IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF
LEHMAN BROTHERS INTERNATIONAL (EUROPE)
(in administration)

AND IN THE MATTER OF THE COMPANIES ACT 2006

CONSOLIDATED EXPERT OPINION OF PROFESSOR PETER O. MÜLBERT AS TO MATTERS OF GERMAN LAW

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I, **Professor Peter Otto Mülbert**, of University of Mainz, Faculty of Law and Economics, 55099 Mainz Germany, **WILL SAY** as follows:

I. QUALIFICATIONS

1. I, Peter Mülbert, domiciled at Eisgrubweg 9, 55116 Mainz, Germany, have a doctorate in law and a Habilitation. I have authored or co-authored several books on banking law, with a special focus on credit transactions and banking guarantees, and I have written numerous articles in the field of banking law and commercial law, focusing among other topics on credit transactions and investor protection.

2. A copy of my *curriculum vitae* is attached to this opinion as Annex A.

II. INTRODUCTION AND BACKGROUND

3. I have been retained by Ropes & Gray International LLP, acting on behalf of CVI GVF (Lux) Master Sàrl, Hutchinson Investors LLC, Burlington Loan Management Limited, and their relevant affiliates (together the **Senior Creditor Group**), to prepare this opinion to assist the Court in its consideration of the Lehman Brothers International (Europe) (**LBIE**) Waterfall II application. A copy of the original instruction letter dated May 28, 2015 is attached to this opinion as Annex D. Following that letter, I understand that the parties to the Waterfall II application agreed to vary the questions to the German law experts. The revised questions and supporting material is attached to this opinion as Annex E.

4. The purpose of this opinion is to explain the principles of German law relevant to the interpretation of the late interest rate provisions that would apply to the close-out amount under clauses 7 to 9 of the Master Agreement of Financial Derivative Transactions appended to this opinion as Annex C (the **German Master Agreement** or the **GMA**).

5. In producing this opinion I understand that my duty is owed to the Court and I understand that this duty overrides any obligation to the parties who have engaged me. I have complied with this duty and will continue to comply with it.

6. I also confirm that I am aware of the requirements of Part 35 of the Civil Procedure Rules, the Practice Direction to Part 35 and the Guidance for the Instruction of Experts in Civil Claims 2014.

7. The facts and matters, upon which my expert opinion is based, including relevant provisions and details of English law, have been provided to me by Ropes & Gray International LLP. This includes a general description of the English administration procedure to which LBIE is subject and a description of the distributions and proof of debt process (which I understand has also been provided to Dr Fischer) as set out in Annex E.

8. Waterfall II involves an application to the English High Court by the Administrators of LBIE on a number of questions that impact on the nature and extent of creditors' entitlements to a share in the surplus assets in LBIE's estate now that creditors' provable debts have been paid in full (the **Waterfall II Application**).

9. The following entities were selected as the original respondents in the Waterfall II application:

(i) the Administrators;

(ii) Burlington Loan Management Limited, part of the DK group (**Burlington**);

(iii) CVI GVF (Lux) Masters Sàrl, part of the CarVal group (**CVI**);

(iv) Hutchinson Investors, LLC, part of the Baupost group (**Hutchinson**);

(v) Wentworth Sons Sub-Debt SARL, a joint venture comprising the US parent company Lehman Brothers Holdings Inc. and the hedge funds King Street and Elliott (**Wentworth**); and

(vi) York Global Finance BDH LLC (**York**).

10. Burlington, CVI and Hutchinson hold between them large exposures under swaps with LBIE documented under:

(i) English law governed ISDA Master Agreements;

(ii) French law governed Master Agreements;

(iii) German law governed German Master Agreements.

11. The German law issues in the Waterfall II application are:

(i) whether and in what circumstances, following LBIE's administration, a creditor would be entitled to make a "damages interest claim"[1] within the meaning of section 288(4) of the German Civil Code (**BGB**) on any sum which is payable pursuant to clauses 7 to 9 of the German Master Agreement?

(ii) if so, whether (and if so, in what circumstances) all or part of such "damages interest claim" can constitute part of "the rate applicable to the debt apart from the administration" for the purpose of Rule 2.88(9)? ((i) and (ii) being **Issue 20**));

(iii) if the answer to Issue 20 is that a further claim for damages can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9), how in such circumstances is the relevant rate to be determined? In particular:

(a) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party, is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?

[1] NB Although this is the definition used in the Issues, I have found such definition confusing and so in my report, I refer to this particular claim as the Further Damages Interest Claim as defined in paragraphs [26] and [27].

(b) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?

(c) where does the burden of proof lie in establishing a Damages Interest Claim and what is required to demonstrate that a relevant creditor has or has not met such requirement?

(Issue 21)

12. On 21 November 2014, the High Court made an order that the Senior Creditor Group and Wentworth may adduce and rely upon expert evidence for the purposes of assisting the court with determining Issues 20-21. Following that order, Wentworth and the Senior Creditor Group together with the Administrators agreed a list of questions to be addressed by experts in relation to Issues 19 to 26 (the **Agreed Questions**). The Agreed Questions included questions on Issues 20 and 21 to be put to the parties' respective German law experts (the **German Law Questions**). Following the submission of a report and a reply by each of the German law experts, I understand that a revised set of questions (the **Revised German Law Questions**) were agreed by the parties on 25 September 2015 to more properly reflect the issues in play. This report expresses my expert opinion on the answers to the Revised German Law Questions. It is intended to be comprehensive and therefore supercedes both my original report and my reply.

13. For the convenience of the English court, I have produced this report in English, even though this is not my first language. I consider my knowledge and ability to speak English to be sufficient to enable me to do this, and believe this report to reflect accurately my expert opinion in this matter.

14. I have included at Annex B to this report a list of the materials that I have relied upon in making this report (in addition to the matters set out in my letter of instruction from Ropes & Gray International LLP). I have reviewed all such materials in their original German language version but I understand that translations will be made available to the English court to the extent that there is any disagreement between the respective experts in German law on the matters set out in this report.

III. REPORT

A. ISSUE 20

Issue 20(1) ***Following LBIE's administration, is a creditor entitled (and if so in what circumstances) to make a "damages interest claim"[2] within the meaning of section 288(4) of the German Civil Code (BGB) on any sum which is payable pursuant to clauses 7 to 9 of the German Master Agreement?***

Issue 20(2) ***If the answer to Issue 20(1) is yes, can (and if so, in what circumstances) all or part of such "damages interest claim" constitute part of "the rate***

[2] NB Although this is the definition used in the Issues, I have found such definition confusing and so in my report, I refer to this particular claim as the Further Damages Interest Claim as defined in paragraphs [26(iv)] and [36].

applicable to the debt apart from the administration" for the purpose of Rule 2.88(9)?

Executive Summary

15. A creditor is entitled to claim compensation for late payment of an overdue debt under section 288(1) BGB in the form of interest at the rate referred to in that section (i.e. 5 percentage points above the base interest rate) regardless of any actual loss (see paragraphs [30] – [35] below).

16. In addition, a creditor is entitled to claim further damages in respect of delayed payment of an overdue debt under sections 280(1), 280(2), 286 and 288(4) BGB. If the loss as a result of a delay in payment is greater than the amount of interest at the fixed rate, the relevant entity is therefore able to claim in respect of the additional loss exceeding such fixed rate by way of a claim for further damages.

17. Such damages are, as a matter of German law, calculated in accordance with section 249(1) and section 252 BGB. In order to claim such further damages in respect of delayed payment of an overdue debt, it is ordinarily necessary for the creditor to assert and prove the existence of loss and damage caused by the late payment (see paragraph [29] below).

18. Depending on the type of loss and damage suffered, such an award of further damages in respect of actual loss and damage arising from delayed payment of an overdue debt is capable of being expressed as a percentage rate (see paragraphs [38] – [40] below) which accrues on the principal amount of the unpaid debt (see paragraph [45] below). The applicable rate in such cases is determined in accordance with the principles set out in paragraphs [49] – [51] below.

