral from your supplier, e.g. a *performance bond*, a *guarantee from* a potent parent company or a *directly enforceable guarantee on first demand*?

Have you asked your insurance department whether the supplier is insured (is there a default insurance)? Have you considered whether you might be able to get hold of collateral in the short term? Does your supplier have assets in Europe, especially in Germany (real estate, warehoused goods, infrastructure, etc.)

that you can seize (*sequester) at short notice as collateral* or accounts that you can have *frozen* at short notice as collateral? Have you already discussed with your legal department the *attachment in rem* (§ **917** ZPO), which may allow something like this, perhaps simply because your supplier is based in Russia (see **OLG Hamburg 13.7.2016 - 6 U 152/11, marginal no. 36**) or in Iran?

Where is your supplier located, in Germany, in the EU, in Russia or elsewhere? Where do you have to sue him, is it realistic for you to go to arbitration in Alaska or to the People's Court in Beijing? Is it realistic that you can enforce against your supplier in his home country at all (enforcement will probably be quite unrealistic, for example, if your supplier is based in Iran).

Between the chairs:

Do you have sufficient funds to bridge the time that court or arbitration proceedings, recognition and enforceability proceedings and foreclosures will take? Can you sufficiently synchronise the outflow of funds to your customers and the inflow of funds from your suppliers when business situations are disrupted?

Towards your customers:

Have you considered how you can defend your own performance obligations with rights of retention (§ 273 BGB), the defence of non-performance of contract (§§ **321**(1) BGB), the defence of mutuality (§320 BGB) or similar?

Have you already considered how you can otherwise get out of your contracts, e.g. by ordinary termination, by withdrawal or extraordinary termination (e.g. in case of default with payment or delivery or acceptance after expiry of a reasonable grace period, in case of serious and final refusal of performance) or *termination due to endangerment of delivery due to lack of performance of your supplier* (§ **321**(2) BGB)? Can it become interesting in connection with the sanctions (=prohibition laws) to activate § 134 BGB, which declares legal transactions invalid that violate prohibition transactions (At your conclusion or also afterwards?).

Can you prepare situations that will improve your chances of being dismissed for cause?

Have you already looked through the contracts with your customers to see whether and which rights of resolution might have been agreed there? Have you thought about the obvious, namely possibly very short notice periods for ordinary termination?

Do you think it makes sense to check whether, after what you have (hopefully) taken with you, you should not still be active now, because we think that everything is only psychology at the moment, but nothing has actually happened on the real market yet?

Have you thought about why airlines don't pay your claim for delay money and always get sued?

DISCLAIMER: You are smart and have realised that you have **only** read **a Quick Guide.** You have learned some terms and concepts and also learned about a few decisions. You now feel (hopefully) fit to talk to your legal department. You know, and the Quick-Guide has (hopefully) confirmed this, that individual legal problems are not particularly complicated, but that they tend to intertwine and shift and influence each other. Even more so, legal problems tend to hide, and searching for them can be long and laborious. Several million decisions and other sources are stored in the *juris®* database alone. In the end, it is a huge hidden object and you have to look at each male in painstaking detail, find out what it does, what other males or objects it is connected to and how the individual stories are interwoven. You know that in practice there is no one solution, but always a bundle of plausible assumptions and various probabilities, and that the strategies are then derived from these. Smart as you are, you will therefore (hopefully) feel well equipped for your discussion with your legal department, but you will of course not overconfidently try to set about solving your contract problem on your own.

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Investment: selected commodity contracts, agricultural products

Standard Terms and Conditions for the German Grain Trade, current version

Versions 2017 (current), 1967 (last annotated version) and 1929 (original version)

2017	1967	1929
1. **if, after the conclusion of a contract**	I.	I.
the fulfilment of which by	If fulfilment is ensured by	If fulfilment is ensured by
force majeure, import or export bans at home or abroad,	force majeure, import or export ban at home or abroad,	Force majeure, export ban at home or abroad
official measures **GIVEN**	**official measures, issued after the conclusion of the contract,** or	
or		or
other circumstances beyond the control of a contracting party,	other circumstances for which one party to the contract is not responsible PREVENTED	other circumstances for which one party to the contract is not responsible PREVENTED
GESTRICHED	or so difficult that one party to the contract cannot reasonably be expected to fulfil it - price fluctuations excluded -,	or so difficult that one party to the contract cannot reasonably be expected to fulfil it - price fluctuations excluded --,
the contract or the unfulfilled part thereof shall be cancelled.	the contract or the unfulfilled part thereof shall be cancelled.	the contract or the unfulfilled part thereof shall be cancelled.
The other contracting party shall be informed of the said events in writing immediately after they become known. If this is omitted, the impediment to performance cannot be asserted with legal effect.		
2. if fulfilment is prevented by elementary events or **by** riot, strike, lockout, **a** blockage of loading	II. If the delivery is delayed due to elementary events or riots, strikes, lockouts, Loading lock	II. If the delivery is delayed due to elementary events or riots, strike, lockout, loading blockage
or other equivalent circumstances		
Hindered,	Hindered,	Hindered,
the performance period shall be extended by the duration of the impediment,	it shall be effected after removal of the impediment within the time which was still available to the seller for delivery at the time of the occurrence of the impediment,	it shall be effected after removal of the impediment within the time which was still available to the seller for delivery at the time of the occurrence of the impediment,
GESTRICHED	**plus a further 7 business days, in the case of water shipments 14 business days.**	plus a further **8** working days.

