

Contractual netting in Germany – the new law

The enforceability of contractual close-out netting in Germany has been strengthened following the changes to section 104 of the German Insolvency Code (*Insolvenzordnung*, "**InsO**") which entered into force on 29 December 2016. Section 104 InsO aims to ensure the enforceability of contractual netting arrangements which was put into question following a decision of the German Federal Court of Justice (*Bundesgerichtshof*, "**BGH**") of 9 June 2016 (for further background, please see our previous newsletters, available [here](#) and [here](#)).

Background

In its June 2016 decision, the BGH ruled that a contractually agreed close-out netting agreement in the case of an early termination for insolvency-related reasons is invalid where the method for determination of the close-out amount and the point in time when such close-out amount is determined deviate from section 104 InsO and that in this case the provisions of section 104 InsO are directly applicable.

The decision prompted an immediate response from the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**"), who issued a general decree (*Allgemeinverfügung*) based on section 4a of the German Securities Trading Act (*Wertpapierhandelsgesetz*) stating contractual netting arrangements in existing master agreements (including the German Master Agreement for Financial Derivatives Transactions (*Rahmenvertrag für Finanztermingeschäfte*, "**DRV**"))

should continue to be settled as agreed.

Similarly, the German government announced that legislative measures would be initiated to clarify the relevant provisions of German insolvency law to ensure continuous acceptance of such master agreements in the market and by supervisory authorities.

The legislative process was initiated quickly and on 1 December 2016, the German Parliament (*Bundestag*) has passed an amendment to the InsO clarifying the scope of section 104 InsO to ensure the enforceability of close-out netting in German insolvency proceedings (the Federal Council (*Bundesrat*) did not object to the law). Upon publication in the Federal Gazette (*Bundesanzeiger*), the law entered into force on 29 December 2016. For more detail on the entering into force see below.

Key issues

- Contractually agreed early termination of fixed date transactions (*Fixgeschäfte*) or financial transactions (*Finanzleistungen*) prior to the opening of insolvency proceedings is valid under section 104 InsO
- Parties may agree on deviations from statutory valuation methods and timing as long as they are comparable to the "fundamental principles" of the statutory provisions
- Clarification on scope of recognition of mixed master agreements

Elements of the new law

The new section 104 InsO is now grouped into two parts: the first part provides for statutory termination provisions and the consequences thereof, while the second part allows for certain contractual modifications to be agreed between the parties.

Clarification of scope of application of section 104 InsO

Section 104 InsO applies to the delivery of goods with a market or exchange price (fixed date transactions - *Fixgeschäfte*) and to financial transactions (*Finanzleistungen*), in each case for which a particular time or period was agreed and where such time or the expiry of such period does not occur until after the opening of insolvency proceedings (section 104 paragraph 1 InsO). In this respect, the wording of the law has been simplified rather than amended. However, section 104 InsO now also expressly applies in accordance with paragraph 4 thereof to transactions where the specified time or expiry of the period does not occur until after the contractually agreed termination, which is likely to be prior to the opening of insolvency proceedings (in this respect, please see *Permitted contractual agreements below*).

In view of the above, parties should consider, where relevant, to provide for a specific end date for such transactions which are terminable at any time, but which otherwise do not provide for a specified period or fixed date for delivery, in order for these to be covered by section 104 paragraph

1 InsO (and such point in time may be an arbitrary date far in the future).

Extension of scope of application

As in the previous version, section 104 InsO provides for a non-conclusive enumeration of financial transactions, which, pursuant to the legislative reasoning, is not intended to materially change the range of products included in its scope.

Accordingly, such types of transactions which were previously covered continue to be in scope, including, for example, delivery of precious metals, foreign exchange transactions and securities lending and repo transactions.

Financial transactions are now defined to include transactions on financial instruments as specified in Directive 2014/65/EU (MiFID II), so that, accordingly, the list of financial instruments in Annex I Section C of the MiFID II is expressly covered, including commodity futures (*Waretermingeschäfte*) and other commodity derivatives (*Warenderivate*). Options on those instruments are also expressly in scope.

As a result of defining financial instruments by reference to MiFID II, questions of interpretation discussed in the context of MiFID II will also become relevant in the context of the InsO.