19. The question of whether a damages claim under sections 280(1), 280(2) BGB and section 286 BGB can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) is a matter of English law and, hence outside the scope of this expert evidence.

20. Upon LBIE applying for administration, each German Master Agreement terminated in accordance with clause 7(2) of the German Master Agreement. A close-out amount became due and payable immediately upon termination pursuant to section 271(1) BGB (see paragraph [74] below).

21. As referred to above, LBIE's counterparties under the German Master Agreement have a statutory entitlement to interest at a default rate (being the minimum rate of damage provided under section 288(1) BGB plus a further entitlement to damages caused by LBIE's delayed payment of the close-out amounts to the extent such damage exceeds the minimum rate of damage under the BGB). This entitlement to damages does not arise under clause 3(4) of the German Master Agreement in conjunction with the BGB but rather directly under the BGB. In my opinion, nothing of relevance turns on whether the claim arises under clause 3(4) of the German Master Agreement in conjunction with the BGB or only the BGB as a matter of German law.

22. For a creditor of a German law debt to be entitled to default interest, a default must have occurred with respect to that debt. Section 286 sets out the requirements for a

default. Either a warning notice (*Mahnung*) must have been given or an exception to this requirement must have been made out (see paragraphs [75] – [78]). The exceptions include circumstances in which there is a definitive refusal to perform by the debtor (section 286(2) no. 3 BGB) (see paragraphs [100] – [102] below). If an exception is made out, default occurs without a warning notice.

23. In my opinion, by applying for administration, LBIE would be regarded as having definitively refused to perform for the purposes of section 286(2) no. 3 BGB. This is because the administration application constituted a clear statement by LBIE that it would not pay its outstanding debts (including those such as the close-out amounts that became due upon the presentation of the application) at the time of such application or within a reasonable grace period (see paragraphs [103] – [104] below).

24. Support for this view can be taken from section 323(4) of the BGB which sets out the pre-conditions for a party to be able to rescind a contract, including for a serious and definitive refusal to perform. Although clause 7(2) of the GMA provides for the method of termination (i.e. by automatic termination rather than by notice), as a general business term, it is still has to comply with certain minimum standards or pre-conditions for termination as set out in the BGB. The same pre-conditions for termination would apply in order for a party to be able to rescind a contract pursuant to section 323(4) BGB. Hence, although termination under clause 7(2) of the GMA is automatic rather than as a consequence of the counterparty relying on a repudiatory breach, it is instructive to look at whether LBIE's administration application would have constituted a serious and definitive refusal of performance for the purposes of section 323(4). My view is that it would for the reasons given in paragraphs [105] – [118] below.

25. Given that the same expression "serious and definitive refusal of performance" is used for the purposes of section 323(4) BGB and for section 286(2) no. 3 BGB, it follows that LBIE's administration application would also constitute an exception to the need for a warning notice under section 286(2) no. 3 BGB

Definitions

26. For the purpose of this report, the terms (i) to (v) are to be understood as follows:

(i) **Damages Claim**: any claim pursuant to section 280(1), in conjunction with sections 280(2), 286 (and 288) BGB for damages in the case of late payment. As an umbrella term, it includes definitions (ii) to (iv) below, each of which is capable of being expressed as a rate, but also includes the definition in (v) below in respect of damages incurred which are not capable of being expressed as a rate.

(ii) **Damages Interest Claim**: any claim pursuant to section 280(1), in conjunction with sections 280(2), 286 and 288 BGB for damages incurred which are capable of being expressed as a rate. This expression includes each of the types of claim referred to in (iii) and (iv) below.

(iii) **Minimum Damages Interest Claim**: any claim pursuant to section 280(1), in conjunction with sections 280(2), 286 and 288(1) or 288(2) BGB for damages

in the case of a payment default regardless of whether the creditor actually incurred a loss or not.

(iv) **Further Damages Interest Claim**: any claim pursuant to section 280(1), in conjunction with sections 280(2) and 286 BGB for (additional) damages within the meaning of section 288(4) BGB which are capable of being expressed as a rate, i.e. for damages incurred which are capable of being expressed as a rate and which are in excess of the losses compensated by the Minimum Damages Interest Claim(s) pursuant to sections 288(1) or 288(2) BGB.

(v) **Other Damages Claim**: any claim pursuant to section 280(1), in conjunction with sections 280(2) and 286 BGB for damages incurred which are not capable of being expressed as a rate.

27. The way these definitions fit together can be shown in the flow-chart in the Schedule to this report.

Damages Claim under BGB

20.1 What is the nature and basis, as a matter of German law, of an award of damages in respect of the late payment of the close-out amount under the German Master Agreement and what form or forms can the award of damages take? In particular:

(a) What, in relation to any such basis or bases, has to be established as a matter of law and fact for such an award to be made?

Damages Claims

28. The statutory basis for awarding damages in cases of delayed performance in general derives from section 280(1) BGB, in conjunction with section 280(2) and 286 BGB (**Damages Claims**). These provisions would therefore apply in relation to the late payment of the close-out amount under the German Master Agreement.

29. A Damages Claim requires the following facts to be established:

(i) a (legal) relationship between the parties based on contract or statute – in the case of the close-out amount under the German Master Agreement, the relationship will be a contractual one;

(ii) a failure of the debtor to perform, including a failure to pay a debt when it falls due – the question of when the close-out amount becomes due is dealt with in paragraphs [65] – [74] below;

(iii) a warning notice (*Mahnung*) by the creditor made after performance is due unless one of the exceptions applies – this is dealt with further in paragraphs [77] and [96] – [124] below (sections 286(1) and 286(2) BGB);

(iv) fault for which the debtor is responsible for the purpose of section 276(1) BGB which is to be presumed according to section 286(4) BGB; and

(v) a damage actually suffered by the creditor regardless of whether the loss is capable of being expressed as a rate or not.[3]

Minimum Damages Interest Claims

30. In the event of a payment default, sections 288(1) and 288(2)[4] BGB deviates from the requirement of actual damages outlined at point (v) above by providing that the creditor may claim default interest regardless of whether he actually incurred a damage or not (**Minimum Damages Interest Claim**). The purpose of this derogation from general principles (i.e. the waiver of the need to demonstrate a damage actually incurred by the creditor) is to incentivize the debtor to pay in time. Consequently, where sections 288(1) and 288(2) BGB is relied upon, the creditor does not need to show that he incurred a loss as a result of the late payment nor is the debtor entitled to object that the creditor did not suffer any concrete loss[5].

31. A Minimum Damages Interest Claim is calculated as a percentage of the outstanding principal debt owed by the debtor. Sections 288(1) and 288(2) BGB set out the applicate rates. Pursuant to para. 1, the default rate of interest per year is 5 percentage points above the basic rate of interest. In turn, pursuant to section 247 BGB, the basic rate of interest is determined twice a year for a six-month period each, beginning on January 1 and on July 1, by reference to the most recent refinancing operation of the European Central Bank, and is made public by the Deutsche Bundesbank.

32. The legal prerequisites for a Minimum Damages Interest Claim pursuant to section 288(1) are (i) a money debt that results from a (legal) relationship between the parties based on contract or statute; and (ii) the default of the debtor. As referred to above, the requirements for a default within the meaning of section 288(1) BGB are governed by section 286 BGB.

33. As stated by the BGH in a landmark decision in 1979, the Minimum Damages Interest Claim is a subcategory of the general right to claim damages for delay of performance pursuant to sections 280(1) and 280(2) in conjunction with section 286 BGB.[6] This follows from the clarification in section 288(4) BGB to the effect: "*The assertion of further damage is not excluded*" and, in particular, from the reference to "further" damage. Default interest awarded by section 288(1) BGB serves as compensation for a (hypothetical) minimum loss suffered by the creditor.[7] In the event of a payment default in accordance with section 286 BGB, section 288(1) BGB deviates from the requirement of actual damages, to award the creditor with a claim to compensate this minimum loss. The purpose of this derogation from general principles (i.e. the waiver of the need to demonstrate a damage actually incurred by the creditor) is to incentivize the debtor to pay on time.