if the party concerned notifies the other party in writing of the impediment immediately after becoming aware of it or at the start of the performance period. **If, after expiry of the performance period, the impediment exceeds 30 calendar days in the case of contracts with a performance period of less than one month or 45 calendar days in the case of contracts with longer performance periods, the contract shall be cancelled without mutual compensation.** **GESTRICHED**		
	Failure to provide wagons on time shall only extend the delivery time by the duration of the failure to provide **them.** **This also applies to road trains ordered in good time which are prevented from being on site in good time due to unforeseen circumstances.**	Failure to provide wagons on time shall only extend the delivery time by the duration of the failure to provide them.
(3) If the party concerned invokes an impediment to performance, it shall provide the relevant evidence at the request of the other party to the contract.		

When can you claim force majeure under the Uniform Conditions?

We don't know.

Even the original version and the justification of the original version are unclear. EHLERS, who justified the original version in his booklet KOMMENTAR ZU DEN EINHEITSBBDINGUNGEN IM DEUTSCHEN GETREIDEHHNDEL, reports that if nothing were regulated, according to his understanding of the case law of the Imperial Court, even the economic ruin of the debtor would not be force majeure. He then seems to be of the opinion that the Unified Conditions declare precisely this economic **impossibility** to be force majeure and cites as an example of such a case that Poland suddenly imposed an export duty of 25% on bran in 1927. This fits the wording in the original version "made so difficult that one party to the contract cannot reasonably be expected to fulfil it".

However, it becomes confusing when EHLERS emphasises in the next paragraph that price fluctuations would never be force majeure, which was probably meant to be implemented with the wording "price fluctuations excluded" in the original version.

STARK's explanations of the 1967 version in the work of the same name as EHLERT, KOMMENTAR ZU DEN EINHEITSBBDINGUNGEN IM DEUTSCHEN GETREIDEHHNDEL, seem even less clear to us.

It becomes completely confusing when in the subsequent versions the clause, which according to EHLERS should equate the economic ruin of the debtor with force majeure, is deleted again.

A number of interpretations of § 30 EB are probably possible, including: (a) Imminent economic ruin does not play a role: economic risks are not only hedged by forward transactions but also by ordinary cover contracts with long terms; it runs counter to the hedging function to provide for a release from contractual obligations only because the supplier would otherwise be ruined. Or (b) The threat of economic ruin plays a role, but does not have to be specifically regulated in the standard terms and conditions because the principles on the **cessation of the basis of the contract under** general law are sufficient (general law is always to be applied in addition, Art. 44 EB!).

Finally, the question raised by the BGH in the oil crisis case suggests that the supplier's ruin may be a relevant consideration for a contract adjustment and that the rather merciless case law of the **Reichsgericht** will in any case no longer be continued in this severity.

What is the point if you can claim force majeure under the Uniform Conditions.

We don't know, but we suspect that it can bring you quite a lot - if you do everything right.

According to the wording - unchanged over time in this respect - the supplier is not only released from his obligation to physically deliver the goods, but all obligations of both parties to the contract seem to us to be extinguished. This is disputed by the wording "cancelled".

For the fathers of the Uniform Conditions, what they meant by "rescinded" was so clear that they unfortunately did not explain the term. STARK explains that counter-performances (in the many cases this would probably be the advance payment) would have to be "reclaimed according to §§ 812 BGB". These paragraphs of the BGB regulate how a failed contract is to be reversed.

This should be a strong indication that "cancelled" (as in § 49 EB) actually means the elimination of all obligations, i.e. of the whole contract.

That will probably make them very happy as the supplier. If, on the other hand, you are the buyer, you will probably not be very happy about losing all your claims.

Do I have to do something to secure my rights.

You always have to do something and probably much more than what you can read here or in the Uniform Conditions, in the BGB, in the HGB and in other standards.

In any case, the wording of § 30(1) EB is eye-catching:

The other contracting party shall be informed of the said events in writing immediately after they become known. If this is omitted, the impediment to performance cannot be invoked with legal effect."

The intention when this sentence was inserted was presumably to quickly create legal certainty for the parties on the one hand and to align with international sets of rules, such as certain GAFTA contracts, on the other. Perhaps,

however, the sentence has rather brought about the opposite, as the following obvious questions show:

When does the event become known, on whose knowledge does it depend, how certain must the knowledge be, can you wait for the knowledge to come to you or do you have to obtain the knowledge, how much effort do you have to put into it and at what point do you have to start investigating? Is the duty only triggered upon knowledge or are indications sufficient and, if indications are sufficient, how much must these have condensed? Is the contract already cancelled with the information to your contract partner or can you only declare the cancellation later, in a further step? Can you only refer to force majeure as a supplier or can you also do this as a customer or is the contract already cancelled with the occurrence of force majeure anyway (which is stated in sentence 1) - but what is the point of the notification then? Do you perhaps even have to invoke force majeure as a customer because the wording does not distinguish between you and your contractual partner and can it really be that your supplier, if informed in time, is released from the obligation to perform but you as a customer still have to pay because you, for your part, did not inform your supplier about the force majeure in his own backyard?