Clarification of the determination of market or exchange value

As before, the claim for non-performance resulting from the termination of the relevant transaction is to be determined on the basis of market or exchange values. Pursuant

to the new paragraph 2 of section 104 InsO, the market or exchange value of the transaction is deemed to be either (i) the market or exchange price for a replacement transaction that is actually entered into without undue delay, but not later than 5 business days after the opening of insolvency proceedings or (ii) in the case no such replacement transaction is actually entered into, the market or exchange price of a replacement transaction that could have been entered into on the second business day following the opening of insolvency proceedings (as regards the possibility to agree on deviating timings, see *Permitted contractual agreements below*).

In situations where market conditions do not allow for the conclusion of a replacement transaction, the market or exchange price may be determined by way of methods and procedures allowing for an adequate assessment of the value, which, pursuant to the legislative reasoning, may include a determination based on models for the assessment of market risks.

The legislative reasoning also clarifies that a replacement transaction is a transaction which relates to the same financial transaction, with the same strike or forward price and that must be delivered at the same time or within the same period as the original transaction.

The claim for non-performance resulting from close-out netting would generally rank *pari passu* with claims of all other unsecured creditors in Germany insolvency proceedings. In this respect, the situation remains unchanged.

Recognition of single agreement clause

Section 104 paragraph 3 InsO now provides that, where fixed date

transactions or financial transactions are combined in a master agreement or within the rules of a central clearing counterparty for which it has been agreed that the covered transactions can, upon the occurrence of specified reasons (whether or not related to the insolvency of a party), only be terminated in their entirety, such contracts are together deemed to form one single agreement for the purposes of section 104 InsO.

Accordingly, all transactions (including fixed date transactions, which was not the case in the previous version of section 104 InsO) covered by such master agreement or rules of a central clearing counterparty which fall within the scope of section 104 InsO are deemed to constitute a single agreement, irrespective of whether they have already been unilaterally fully performed.

It has now also been clarified that the inclusion of transactions which do not fulfil the requirements for transactions falling within the scope of section 104 paragraph 1 InsO (resulting in a "mixed master agreement") does not jeopardise the single agreement treatment. These out-of-scope transactions, however, do not benefit from section 104 InsO, but are subject to general principles, which includes a "cherry picking" right of the insolvency administrator whether or not to uphold or terminate such transactions.

Permitted contractual agreements

The provision that market participants were likely most eagerly awaiting is contained in paragraph 4 of section 104 InsO.

According to section 104 paragraph 4 InsO, the parties may agree to deviate from the applicable statutory

provisions as long as the agreed provisions are compatible with the fundamental principles of the relevant statutory provisions from which such deviation is made.

In particular, the parties may agree that the termination and determination of the resulting claim for non-performance may take place prior to the opening of insolvency proceedings, in particular where a party petitions for the opening of insolvency proceedings or where a reason for the opening of insolvency proceedings exists (contractual termination), as is standard in existing industry documentation such as the ISDA Master Agreement or the DRV.

As a consequence of permitting a contractual termination (i) such termination may also cover such agreements where the claim for delivery of goods or the performance of the financial transaction becomes due prior to the opening of insolvency proceedings, but after the contractually agreed termination and (ii) the determination of the market or exchange price may be made at the time of the contractually agreed termination rather than at the time of opening of insolvency proceedings.

Further, section 104 paragraph 4 InsO now provides that, for the purposes of the determination of the market or exchange value of a transaction (which may, as provided for in both the ISDA Master Agreement and the DRV for the purposes of the determination of the close-out amount, be determined by reference to replacement transactions which are or could be entered into), a replacement transaction may be entered into until the end of the 20th business day after the contractual termination, if this is required to ensure that the unwinding of the transaction is performed in a manner

that will maximise value (which may be important for master agreements covering large or complex portfolios).

In cases where no replacement transaction can be entered into, the market or exchange value is determined on the basis of the market or exchange price of a replacement transaction that could have been entered into at a point in time between the contractual termination and the end of the 5th business day following such contractual termination.

Examples of provisions that cannot be validly agreed include, according to the reasoning given by Parliament, provisions prohibiting the exercise of termination rights (*Kündigungssperren*) or other rules that would allow for speculations by the insolvency administrator to the detriment of the counterparty.