34. The categorization of section 288(1) BGB as a subcategory of the general right to claim damages for delay of performance indicates that that provision does not constitute a separate cause of action but serves as an ancillary rule to sections 280 and

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3 While the amount of damages is to be calculated pursuant to the general provisions stipulated under sections 249(1) and 252 BGB.

4 Para. 2 of section 288 BGB stipulates a higher default interest rate than para. 1 but does not apply to a contract of the type of the German Master Agreement. Hence, in the following, the provision will not be dealt with any further.

5 See, eg, BGH, NJW 2011, 3648, 3649 n. 16 (with further references) and Grüneberg in Palandt, BGB, 74th ed., 2015, section 288 n. 4.

6 See BGH, BGHZ 74, 231, 235 1 2 b bb): "This provision is a specific expression of the principle that the debtor must reimburse the damage caused by delay, which is laid down in § 286 para 1 BGB." (unauthorized translation).

7 BGH, NJW 1953, 337; KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 55.

286 BGB. However, even if section 288(1) BGB would qualify as an independent basis for a claim, this would only amount to a purely dogmatic classification and, thus, be a matter of legal theory, but would be without any practical relevance for the case at hand.

35. The relationship outlined above between the Damages Interest Claim and the Minimum Damages Interest Claim also determines which elements have to be established in law and in fact: the Minimum Damages Interest Claim is subject to the same requirements as described above for the Damages Claim except that it does not require a concrete loss incurred by the creditor, i.e. the requirement outlined in paragraph [29(v)] above does not apply. Instead, the statutory default interest rate(s) during the default period apply.

Further Damages Interest Claim

36. If the creditor suffers a loss that exceeds his compensation pursuant to section 288(1) to (3) BGB, he may claim **further** damages; where such damages are capable of being expressed as a rate (as outlined below), these are referred to as a **Further Damages Interest Claim**. Section 288(4) BGB, operating as a savings clause, clarifies as much by stipulating that, although sections 288(1) and 288(2) BGB provides for the possibility of claiming default interest in case of a payment default, the creditor is not barred from bringing a claim for any additional loss including a Further Damages Interest Claim with respect to further damages incurred by him.[8] Hence, the claim for further damages within the meaning of section 288(4) BGB is a form of the Damages Interest Claim and, thus, subject to the requirements set out above at paragraph [29].

(b) How would such an award be expressed? In particular, is such an award capable of expression only as an amount, or is it (and if so, in what circumstances is it) capable of expression as a rate? If both expressions would be possible, would these be mutually exclusive?

37. A Minimum Damages Interest Claim under section 288(1) BGB is only capable of expression as a percentage rate, unless the debtor is no longer in default. In the latter situation, a court could calculate the total amount of default interest that accrued for the period of time the debtor was in default. However, in such a case, a court can also express the default interest as a rate applied to the principal claim for the period of default.[9]

38. As regards a Damages Claim, two different types of damages have to be distinguished at the outset:

(a) the first type of damage is in relation to a one-off loss rather than a continuing loss suffered over time in respect of the time value of money, for example the costs of enforcing a claim including the costs of bringing a law suit **(Other Damages Claim)**;

(b) the second type of damage is a continuing loss, suffered by the creditor as a result of the delay in receiving its money including in particular:

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[8] See KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 63.
[9] See, eg, BGH, NJW 2006, 3271.

(i) the costs of necessary interim financing, resulting from the delay in receiving the funds due at an earlier time (*Kosten der Zwischenfinanzierung*); and

(ii) the loss of investment return that results from not being able to (re)invest the funds due (*entgangene Anlagezinsen*), i.e. opportunity costs in a broad sense.

39. For the first type of damage, compensation cannot be expressed as a rate.

40. For the second type of damage, the compensation is in principle capable of expression both as an amount or as a percentage rate. However, to award a Damages Interest Claim in respect of the second type of damage as an amount requires that the final amount of such damage be known at the time of the judgment being rendered. In the case of an award for damages incurred because of delayed payment, this will only be the case if the debtor has already paid the amount due and the default has therefore ended prior to the court's decision. Otherwise, the court cannot determine the exact amount of the damages since it will be unable to calculate the amount of additional future damages pending payment of the defaulted amount by the debtor. Likewise, if the creditor has to raise money (interim financing) in order to cover the shortfall resulting from the funds being withheld by the debtor, the court will only be able to determine the exact amount of damages to be awarded if the debtor is no longer in default. In addition, although in such circumstances, the damages could be expressed as an amount, that amount would simply reflect the application of the rate over a defined period (and so the damages could also be expressed as a rate).

41. If the debtor has not already paid the defaulted amount by the time final judgment has been rendered, the court will assess the Damages Interest Claim in relation to the second type of damage as a percentage rate in accordance with the answer to question 20.2(c) below.

42. Paragraph 87 of Dr Fischer's original opinion appears to suggest that a claim for loss of profits is only ever capable of expression as a lump sum rather than a rate. Dr Fischer states: "*If the damage, however, does not consist of lost interest income or in interest expense, it can only be asserted in the form of an amount. This is especially true if the creditor asserts that he would have used the owed money for an investment that would have brought him a profit (for example, an investment in shares which would have generated a particular capital gain for the period in question, or buying a machine with which he would have performed profitable work)*". I do not agree that a claim for loss of profits is *only ever* capable of expression as a lump sum rather than a rate.

43. In the context of the share investment example given in paragraph 87 of Dr Fischer's original opinion, a distinction has to be made: if the purpose of investing in the shares is to generate an income by way of fixed return such as dividends, there is no reason why a claim for loss of profits could not be expressed as a rate rather than a lump sum, particularly if the investment period is not known at the time the claim is being asserted. To award a damage claim as an amount requires the final amount of such damage to be known at the time of the judgment being rendered. If, by contrast, the creditor were to claim for the loss of profit arising from a particular sale that was

contemplated by the creditor, then I agree that the claim would usually only be capable of expression as an amount.

44. It should be noted that I understand that the question of whether a Damages Interest Claim pursuant to sections 280, 286 and 288(4) BGB, when expressed as a rate, can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) is a matter of English law and, hence, outside the scope of this expert evidence.

(c) In circumstances in which the award is capable of expression as a rate, on what principal sum would such an interest rate accrue, how would the applicable rate be determined?

Principal sum on which the award accrues

45. Where a Minimum Damages Interest Claim or a Further Damages Interest Claim is expressed as a rate[10], it applies to the amount of the principal claim not timely paid by the debtor (i.e. the close-out amount payable pursuant to clauses 7 to 9 of the German Master Agreement). Hence, the principal sum on which such an interest rate accrues is the amount withheld or unpaid by the debtor when the debt fell due.

46. I understand that it has been suggested by Wentworth in correspondence that the Further Damages Interest Claim may accrue on some notional equivalent sum to the close-out amount that might be borrowed or invested by the counterparty to fill any "funding gap" left by LBIE's failure to pay the close-out amount when it fell due. This is not my understanding of the position as a matter of German law. In my opinion, the Further Damages Interest Claim would accrue on the amount that LBIE failed to pay to the counterparty (i.e. the close-out amount).

Determination of applicable rate

47. As described above, the applicable rate in the case of a Minimum Damages Interest Claim pursuant to section 288(1) BGB is 5 percentage points above the basic interest rate (section 247 BGB) during the time the debtor is in delay in paying the amount due.

48. Where a Further Damages Interest Claim is expressed as a rate, the determination of the applicable rate varies depending on whether the creditor has to calculate the concrete losses suffered (*konkrete Schadensberechnung*) or whether he is entitled to apply a simplified method of calculation.