We do not know. But they will probably do well to assume the worst in each case and - after weighing up the pros and cons - act accordingly.

Depending on how you answer the questions, you may be asked to do something quite quickly. Do you already know that there will be no goods from Ukraine this year, or at least from the provenance you have sold? Can you foresee that the prices will develop so insanely that you will not be able to procure even your non-eastern goods? Shouldn't you take the precaution of informing all and sundry and keeping them informed, or are you risking that the contracts will be cancelled before time?

So it will probably be good advice to develop some activity, even if it is only factual and legal education work, and to start thinking strategically.

What is the difference between VER- and BE-inhibition?

We do not know exactly because the unit conditions do not define the terms.

The statements of EHLERT and STARK can presumably be understood in such a way that VER-hinderung means definite **impossibility** and BE-hinderung means only temporary **impossibility.**

An example of BE hindrance could perhaps be the Danube low water of a few years ago, when there was practically no transport capacity on the Mark for some time.

GAFTA - Treaties

When can you claim force majeure under the GAFTA treaties?

We do not know, if only because we do not know which GAFTA contract you have concluded.

We know that GAFTA treaties deal with **force majeure in** quite different ways. Some have a force majeure **clause**, some don't, and some (No. 119, for example) only have a form field with a heading where you can enter what should apply.

If a GAFTA treaty has a force majeure clause, what does it look like?

An example corresponding to current events could perhaps be the **higher violence clause** in No. 49 (as of 01.01.2020):

13. PREVENTION OF DELIVERY

Event of Force Majeure - "Event of Force Majeure" means (a) prohibition of export or other executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports named herein is/are situated, restricting export, whether partially or otherwise, or (b) blockade, or (c) 101 acts of terrorism, or (d) hostilities, or (e) strike, lockout or combination of workmen, or (f) riot or civil commotion, or (g) breakdown of machinery, or (h) fire, or (i) Act of God, or (j) unforeseeable and unavoidable impediments to transportation or navigation, or (k) any other event comprehended in the term "force majeure".

Should performance of this contract be prevented, whether partially or otherwise, by an Event of Force Majeure, the performance of this contract shall be suspended for the duration of the Event of Force Majeure, provided that Buyers/Sellers (the affected party) shall have served a notice on the other party within 7 consecutive days of the occurrence or not later than 21 consecutive days before commencement of the period of delivery, whichever is later, with the reasons therefor.

If the Event of Force Majeure continues for 21 consecutive days after the end of the period of delivery, then Sellers/Buyers (the non-affected party) have the option to cancel the unfulfilled part of the contract by serving a notice on the other party not later than the first business day after expiry of the 21 day period.

If this option to cancel is not exercised then the contract shall remain in force for an additional period of 14 consecutive days, after which, if the Event of Force Majeure has not ceased, any unfulfilled part of the contract shall be automatically cancelled.

If the Event of Force Majeure ceases before the contract or any unfulfilled part thereof can be cancelled, Buyers/Sellers shall notify Sellers/Buyers without delay that the Event of Force Majeure has ceased. The period of delivery shall be extended, from the cessation, to as much time as was left for delivery under the contract prior to the occurrence of the Event of Force Majeure. If the time that was left for delivery under the contract is 14 days or less, a period of 14 consecutive days shall be allowed.

The burden of proof lies upon the party claiming under this clause and the parties shall have no liability to each other for delay and/or non-fulfilment under this clause, provided that the party relying on the clause shall have provided to the other party, if required, satisfactory evidence justifying the delay or non-fulfilment.

As you can see, this clause is considerably longer than its counterpart in the Uniform Conditions. However, it might be clearer, at least in some places.

According to No. 49, for example, you presumably do not have to inform immediately after the event occurs, but "only" at the latest 21 days before the start of the compliance period. This could save you the purchase of a crystal ball in many cases.

According to No. 49, you may not need to be able to read coffee grounds in order to know who has to report to whom; this is presumably the party who cannot comply. Even clearer seems to us the corresponding clause in No. 100, which with *"If delay (...) is likely"* possibly makes clear that even circumstantial evidence already obliges you to report.

You may also be pleased that it seems to be clarified that the information is not at the same time already the withdrawal from the contract, but can be made separately.

BRIDGE points out an interesting aspect in his book The International Sale of Goods, who would like to conclude from the formulation *"If shipment under this clause"* in GAFTA No. 100 that it would be a question of the actual shipment. In Germany, we would perhaps understand this as a reference to a **piece debt,** with the result, formidable or devastating for you as the case may be, that the prevention of the one concrete shipment already renders the supplier free of performance. However, we would consider this view, if it were meant in this way, to be rather doubtful.