Coming into force and application to insolvency proceedings opened or to be opened

The provisions permitting contractually agreed deviations from the statutory provisions as implemented by Article 1 of the law amending section 104 InsO (in this respect, please see Annex 1 to this newsletter) have come into effect retroactively as of 10 June 2016. Pursuant to the reasoning of the law, the retroactive effect is justified in this case as this was the date on which the general decree of the BaFin entered into effect and accordingly, no reliance could be placed by market participants on the interpretation of section 104 InsO as made by the BGH in its 9 June 2016 decision.

All further amendments to the new provisions come into effect on 29 December 2016.

Accordingly, section 104 InsO in its previous version continues to apply to insolvency proceedings opened prior to 10 June 2016. Insolvency proceedings opened on or after 10 June 2016, but prior to the day after the publication of the new law, are subject to the new section 104 InsO as set out in Annex 1 hereto. For all insolvency proceedings opened after publication, section 104 InsO will apply in the form set out in Annex 2 hereto.

See next pages for a non-binding convenience translation of the new section 104 InsO as amended by Article 1 of the third law amending the insolvency code (Annex 1) and as amended by Article 2 of the third law amending the insolvency code (Annex 2)

Conclusions and outlook

The amendments to section 104 InsO largely clarify the uncertainties caused among market participants by the June 2016 decision of the BGH, in particular with a view to treatment of relevant transactions for the purposes of their recognition for regulatory purposes.

However, a number of questions that are frequently discussed, for example as regards challenges in insolvency proceedings, have not been addressed.

According to the reasoning, the provisions do not purport to be exhaustive to allow market participants to design their contractual agreements according to market needs as long as the fundamental principles of the statutory provisions are adhered to. Industry associations will consider as to whether sensible amendments to standard documentation should be made. Similarly, parties to existing agreements may wish to consider whether any amendments may be reasonable in view of the new statutory provisions.

Annex 1

Section 104 InsO (incorporating the amendments in Article 1 of the third law for the amendment of the Insolvency Code)

<p style="text-align: center;">§ 104</p> <p style="text-align: center;">Fixgeschäfte, Finanzleistungen, vertragliches Liquidationsnetting</p>	<p style="text-align: center;">§ 104</p> <p style="text-align: center;">Fixed Date Transactions, Financial Transactions, contractual close-out netting</p>
<p>(1) War die Lieferung von Waren, die einen Markt- oder Börsenpreis haben, genau zu einer festbestimmten Zeit oder innerhalb einer festbestimmten Frist vereinbart und tritt die Zeit oder der Ablauf der Frist erst nach der Eröffnung des Insolvenzverfahrens ein, so kann nicht die Erfüllung verlangt, sondern nur eine Forderung wegen der Nichterfüllung geltend gemacht werden.</p>	<p>(1) In the event that a particular time or period was agreed upon for delivery of goods with a market or exchange price, and such time occurs or such period lapses after the opening of insolvency proceedings, specific performance may not be demanded, but rather only a claim for non-performance may be asserted.</p>
<p>(2) War für Finanzleistungen, die einen Markt- oder Börsenpreis haben, eine bestimmte Zeit oder eine bestimmte Frist vereinbart und tritt die Zeit oder der Ablauf der Frist erst nach der Eröffnung des Verfahrens ein, so kann nicht die Erfüllung verlangt, sondern nur eine Forderung wegen der Nichterfüllung geltend gemacht werden. Als Finanzleistungen gelten insbesondere</p>	<p>(2) Where a specified time or a specified period has been agreed for the delivery of financial products which have a market or exchange price, and where this time, or the expiry of this period, is not until after the opening of insolvency proceedings, performance may not be demanded, but rather only damages for non-performance may be claimed. Financial transactions shall include in particular</p>
<p>1. die Lieferung von Edelmetallen,</p>	<p>1. delivery of precious metals,</p>
<p>2. die Lieferung von Wertpapieren oder vergleichbaren Rechten, soweit nicht der Erwerb einer Beteiligung an einem Unternehmen zur Herstellung einer dauernden Verbindung zu diesem Unternehmen beabsichtigt ist,</p>	<p>2. delivery of securities or comparable rights, except where there is an intention to acquire an interest in another enterprise with the aim of establishing a long-term association with that enterprise,</p>
<p>3. Geldleistungen, die in ausländischer Währung oder in einer Rechnungseinheit zu erbringen sind,</p>	<p>3. payments of money which are to be made in a foreign currency or in a mathematical unit,</p>
<p>4. Geldleistungen, deren Höhe unmittelbar oder mittelbar durch den Kurs einer ausländischen Währung oder einer Rechnungseinheit, durch den Zinssatz von Forderungen oder durch den Preis anderer Güter oder Leistungen bestimmt wird,</p>	<p>4. payments of money the amounts of which are calculated, directly or indirectly by referencing to the exchange rate of a foreign currency or a unit of account, to the interest rate for borrowings or to the price of other goods or services,</p>
<p>5. Optionen und andere Rechte auf Lieferungen oder Geldleistungen im Sinne der Nummern 1 bis 4,</p>	<p>5. options and other rights to demand delivery of something or performance of payment obligations within the meaning of sub paragraphs 1 to 4 above,</p>
<p>6. Finanzsicherheiten im Sinne des § 1 Abs. 17 des Kreditwesengesetzes.</p>	<p>6. financial collateral within the meaning of section 1 para 17 KWG.</p>
<p>Sind Geschäfte über Finanzleistungen in einem Rahmenvertrag zusammengefaßt, für den vereinbart</p>	<p>Where the contracts involving financial transactions are combined in a master agreement for which it has been</p>