49. The generally applicable method for calculating damages which is available to all creditors is to determine the concrete losses suffered (*konkrete Schadensberechnung*). The creditor has to demonstrate and ultimately prove the intended use of the amount withheld, the effect on his assets from the non-availability of the funds due to him, and the damage he suffered from not being able to use the funds in a specific way.[11]

50. Regarding a loss of return that a creditor suffers because funds due are withheld by the debtor and, thus, are not available for carrying out a profitable investment

[10] It should be noted that, given the definition of these two expressions, they could only be expressed as a rate.
[11] See, eg, BGH, WM 1974, 128 sub II; BGH, NJW 2012, 2427 n. 64.

(*entgangene Anlagezinsen*), the creditor can apply the method just described in paragraph [49] if he is able to prove that those profits would have accrued.

51. Since it will not always be easy or possible to prove the rate of return that would have been generated by the creditor had the funds been paid on time, the German Federal High Court (**BGH**) allows for a somewhat simplified method of calculation based on sentence 2 of section 252 BGB. Sentence 2 provides for a relaxation of the standard of proof to the effect that profits which the specific creditor in question could not realize as a consequence of a delayed payment by the debtor are to be considered as a damage (i.e. a Damages Interest Claim) if the profits could probably have been expected to accrue in the normal course of events or in the special circumstances applicable to the particular creditor. Since, according to generally accepted insight into human behavior (*allgemeine Lebenserfahrung*), a substantial amount of money will not be wasted but rather will be invested at a current market investment rate, a creditor who is owed a substantial amount of money is entitled to claim damages for the loss of such profit,[12] unless the debtor is able to rebut the presumption of profits made by the creditor.[13]

52. In considering the recent approach of the courts to the assessment of lost profits, the starting point is section 287 of the German Civil Procedure Code whereby the court, in determining the damages incurred, is empowered to make an estimate where the actual loss of return is not clear. In doing so with respect to damages that are capable of being expressed as a rate, the court has to take into account the prevailing market conditions. Hence, the creditor has to demonstrate (and potentially prove) the actual basis on which the court should base its estimate.[14] If, for example, the creditor claims damages for having missed an alternative investment in bonds, the court will base its estimate on the publicly available statistics published by the Bundesbank.[15]

53. The case law is inconsistent, however, regarding the standard of proof that applies in relation to the claimant's obligation to demonstrate the basis for his claim for damages (*Darlegungslast*). According to some decisions, the creditor is not subject to stringent requirements with regard to demonstrating the profit he would have made in the ordinary course of business; a non-negligible probability suffices.[16] Other decisions, however, stipulate far stricter requirements. For example, it has been held that the creditor has to detail the specific investment he would have undertaken if he had received the funds on the due date.[17] Moreover, the court has refuted the view that a significant sum will always carry interest equal to the statutory interest rate of 4 %[18] at least where no evidence was presented to substantiate this, and has even doubted with respect to long-term sovereign bonds and bank bonds whether one can expect any minimum gain at all.[19]

54. Finally, *banks*[20] are entitled to an even more simplified method of calculating losses from foregone investment opportunities, allowing them to employ abstract

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12 See, eg, BGH, NJW 2012, 2427 n. 64 (with further references).
13 BGH, WM 1974, 128 sub II.
14 BGH, NJW 2012, 2266 n. 13
15 See, eg, BGH, BGHZ 161, 196, 201 et seq. for the calculation of a prepayment fee (*Vorfälligkeitsentschädigung*) for which the same principles of calculation apply. http://www.dict.cc/englisch-deutsch/prepayment.html.
16 See, eg, BGH, NJW 2012, 2427 n. 64 (with further references).
17 BGH, NJW 2012, 2266 n. 13.
18 See section 246 BGB.
19 BGH, NJW 2012, 2266 n. 13, 18.
20 The cases referred to below concern a commercial bank or universal bank rather than an investment firm or other financial institution.

hypotheticals based on assumptions regarding their behavior and the nature of their business (*abstrakte Schadensberechnung*).[21] The starting point is the idea that a bank will typically suffer a loss as a result of a delayed payment since it could have (re)invested the amount withheld from it. Hence, for the purpose of expressing a Damages Interest Claim as a rate, the average interest rate charged by the bank serves to determine the applicable rate.

55. Decisions dealing with that issue typically refer to the average rate regarding a bank's lending business.[22] However, the BGH, in a landmark decision in 1974, referred to the average rate of a particular bank's full range of business activities (e.g. in case of a universal bank: mortgage credit, short-term credit, investment in fixed-income securities) not only to a bank's lending business.[23] Hence, if the bank operates only one type of business, the average interest rate charged by the bank applies; if a bank operates different types of business lines, the average interest rate across its several lines of business applies so for example in the case of a credit bank (*Kreditbank*), the weighted average interest rate across its different types of loans (e.g. consumer credit; mortgage credit).[24] Saved costs, e.g. saved costs of refinancing or saved administrative costs, need not be deducted. However, the bank has to demonstrate and ultimately prove the factual basis of its abstract calculation of damages.[25] This requires, inter alia, a credit bank to demonstrate the types of loans it makes as well as the lending rates for each of these types of loans.[26] In turn, the debtor is entitled to demonstrate that this method of calculating the Damages Interest Claim lacks a factual basis because, even if the bank had received the outstanding amount of money on the due date, it would have lacked the opportunity to make a profitable investment in its line(s) of business.[27]

56. *Other* types of *investors*, e.g. non-bank financial institutions and hedge funds, according to many commentators, are entitled to calculate Damages Interest Claims in the same way as banks.[28] It is without doubt that other professional investors may apply the method of calculation based on sentence 2 of section 252 BGB. Whether they are also entitled to rely on an abstract calculation (as outlined in paragraph [54]) is marginally less settled. The BGH, in a landmark decision in 1988, pointed out in passing that, like any other merchants, banks are entitled to an abstract calculation[29]. Before that, lower courts disagreed as to whether insurance companies are entitled to an abstract calculation.[30] Moreover, judge *Grüneberg*, a member of the eleventh chamber of the BGH, states that only banks are entitled to calculate "further damages of default" by resorting to that method.[31] In my view, the more lenient approach is the correct one.

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21 BGH, BGHZ 104, 337, 344 et seq. sub III.

22 See, eg, BGH, BGHZ 104, 337, 345, BGH, NJW 1992, 109 and BGH, NJW 1992, 1620.

23 BGH, BGHZ 62, 103, 107.

24 BGH, BGHZ 104, 337, 344 et seq. sub III. It should be noted that, in that context, the court expressly referred to a "Kreditbank". By inference, for banks that operate other lines of business as well, the average interest rate must be the weighted average interest rate across all its business lines.

25 BGH, NJW 1992, 109, 110 sub II 3.

26 BGH, NJW 1992, 109, 110 sub II 4.

27 BGH, BGHZ 104, 337, 348 sub IV 1.

28 *Löwisch* and *Feldmann* in Staudinger, BGB, 2014, section 288 n. 47; *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 286 n. 134.

29 BGH, BGHZ 104, 337, 344 et seq. sub III.

30 LG Verden, VersR 1967, 869 (yes); OLG Köln, NJW 1969, 1388 (no).

31 *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 288 n. 13.

20.2 As a matter of German law, in your opinion:

(a) Is the relevant entity entitled to the fixed rate of interest (as a minimum) pursuant to section 288(1) BGB regardless of any loss?

57. Yes – in my view, as a matter of German law, the relevant entity is entitled to the fixed rate of interest (as a minimum) pursuant to section 288(1) BGB regardless of any loss because LBIE's failure to pay the close-out amounts arising under the GMA when they became due fulfils all requirements for a Minimum Damages Interest Claim set out in paragraphs [30] and [35] above. An actual loss is not a requirement of a Minimum Damages Interest Claim as explained in paragraph [30] above.

58. Hence the relevant creditor, regardless of any losses incurred, is entitled to the fixed rate of interest as a minimum pursuant to sections 280 and 286 BGB, in conjunction with section 288(1) BGB.

(b) If the relevant party's loss as a result of any delay in payment is greater than the amount of the interest at such fixed rate, is the relevant entity entitled to recover: (i) the entire loss, or (ii) the loss exceeding such fixed rate by way of a claim for (further) damages in respect of late payment?

59. In my view, if the relevant party's loss as a result of any delay in payment is greater than the amount of the interest at such fixed rate, the relevant party is entitled to recover its entire loss as a Damages Claim which would include any Damages Interest Claim. The latter claim would comprise of two elements: (a) a Minimum Damages Interest Claim at the rate specified in section 288(1) BGB; and (b) a Further Damages Interest Claim for the loss exceeding such fixed rate pursuant section 288(4) BGB. Hence alternative (b)(ii) is the correct one.

60. The Further Damages Interest Claim that accrues on the close-out amount payable pursuant to clauses 7 to 9 of the German Master Agreement is a statutory claim based on sections 280, 286 and 288(4) BGB.

61. Hence, whether, under the German Master Agreement, a relevant party may only claim damages for its losses actually incurred or whether the party is entitled to claim both default interest (section 288(1) BGB (Minimum Damages Interest Claim)) and damages for the losses actually incurred (Further Damages Interest Claim), is governed by the relationship between para. 1 and para. 4 of section 288 BGB.

62. The relationship between para. 1 and para. 4 of section 288 BGB needs to be understood in the light of the fundamental principle underlying the German law of damages which is to make the creditor whole. The flipside of that principle is the prohibition on creditor enrichment (*Bereicherungsverbot*) which aims at preventing overcompensation of creditors. Applying these principles to paras. 1 and 4 of section 288 BGB and taking into account that default interest pursuant to para. 1, in essence, qualifies as a irrefutable minimum damage (*supra* issue 20.2(a)), the creditor is entitled to recover the entire loss that it actually suffered, but not compensation for its entire loss actually suffered as well as default interest pursuant to para 1.[32]

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[32] KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 55; see also BGH, NJW 1953, 337 ("... Teil der Zinsforderung, der über 5 % hinaus geht").

63. Technically, a creditor seeking damages for its entire loss has two options:

(a) the creditor can claim default interest pursuant to section 288(1) BGB (5 %) and, in addition, claim compensation for further default damages expressed as a rate (e.g. 3 %) within the meaning of section 288(4) BGB, i.e. by way of a Further Damages Interest Claim: 5% (under section 288(1) + 3 % (under section 288(4)); or

(b) alternatively, the creditor can seek to recover his entire loss by way of a Damages Interest Claim, for losses actually incurred that are capable of being expressed as a rate (e.g. 8%). If he chooses the second option, in order to avoid overcompensation, default interest awarded pursuant to section 288(1) BGB (5 %) will be offset *ex lege*[33] thereby "reducing" the Damages Interest Claim expressed as a rate: 8% (sections 280(1), 280(2), 286) - 5% (section 288(1)).

64. The upshot, then, with respect to claims for default interest and damages under the German Master Agreement is that the relevant entity is entitled to recover its entire loss in respect of the late payment by way of:

(a) a claim for default interest pursuant to section 288(1) BGB (the Minimum Damages Interest Claim); and

(b) a claim for the loss exceeding such fixed rate by way of a claim for (further) damages (the Further Damages Interest Claim).

Clauses 7 to 9 of the German Master Agreement (GMA)

20.3 On the true construction of clauses 7 to 9 of the GMA:

(a) When does a close-out amount arising under clauses 7 to 9 of the GMA become due and payable?

(e) Is section 271 of the BGB relevant to the question in 1(a) above?

65. For the reasons given below, I consider that the close-out amount arising under clauses 7 to 9 of the GMA would become immediately due upon the termination of the GMA triggered by LBIE's administration application.

66. I have also dealt in this section with some features regarding clause 7(2) of the GMA which are relevant to my default analysis below. Although this analysis does not go to the question of when a close-out amount arising under clauses 7 to 9 of the GMA becomes due and payable, it makes sense to deal with these features when considering the close-out mechanism under the GMA.

67. The overall objective of the GMA is to replicate under German law, as best as possible, the manner in which the ISDA Master Agreement and its close-out netting provisions in particular are intended to operate.[34] It would therefore be surprising if, post an English administration of the counterparty, the ISDA Master Agreement was

[33] KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 55.
[34] C.f. *Clouth* and *Vollmuth* in in Hopt, Vertrags- und Formularhandbuch, 4th ed. 2013, p. 1836.

capable of giving rise to an entitlement to default interest but the GMA was not (as Dr Fischer seems to suggest in his original report). For the reasons given below, I consider that the GMA would give rise to an entitlement to default interest on the facts of this particular case.

68. Clauses 7, 8 and 9 of the GMA provide the rules for "*close-out netting*". Pursuant to clause 7(2) GMA, the GMA itself, as well as all individual transactions that the parties have entered into under the GMA, terminate automatically without notice, when:

(i) an insolvency proceeding is petitioned with respect to the assets of a party to the GMA; and

(ii) such party either (i) has submitted the petition itself or (ii) is unable to pay its debts or is for other reasons in a situation which justifies the commencement of such proceedings.

69. As a result of the termination, the individual claims pursuant to clause 3(1) GMA are replaced by mutual compensation claims (clauses 7(3) and 9(1) GMA), consisting of, *inter alia*, damage claims pursuant to clause 8(1) GMA,[35] which are combined into a "single compensation claim" (within the meaning of clause 9(1) GMA) for each of the GMAs (**Single Compensation Claim**).[36] This is the case regardless of whether the claims from the individual transactions arising as a result of early termination would qualify as contractual claims or damage claims[37].

70. The reason for triggering automatic termination upon the filing of the application instead of the commencement of an insolvency proceeding is to adjust the netting mechanism provided by the ISDA Master Agreement to the particularities of German insolvency law,[38] especially sections 103 et seq. of the German Insolvency Code (*Insolvenzordnung*, **InsO**).[39] Not surprisingly, there is no commentary on how the termination provisions and the right to default interest would operate upon the debtor's application for foreign insolvency proceedings. Indeed, practitioners have suggested that, if parties want to tailor the termination provisions to meet the requirements of insolvency proceedings under a foreign jurisdiction, they may want to amend clause 7(2) GMA accordingly[40]. Clearly this was not done in the present case and so I have developed my arguments below regarding the impact of LBIE's administration application from first principles.

71. The close-out mechanism aims to make the other party whole in economic terms i.e. it seeks to place the party not filing the application for the commencement of insolvency proceedings (the **non-defaulting party**) in the same (economic) situation as it would have been in if the individual transaction(s) had matured in the normal course. The close-out mechanism is intended to simplify the compensation process after automatic

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35 There is some controversy regarding precise construction of this mechanism as a matter of German law. The prevailing opinion holds that the *damages claims* within the meaning of clause 8 GMA are only items for calculating the single compensation claim (see *Behrends* in Zerey, Finanzderivate, 3rd ed. 2013, p- 121, 122; *Jahn* in Schimansky/Bunte/Lwowski, Bankrechts-Handbuch, 4th ed. 2011, section 114 no. 134). A minority refers to the mechanism of an anticipatory set-off agreement, thus arguing that these damages claims exist but, as part of a second step, are immediately offset against other existing claims (see *Fuchs*, Close-out Netting, Collateral und systemisches Risiko, 2013, p. 46 et seq. with further references). There is no suggestion, however, that the mechanism is invalid.

36 See for example *Clouth* and *Vollmuth* in Hopt, Vertrags- und Formularhandbuch, 4th ed. 2013, p. 1841.

37 See for example *Clouth* and *Vollmuth* in Hopt, Vertrags- und Formularhandbuch, 4th ed. 2013, p. 1841.

38 See *Behrends* in Zerey, Finanzderivate, 3rd ed. 2013, p. 118.

39 Formerly section 17 of the German Bankruptcy Code *(Konkursordnung)*

40 See *Behrends* in Zerey, Finanzderivate, 3rd ed. 2013, p. 118.

termination of the individual transactions and the GMA by making it easier for the parties to determine the net entitlement to compensation payable to either party. It would therefore be contradictory if, but for the close-out, the individual transactions would have given rise to default interest (because of the specified date for performance in clause 3 GMA) but the Single Compensation Claim does not.