<p>ist, daß er bei Vorliegen eines Insolvenzgrundes nur einheitlich beendet werden kann, so gilt die Gesamtheit dieser Geschäfte als ein gegenseitiger Vertrag im Sinne der §§ 103, 104.</p>	<p>agreed that, where reasons for the opening of insolvency proceedings exist, it can only be terminated in its entirety, then such contracts shall together be deemed to form one single mutual agreement within the meaning of sections 103, 104.</p>
<p>(3) Die Forderung wegen der Nichterfüllung richtet sich auf den Unterschied zwischen dem vereinbarten Preis und dem Markt- oder Börsenpreis, der am zweiten Werktag nach der Eröffnung des Verfahrens am Erfüllungsort für einen Vertrag mit der vereinbarten Erfüllungszeit maßgeblich ist.</p>	<p>(3) The amount of any claim for non-performance shall be the difference between the agreed price and such a market or exchange price which is applicable at the place of performance to an agreement with the stipulated time for performance on the date agreed between the parties on the second working day after the opening of insolvency proceedings.</p>
<p>(4) Die Vertragsparteien können abweichende Bestimmungen treffen, sofern diese mit den wesentlichen Grundgedanken der jeweiligen gesetzlichen Regelung vereinbar sind, von der abgewichen wird. Sie können insbesondere vereinbaren,</p>	<p>(4) The parties to the contract may agree deviating provisions as long as these are compatible with the fundamental principles applicable to the statutory provision which is to be amended. They may, in particular, agree that,</p>
<p>1. dass die Wirkungen nach Absatz 1 oder Absatz 2 auch vor der Verfahrenseröffnung eintreten, insbesondere bei Stellung des Antrags einer Vertragspartei auf Eröffnung eines Insolvenzverfahrens über das eigene Vermögen oder bei Vorliegen eines Eröffnungsgrundes (vertragliche Beendigung),</p>	<p>1. the effects of paragraph (1) or paragraph (2) may apply prior to the opening of proceedings, in particular upon the application by a party to the contract for the opening of insolvency proceedings over its assets or upon the existence of a reason for the opening for proceedings (contractual termination),</p>
<p>2. dass einer vertraglichen Beendigung auch solche Geschäfte nach Absatz 1 oder Absatz 2 unterliegen, bei denen die Ansprüche auf die Lieferung der Ware oder die Erbringung der Finanzleistung vor der Verfahrenseröffnung, aber nach dem für die vertragliche Beendigung vorgesehenen Zeitpunkt fällig werden,</p>	<p>2. that a contractual termination will encompass also such transactions pursuant to paragraph (1) or paragraph (2) in respect of which the claim for delivery of the goods or the performance of the financial transaction becomes due prior to the opening of proceedings, but after the point in time agreed for contractual termination,</p>
<p>3. dass die Forderung wegen Nichterfüllung</p>	<p>3. that the claim for non-performance</p>
<p>a) sich nach dem Markt- oder Börsenpreis für ein Ersatzgeschäft bestimmt, das unverzüglich, spätestens jedoch am fünften Werktag nach der vertraglichen Beendigung abgeschlossen wird,</p>	<p>a) is determined by virtue of the market or exchange price for a replacement transaction which is entered into without undue delay, but no later than on the fifth business day after the contractual termination,</p>
<p>b) sich nach dem Markt- oder Börsenpreis für ein Ersatzgeschäft bestimmt, das zu einem vereinbarten Zeitpunkt, spätestens jedoch am fünften Werktag nach der vertraglichen Beendigung hätte abgeschlossen werden können,</p>	<p>b) is determined by virtue of the market or exchange price for a replacement transaction which could have been entered into at a contractually agreed point in time, but no later than on the fifth business day after the contractual termination,</p>
<p>c) falls das Marktgeschehen den Abschluss eines Ersatzgeschäfts nach den Buchstaben a und b nicht zulässt, nach Methoden und Verfahren zu bestimmen ist, die Gewähr für eine angemessene Bewertung des beendeten Geschäfts bieten.</p>	<p>c) in case the market conditions do not allow for the conclusion of a replacement transaction pursuant to lit. a and b, may be determined by way of methods and procedures allowing for an adequate assessment of the value of the terminated transaction.</p>

(5) Der andere Teil kann die Forderung wegen Nichterfüllung nur als Insolvenzgläubiger geltend machen.

(5) The other party may assert the claim for non-performance only as an insolvency creditor.

Annex 2

Section 104 InsO (incorporating the amendments in Article 2 of the third law for the amendment of the Insolvency Code)

<p style="text-align: center;">§ 104</p> <p style="text-align: center;">Fixgeschäfte, Finanzleistungen, vertragliches Liquidationsnetting</p>	<p style="text-align: center;">§ 104</p> <p style="text-align: center;">Fixed Date Transactions, Financial Transactions, contractual close-out netting</p>
<p>(1) War die Lieferung von Waren, die einen Markt- oder Börsenpreis haben, genau zu einer festbestimmten Zeit oder innerhalb einer festbestimmten Frist vereinbart und tritt die Zeit oder der Ablauf der Frist erst nach der Eröffnung des Insolvenzverfahrens ein, so kann nicht die Erfüllung verlangt, sondern nur eine Forderung wegen Nichterfüllung geltend gemacht werden. Dies gilt auch für Geschäfte über Finanzleistungen, die einen Markt- oder Börsenpreis haben und für die eine bestimmte Zeit oder eine bestimmte Frist vereinbart war, die nach der Eröffnung des Verfahrens eintritt oder abläuft. Als Finanzleistungen gelten insbesondere</p>	<p>(1) In the event that a particular time or period was agreed upon for delivery of goods with a market or exchange price, and such time occurs or such period lapses after the opening of insolvency proceedings, specific performance may not be demanded, but rather only a claim for non-performance may be asserted. This also applies to financial transactions which have a market or exchange price, and for which a particular time or period was agreed which only occurs or expires after the opening of insolvency proceedings. Financial transactions shall include in particular</p>
<p>1. die Lieferung von Edelmetallen,</p>	<p>1. delivery of precious metals,</p>
<p>2. die Lieferung von Finanzinstrumenten oder vergleichbaren Rechten, soweit nicht der Erwerb einer Beteiligung an einem Unternehmen zur Herstellung einer dauernden Verbindung beabsichtigt ist,</p>	<p>2. delivery of financial instruments or comparable rights, except where there is an intention to acquire an interest in another enterprise with the aim of establishing a long-term association with that enterprise,</p>
<p>3. Geldleistungen</p>	<p>3. payments of money</p>
<p>a) die in ausländischer Währung oder in einer Rechnungseinheit zu erbringen sind oder</p>	<p>a) which are to be made in a foreign currency or in a mathematical unit, or</p>
<p>b) deren Höhe unmittelbar oder mittelbar durch den Kurs einer ausländischen Währung oder einer Rechnungseinheit, durch den Zinssatz von Forderungen oder durch den Preis anderer Güter oder Leistungen bestimmt wird,</p>	<p>b) the amounts of which are calculated, directly or indirectly by referencing to the exchange rate of a foreign currency or a unit of account, to the interest rate for borrowings or to the price of other goods or services,</p>
<p>4. von Nummer 2 nicht ausgeschlossene Lieferungen und Geldleistungen aus derivativen Finanzinstrumenten,</p>	<p>4. deliveries and payments from derivative financial instruments not excluded pursuant to number 2 above,</p>
<p>5. Optionen und andere Rechte auf Lieferungen nach Satz 1 oder auf Lieferungen, Geldleistungen, Optionen und Rechte im Sinne der Nummern 1 bis</p>	<p>5. options and other rights to demand delivery pursuant to sentence 1 or for delivery, payment or options and rights within the meaning of numbers 1</p>