72. Termination clauses (*Beendigungs- und Lösungsklauseln*) such as clause 7(2) GMA, which form a part of the general business terms (**GBT**s) of a contract, will be interpreted according to their objective meaning, i.e. independently of the will of the contracting parties[41]. As such clauses either lead to an automatic immediate termination (as is the case with clause 7(2) of the GMA) or give one party the right to terminate the contract with immediate effect as a result of the behavior of the other party (as is the case with clause 7(1) of the GMA), they have to conform with the guiding principles (*Leitbild*) of the BGB concerning an immediate termination[42]. Depending on the nature of the contract and the question of whether the obligations have yet been performed, these guiding principles are to be found in either section 323(2) and 323(4) BGB or section 314 BGB[43] and elsewhere in the BGB[44]. In this context it is worth noting that Dr. Fischer in his original report concluded that clause 7(2) GMA was valid[45] and I agree with this conclusion. That must mean that clause 7(2) does, in fact, comply with the guiding principles.

73. To expand on this point further, under general principles of freedom of contract of German law, parties are free to choose the *method* of termination (i.e. automatic termination in the present case or by notice to the counterparty in other cases). They are also to some extent at liberty to define what they consider as a breach[46] or cause for termination[47]. However, in the case of a GBT rather than an individually negotiated provision, the parties cannot do away altogether with the need for a breach or cause for termination as a pre-condition to termination, at least not if the counterparty is entitled to compensation for early termination (as is the case under clause 7(2) of the GMA). In my view, the filing of an administration application by LBIE in circumstances where the directors are not under any legal obligation to do so (as expanded below) would have constituted a "serious and definitive refusal of performance", giving rise to a ground for rescission for the purposes of section 323(4) BGB (had clause 7(2) not provided for automatic termination) and would thus satisfy the pre-conditions for termination set out in the BGB. Given that the same language is used in section 286(2) no. 3 BGB, if a refusal of performance exists that is sufficient for clause 7(2) GMA to be a valid GBT, then such refusal of performance will also be sufficient to justify the occurrence of a default without a warning notice. I have considered further in paragraphs [108] – [118] below the pre-conditions for termination which are dealt with in section 323(4) BGB.

74. Unlike confirmations of individual transactions under the GMA, the GMA itself does not specify a due date for the payment of the Single Compensation Claim under

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41 Settled case law; see, eg, BGH, decision of 29 April 2015 – VIII ZR 104/14 (juris) sub II 2 c aa (with further references); *Ellenberger* in Palandt, BGB, 74th ed. 2015, section 133 n. 26a.

42 See section 307 BGB.

43 For section 323 BGB see *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 323 no. 2; for 314 BGB see *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 314 no. 3.

44 The other provisions on termination / rescission contained in the BGB are not relevant to the GMA.

45 See para. 6 and 57 of Dr. Fischer's original report.

46 Within the meaning of section 323 BGB.

47 Within the meaning of section 314 BGB.

clauses 7 to 9. Clause 9(2) GMA only deals with certain exceptions[48], none of which applies to the Single Compensation Claims owed by LBIE. However, pursuant to section 271(1) BGB, a debt becomes due and payable immediately if no other time for payment has been agreed by the parties or is evident from the circumstances[49]. As a result, section 271(1) BGB applies and the Single Compensation Claims became due immediately upon the termination of the GMAs triggered by LBIE's administration application.

(b) Must a default have occurred within the meaning of section 286 of the BGB in order for there to be a claim for damages for late payment?

75. I refer to paragraph [29] above where I set out the facts that need to be established to bring a Damages Claim. These include but are not limited to the need for a default. The requirements for a default of the debtor are set out in section 286 BGB.[50] The default of the debtor requires (1) the debtor's failure to perform when performance is due and (2) a warning notice to the debtor. A warning notice, however, is not required if one of the exceptions provided for in section 286(2) BGB applies.

76. The first element of a default within the meaning of section 286 BGB is that the debtor fails to perform at the time performance is due. This includes a debtor's failure to pay a money debt at the time payment of such debt is due. I have dealt in paragraph [74] above with the question of when the Single Compensation Claim falls due. If LBIE failed to pay the Single Compensation Claim on such date, the first condition referred to above would be satisfied.

77. The second element generally necessary for a default within the meaning of section 286 BGB is a warning notice (*Mahnung*) from the creditor to the debtor requesting performance unless one of the exceptions applies, see paragraph [96] below. The effect of a warning notice is to place the debtor of a claim in default (*Verzug*), section 286(1) sent. 1 BGB. The default occurs upon receipt of the warning notice by the debtor or upon the events occurring that give rise to one of the exceptions to the need for a warning notice (assuming the date for performance has already occurred). The purpose of a warning notice is to remind the debtor that non-performance will have consequences and to induce him to perform.[51]

78. I have been instructed that the Senior Creditor Group is not currently aware if any creditor to LBIE (including the original counterparties who assigned the claims now held by the Senior Creditor Group) issued a warning notice with respect to the non-payment of the Single Compensation Claims by LBIE. However, I understand that the Senior Creditor Group is reserving its right to rely on a warning notice if one subsequently comes to light. I have dealt with the exceptions to the requirement for a warning notice in response to question 20.4(e).

Section 286 of the BGB

20.4 What is the true construction of section 286? In particular:

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48 *Clouth* and *Vollmuth* in Hopt, Vertrags- und Formularhandbuch, 4th ed. 2013, p. 1842.

49 C.f. *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 271 no. 1, 10.

50 See *Ernst* in in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 288 no. 14; *Benicke* and *Nalbantis* in Soergel, BGB, Vol. 3/2, 13th ed. 2014, section 288 no. 32; c.f. BGH, BGHZ 74, 231, 235.

51 BGH, NJW 1963, 1823, 1824.

(a) Can a default occur including by the service by the non-defaulting party of a "warning notice" on a defaulting party once the defaulting party has entered into, and remains in, administration in England & Wales?

79. I have dealt with the construction of section 286 in paragraphs [75] – [78] above. I am not aware of any provision of German substantive law (whether statutory or based on case authority) that would have the effect that no default could occur (or that no warning notice could be given) following the commencement of an English administration proceeding.

80. In this regard, I note that, in paragraph [64] of his original report, Dr Fischer has stated that the filing of a claim in (presumably) a German insolvency proceeding would not constitute a warning notice as the debtor has lost the power to dispose of his assets upon the opening of insolvency proceedings. I have considered this statement in the context of question 20.4(c) below.

81. I also note that, in paragraph [80] of his original report, Dr Fischer states that an interest claim for the single compensation claim under clause 9 of the German Master Agreement is not consistent with statutory law because the compensation claim only comes into existence as a result of the commencement of insolvency proceedings and, after that time, claims cannot be enforced against the debtor because he has lost the power to dispose of his assets.

82. It is not clear to me whether Dr Fischer is saying in this paragraph that there is a general principle of German law that no default can occur (including by the giving of a warning notice) following the commencement of insolvency proceedings, wheresoever those insolvency proceedings may be commenced, or if Dr Fischer is saying that this only applies where the insolvency proceedings have the effect of depriving the debtor of the power to dispose of its assets. I am not an expert in English insolvency law but, based on the description provided to me of an English administration proceeding, it would appear that an administrator is able to act as agent of the company with the broad range of powers specified in Schedule 1 to the UK Insolvency Act 1986 including the power to dispose of assets. Clearly on the facts of the present case, no insolvency proceedings were commenced in Germany and so I do not see how the effects of a German insolvency proceeding could be relevant.

83. In any event, for the reasons given below, it is my view that a default occurred upon LBIE's application for administration (which was simultaneously the event that caused the amounts to fall due under the GMA and the event that lead to Exception 3 applying). I understand, based on the description of the administration process in England and Wales that was provided to me, that the administration application was *prior* to the commencement of the English administration. I can see no reason why the same event (i.e. the administration application) should not cause the close-out amount to come into existence and constitute a default in payment of that amount.