5,	to 5 above,
6. Finanzsicherheiten im Sinne des § 1 Absatz 17 des Kreditwesengesetzes.	6. financial collateral within the meaning of section 1 para 17 KWG.
Finanzinstrumente im Sinne von Satz 3 Nummer 2 und 4 sind die in Anhang I Abschnitt C der Richtlinie 2014/65/EU des Europäischen Parlaments und des Rates vom 15. Mai 2014 über Märkte für Finanzinstrumente sowie zur Änderung der Richtlinien 2002/92/EG und 2011/61/EU (ABl. L 173 vom 12.6.2014, S. 349; L 74 vom 18.3.2015, S. 38; L 188 vom 13.7.2016, S. 28), die zuletzt durch die Richtlinie (EU) 2016/1034 (ABl. L 175 vom 30.6.2016, S. 8) geändert worden ist, genannten Instrumente.	Financial instruments within the meaning of sentence 3 numbers 2 and 4 are those instruments listed in Annex I Section C of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ. L 173 of 12.6.2014, p. 349; L 74 of 18.3.2015, p. 38; L 188 of 13.7.2016, p. 28), as last amended by Directive (EU) 2016/1034 (OJ. L 175 of 30.6.2016, p. 8).
(2) Die Forderung wegen Nichterfüllung bestimmt sich nach dem Markt- oder Börsenwert des Geschäfts. Als Markt- oder Börsenwert gilt	(2) The amount of any claim for non-performance shall be determined on the basis of the market or exchange value of the transaction. The market or exchange value is deemed to be
1. der Markt- oder Börsenpreis für ein Ersatzgeschäft, das unverzüglich, spätestens jedoch am fünften Werktag nach der Eröffnung des Verfahrens abgeschlossen wird, oder	1. market or exchange price for a replacement transaction which is concluded without undue delay, but no later than on the fifth business day after the opening of insolvency proceedings, or
2. falls kein Ersatzgeschäft nach Nummer 1 abgeschlossen wird, der Markt- oder Börsenpreis für ein Ersatzgeschäft, das am zweiten Werktag nach der Verfahrenseröffnung hätte abgeschlossen werden können.	2. if no replacement transaction is entered into in accordance with number 1, the market or exchange price for a replacement transaction, that could have been concluded on the second business day after the opening insolvency proceedings.
Sofern das Marktgeschehen den Abschluss eines Ersatzgeschäfts nach Satz 2 Nummer 1 oder 2 nicht zulässt, ist der Markt- und Börsenwert nach Methoden und Verfahren zu bestimmen, die Gewähr für eine angemessene Bewertung des Geschäfts bieten.	To the extent that the market conditions do not allow for the conclusion of a replacement transaction pursuant to sentence 2 numbers 1 or 2, the market or exchange value is to be determined by way of methods and procedures allowing for an adequate assessment of the value of the transaction.
(3) Werden Geschäfte nach Absatz 1 durch einen Rahmenvertrag oder das Regelwerk einer zentralen Gegenpartei im Sinne von § 1 Absatz 31 des Kreditwesengesetzes zu einem einheitlichen Vertrag zusammengefasst, der vorsieht, dass die einbezogenen Geschäfte bei Vorliegen bestimmter Gründe nur einheitlich beendet werden können, gilt die Gesamtheit der einbezogenen Geschäfte als ein Geschäft im Sinne des Absatzes 1. Dies gilt auch dann, wenn zugleich andere Geschäfte einbezogen werden; für letztere gelten die allgemeinen Bestimmungen.	(3) Where transactions pursuant to paragraph 1 are combined in a master agreement or the rules of a contractual counterparty within the meaning of Section 1 paragraph 31 of the German Banking Act, which provides that the covered transactions may, upon the occurrence of certain events, only be terminated in their entirety, then the whole of such covered transactions shall be deemed to be a single transaction within the meaning of paragraph 1. This shall also apply, if other transactions are covered by such agreement or rules; such transactions shall be subject to the general provisions.
(4) Die Vertragsparteien können abweichende Bestimmungen treffen, sofern diese mit den wesentlichen Grundgedanken der jeweiligen gesetzlichen Regelung vereinbar sind, von der	(4) The parties to the contract may agree deviating provisions as long as these are compatible with the fundamental principles applicable to the relevant statutory provision which is to be amended. They

abgewichen wird. Sie können insbesondere vereinbaren,	may, in particular, agree that,
1. dass die Wirkungen nach Absatz 1 auch vor der Verfahrenseröffnung eintreten, insbesondere bei Stellung des Antrags einer Vertragspartei auf Eröffnung eines Insolvenzverfahrens über das eigene Vermögen oder bei Vorliegen eines Eröffnungsgrundes (vertragliche Beendigung),	1. the effects of paragraph 1 may apply prior to the opening of proceedings, in particular upon the application by a party to the contract for the opening of insolvency proceedings over its assets or upon the existence of a reason for the opening for proceedings (contractual termination),
2. dass einer vertraglichen Beendigung auch solche Geschäfte nach Absatz 1 unterliegen, bei denen die Ansprüche auf die Lieferung der Ware oder die Erbringung der Finanzleistung vor der Verfahrenseröffnung, aber nach dem für die vertragliche Beendigung vorgesehenen Zeitpunkt fällig werden,	2. that a contractual termination will encompass also such transactions pursuant to paragraph 1) in respect of which the claim for delivery of the goods or the performance of the financial transaction becomes due prior to the opening of proceedings, but after the point in time agreed for the contractual termination,
3. dass zwecks Bestimmung des Markt- oder Börsenwerts des Geschäfts	3. that for the purposes of the determination of the market or exchange value of the transaction
a) der Zeitpunkt der vertraglichen Beendigung an die Stelle der Verfahrenseröffnung tritt,	a) the point in time of the contractual termination applies instead of the point in time of the opening of insolvency proceedings,
b) die Vornahme des Ersatzgeschäfts nach Absatz 2 Satz 2 Nummer 1 bis zum Ablauf des 20. Werktags nach der vertraglichen Beendigung erfolgen kann, soweit dies für eine wertschonende Abwicklung erforderlich ist,	b) the entering into of the replacement transaction pursuant to paragraph 2, sentence 2, number 1 may occur until the 20th business day after the contractual termination, if this is required to ensure that the unwinding of the transaction is performed in a manner that will maximise value,
c) anstelle des in Absatz 2 Satz 2 Nummer 2 genannten Zeitpunkts ein Zeitpunkt oder Zeitraum zwischen der vertraglichen Beendigung und dem Ablauf des fünften darauf folgenden Werktags maßgeblich ist.	c) instead of the point in time specified in paragraph 2 sentence 2, number 2 a point in time or a period between the contractual termination and the expiry of the fifth business day following such termination shall apply.
(5) Der andere Teil kann die Forderung wegen Nichterfüllung nur als Insolvenzgläubiger geltend machen.	(5) The other party may assert the claim for non-performance only as an insolvency creditor.

Your contacts:



Dr. Marc Benzler
Partner

T: +49 69 7199-3304
E: marc.benzler
@cliffordchance.com



Dr. Gregor Evenkamp
Partner

T: +49 69 7199-3158
E: gregor.evenkamp
@cliffordchance.com



Dr. Christian Hissnauer
Associate

T: +49 69 7199-3102
E: christian.hissnauer
@cliffordchance.com



Dr. Arne Klüwer
Partner

T: +49 69 7199-3932
E: arne.kluewer
@cliffordchance.com



Dr. Oliver Kronat
Partner

T: +49 69 7199-4575
E: oliver.kronat
@cliffordchance.com



Sebastian Maerker
Partner

T: +49 69 7199-1510
E: sebastian.maerker
@cliffordchance.com



Kerstin Schaepermann
Counsel

T: +49 69 7199-3270
E: kerstin.schaepermann
@cliffordchance.com



Dr. Helene Uffelmann
Associate

T: +49 69 7199-3186
E: helene.uffelmann
@cliffordchance.com

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Clifford Chance, Mainzer Landstraße 46, 60325 Frankfurt am Main, Germany

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