(b) What are the formal and substantive requirements for a "warning notice" (as the phrase is used in section 286 of the BGB)?

84. A "warning notice" (*Mahnung*) within the meaning of section 286(1) BGB is an unequivocal demand for payment of a sum due. In legal terms it does not qualify as a declaration of intent (*Willenserklärung*) but as a very similar quasi-declaration of

intent (*rechtsgeschäftsähnliche Erklärung*).[52] However, as the general requirements for declarations of intent are also applicable to the warning notice,[53] the warning notice - in general - has to be submitted by the creditor and received by the debtor.[54]

85. The warning notice must be specific, not conditional and it must be definite and serious. [55] It requires no special form and does not, in particular, have to be in writing[56]. Neither the specification of a date for payment[57] or its designation as a "warning notice" [58] are obligatory.

86. The purpose of a warning notice is to remind the debtor that non-performance will have consequences and to induce him to perform and to make clear that, from the moment at which the debtor has been put on notice, he may be held liable in damages for delay. [59]

(c) Could: (1) the filing of a proof of debt in the LBIE administration and/or (2) the service of a termination notice pursuant to the GMA by a non-defaulting counterparty to LBIE, constitute the service of a "warning notice" for the purposes of section 286(2) BGB?

87. I am not aware of any German case authority or commentary which has considered whether a proof of debt in an *English* administration would constitute the service of a "warning notice" for the purposes of section 286(1) no. 2 or section 286(2) BGB.

88. As a matter of German law, the Reichsgericht in 1928 rejected the proposition that, with respect to German bankruptcy claims (*Konkursforderungen*), i.e. claims that already existed at the commencement of an insolvency proceeding, the filing of a proof of debt in a German insolvency proceeding could constitute the service of a warning notice for the purpose of section 286 BGB. However, for the reasons given below, this is based solely on arguments derived from the particularities of German bankruptcy law and not from substantive civil law (i.e. from provisions and principles enshrined in the BGB).

89. German insolvency law makes a distinction, for certain purposes, between the insolvency estate (*Insolvenzmasse*) and the insolvent debtor as a person or entity. With respect to the former and with a view to ensuring that creditors will be satisfied as best as possible, the German Insolvency Code provides for a special procedure with respect to the settlement of outstanding debts that is not to be impacted by the rules of the law of obligations concerning the specific claims of individual creditors.[60] The German Federal High Court (**BGH**) has moved away from this principle to a certain extent, in particular regarding the status of executory contracts in insolvency pursuant to s. 103 InsO.[61] However, the BGH has not explicitly applied this more recent jurisprudence to the issue of post-commencement defaults with insolvency claims.

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52 See *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 286 no. 16. This distinction is a matter of legal theory and not relevant in the case at hand.
53 See BGH, NJW 2006, 687, 688; *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 286 no. 16
54 *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 286 no. 46.
55 See e.g. BGH, NJW 1998, 2132; *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 286 no.16-19.
56 See *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 286 no. 48.
57 See *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 286 no. 48; *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 286 no.17.
58 *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 286 no. 49.
59 BGH, NJW 1963, 1823, 1824.
60 See *Henckel* in Jaeger, InsO, Vol. 1, 1st ed. 2004, section 39 no. 12.
61 BGH, NZI 2002, 375, 376 (II.2.b.bb); BGH, NZI 2005, 384 (II.2.b.aa); BGH, NZI 2010, 180 (n. 11).

Thus, in my view and the view of most legal commentators, German insolvency law continues to supersede the German law rules on default.[62] As a corollary, pursuant to section 39(1) no. 1 InsO, creditors can claim ddefault interest in a German insolvency proceeding only if default occurred prior to the commencement of the proceeding, and only as a subordinated claium.

90. In contrast, the debtor as an entity can still default after the commencement of an insolvency proceeding,[63] notwithstanding the fact that German insolvency law prohibits the enforcement of individual claims against the debtor during an insolvency proceeding.[64] For instance, pursuant to section 286(3) BGB, in the case of a contract for the supply of goods and services default of the individual debtor occurs automatically after the expiration of a 30 day-period following the receipt of a bill.[65]

91. When a claim is filed in a German insolvency proceeding, however, this is treated as being filed against the insolvency estate and not against the debtor as an entity. This is because the debtor as an entity loses its power of disposition (*Verfügungsmacht*) in respect of the insolvency estate following the commencement of the insolvency proceeding (see section 80 InsO)[66]. The insolvency administrator does not act as a representative of the debtor as an entity and is generally not empowered to receive declarations of intent (*Willenserklärungen)* and quasi-declarations of intent (*rechtsgeschäftsähnliche Erklärungen*) on behalf of the debtor as an entity.[67] In practice, there are recognised exceptions to this principle,[68] but the general principle remains in place. As a corollary, the filing of a proof of debt in a German insolvency proceeding is said to be only directed towards the insolvency administrator and not the debtor as a person.[69]

92. As LBIE is subject to an English administration, whether the filing of a proof of debt in the LBIE administration would have the same effect as the filing of a claim in a German insolvency proceeding depends on particularities of English insolvency law. I am not an expert in English insolvency law but the summary of the administration procedure that I have seen does not refer to any similar distinction between the insolvency estate and the debtor as an entity in an English administration. I also note that the administrator acts as agent of the company. Based on these differences, it is not clear to me why the German authorities and commentary regarding a German proof of debt would apply to a proof of debt in an English administration and, based on the limited summary provided to me, I do not think that they would.

93. Whether a termination notice would also incorporate a warning notice would depend upon the contents of the termination notice and, in particular, whether it met the

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62 See *Henckel* in Jaeger, InsO, Vol. 1, 1st ed. 2004, section 39 no. 12 with further references; *Häsemeyer* in Insolvenzrecht, 4th ed. 2007, no. 17/02.

63 *Marotzke*, Gegenseitige Verträge, 3rd ed. 2001, no. 5.91 – 5.94; *Kepplinger*, Das Synallagma in der Insolvenz, 2000, p. 235-237.

64 *Huber*, Handbuch des Schuldrechts, Vol. 1, 1999, section 19 IV 3 c.

65 *Marotzke*, Gegenseitige Verträge, 3rd ed. 2001, no. 5.100, no. 5.102, fn. 361; c.f. *Obermüller*, Insolvenzrecht in der Bankpraxis, 7th ed. 2007, no.2.174.

66 RG, RGZ 121, 207, 211; *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 286 no. 54.

67 *Marotzke*, Gegenseitige Verträge, 3rd ed. 2001, no. 5.95, 5.97; *Graeber* in Münchener Kommentar zur InsO, 3rd ed. 2013, section 56 no. 144 with further references.

68 Cf. s 103(2) sent. 2 InsO: insolvency creditors can force the *insolvency administrator* to elect whether he wants to perform an executory contract or not; s. 109(2) InsO: the insolvency administrator of a lessee and the lessor can both rescind a lease before the lessee has been granted possession of the property (*Wegener* in Uhlenbruck, InsO, 14th ed. 2015, section 109 no. 31 and *Jacoby* in Jaeger, InsO, Vol. 3, 1st ed. 2014, section 109 no. 85: the rescission must be declared to the insolvency administrator, not to the debtor).

69 *Marotzke*, Gegenseitige Verträge, 3rd ed. 2001, no. 5.95; *Löwisch and Feldmann* in Staudinger, BGB, 2014, section 286 no. 66; *Kepplinger*, Das Synallagma in der Insolvenz, 2000, p. 237, 238.

requirements identified in paragraphs [84] – [86] above. Given that the administration application in respect of LBIE resulted in the automatic termination of the German Master Agreement, it would be unusual in my experience for such a termination notice to be given.

94. For the reasons given in response to question 20.4(e) below, however, I do not consider that it was necessary for a warning notice to be given in order for there to be a default by LBIE in respect of the Single Compensation Payment under the German Master Agreement and therefore I do not consider the answer to question 20.4(c) to be relevant.

(d) **Can a non-defaulting party serve a "warning notice" on the defaulting party after the defaulting party has repaid the principal debt owing to the non-defaulting party? If so, would its damages interest claim relate back to the period prior to the defaulting party making payment in full of the principal debt?**

95. As referred to in paragraph [84] above, a warning notice is an unequivocal demand for payment of a sum due. I do not see how a warning notice could be given if the amount in question (i.e. the principal amount of the close-out amount) has already been paid by the debtor. In any event, even if it were possible to serve a warning notice in such circumstances, I do not see how it could have retrospective effect and so any default interest would only accrue from the date on which the notice was given and only to the extent that the principal debt has not been repaid at that time.

(e) **What are the exceptions to the need for a "warning notice" in order for default to occur? Having regard to the Administration Summary, would there have been a serious and definitive refusal of performance by LBIE within the meaning of 286(2) no. 3 of the German Civil Code or would there have been special reasons, weighing the interests of both parties, justifying the immediate commencement of default within the meaning of section 286(2) no. 4 of the German Civil Code when: (a) an administration application was made by or in relation to LBIE; and/or (b) LBIE went into administration, in each case meaning that there was no need for a warning notice?**

Exceptions from the warning notice requirement

96. Pursuant to section 286(2) BGB, no warning notice (*Mahnung*) is required for a default to occur if one of the exceptions applies. These exceptions are:

(i) a date ("according to the calendar") for performance has been specified by the parties (section 286(2) no. 1 BGB) (**Exception 1**);

(ii) an event occurs and a reasonable amount of time ("according to the calendar") for performance has been specified from that event (section 286(2) no. 2 BGB) (**Exception 2**);

(iii) the debtor "seriously and definitively refuses performance" (section 286(2) no. 3 BGB) (**Exception 3**); or

(iv) for special reasons, after weighing the interests of both parties, the immediate occurrence of default is justified (section 286(2) no. 4 BGB) (**Exception 4**).

97. For the reasons given in response to question 20.3(a) above, clause 7(2) of the GMA does not expressly provide for a due date for payment and so Exception 1 does not apply. Exception 2 depends upon whether a reasonable amount of time for performance has been specified following an agreed event. It will depend on the facts whether this exception has been satisfied but I have not been referred to any notice, correspondence or other dealings between the parties to the GMAs that might satisfy this exception in this case. For the reasons given below, I consider that Exception 3 applies in the present case upon LBIE's application for administration. As I consider (for the reasons given below) that Exception 3 is merely a sub-set of the wider Exception 4, there is no need for me to consider Exception 4 separately.

98. Upon an exception applying, the debtor will automatically be in default at the time of the occurrence of the events giving rise to the exception (or at date when the claim becomes due if later) without the need for a warning notice. In other words, the default will occur at the time upon which the last of the two conditions referred to in paragraph [75] above is satisfied.

History of Exceptions 3 and 4

99. Exceptions 3 and 4 were introduced in 2002. Both rules codify the pre-existing jurisprudence by the BGH which, relying on the principles of good faith within the meaning of section 242 BGB, provided for exceptions to the formal warning notice requirement stipulated by section 286(1) BGB. Exception 4, requiring a balancing of interests of the parties, is more broadly phrased than Exception 3 and, thus, can be conceived of as a catch-all provision (*Auffangtatbestand*). While the German legislature explicitly stated that Exception 4 was not meant to broaden the exceptions to a warning notice requirement beyond the group of cases (*Fallgruppen*) already contemplated by the BGH, it should be noted that the case law regarding Exception 4 has evolved since 2002. In any event, given my conclusion that Exception 3 applies there is no need to consider the wider category of Exception 4.

Exception 3: requirements in general

100. Pursuant to Exception 3, default occurs in respect of a due debt without the need for a warning notice to the debtor if "*the debtor seriously and definitively refuses performance*." Requiring the creditor to send a warning notice to a debtor who so refuses to perform would be a mere (and inappropriate) formality and therefore the law dispenses with the need for the creditor to send such a notice.[70] Similarly, a debtor who refuses to perform but then argues that no default could occur absent a warning notice would inappropriately contradict its own actions (*venire contra factum proprium*).[71]

101. A refusal under Exception 3 does not need to be made in any particular form or using particular words.[72] It can be explicit or implicit,[73] provided that the refusal constitutes the debtor's "final say" (*letztes Wort*).[74] Whether the debtor's refusal is its "final say" is a question of fact that needs to be reviewed on a case-by-case basis. The term "letztes Wort" does not imply that the debtor has to refuse outright any future

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70 *Schulze* in Schulze, BGB, 8th ed. 2014, section 286, no. 16

71 *Löwisch* and *Feldmann* in Staudinger, BGB, 2014, section 286 no. 86; *Huber*, Leistungsstörungen, Vol. 1, 1999, p. 448, 449.

72 C.f. *Schwarze* in Staudinger, BGB, 2014, section 281 no. B.94.

73 *See* examples in *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 323, no. 101 f.

74 See *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 286 no. 24; c.f. BGH, NJW 2012, 3714, 3716.

performance. According to case law and commentators, a refusal is "serious and definitive" if the debtor states, or conducts itself in a way where it can be implied, that it may be able to perform some time in the future but not at the time performance is due or within a reasonable grace period.[75]

102. A debtor's refusal to perform within the meaning of Exception 3 can occur at, after or even before the respective claims fall due. A premature refusal will not immediately result in a default since, for the reasons given in paragraph [75] above, default requires that the payment of the claim has become due.[76] However, it is generally accepted that a premature refusal of performance is to be treated as having an ongoing legal effect until performance is due.[77] Consequently, in the case of a premature refusal to perform, a default occurs with respect to the debtor immediately at the time performance is due, without the obligation for the creditor to give a warning notice or the requirement of a second refusal of performance by the debtor.[78] If, on the other hand, the same event (in this case, LBIE's administration application) causes the debt to become due pursuant to clause 7(2) of the GMA and is evidence of the debtor's refusal to perform within the meaning of Exception 3, the default will occur upon the occurrence of that event.

Impact on Exception 3 of LBIE's administration application

103. From the perspective of creditors, LBIE's filing of an application for English administration proceedings conveys the message that LBIE would not pay its outstanding debts (including those such as the Single Compensation Claims that became due upon the presentation of the application) at the time of such filing or within a reasonable grace period. That reading exactly corresponds with the well accepted interpretation of a "serious and definitive refusal" within the meaning of Exception 3 referred to above (see paragraphs [100] and [101]).

104. Whether the filing of a (German) insolvency petition qualifies as a serious and definitive refusal of performance within the meaning of Exception 3 has not been discussed by the German courts or in the legal literature. In the context of the commencement of a German insolvency proceeding, the Munich Court of Appeal[79] rejected such an interpretation in passing and one legal commentator[80] concurred, albeit solely by referring to the decision of the Munich Court of Appeal. The Munich Court of Appeal, dealing with a very particular fact pattern under the old German Bankruptcy Code, did not give any reason for its rejection, nor did it enter into any detailed discussion.[81] In particular, the court did not distinguish between two situations, namely (i) a filing mandated by (insolvency[82]) law (the situation in the Munich case) and (ii) the filing of a petition not mandated by insolvency law or another body of law e.g. corporate law. The difference between these two concepts is explored below in paragraphs [115] – [118]. For the reasons given in those

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75 C.f. *Schwarze* in Staudinger, BGB, 2014, section 281 no. B.96; BGH, NJW 1984, 48, 49.

76 See BGH, NJW-RR 2008, 210 n. 11.

77 *Löwisch* and *Feldmann* in Staudinger, BGB, 2014, section 286 n. 88.

78 *Huber*, Leistungsstörungen, Vol. 1, 1999, p. 450.

79 OLG München, NJOZ 2002, 1561.

80 *Schwarze* in Staudinger, BGB, 2014, section 281, B95.

81 I note that, in the Munich case, the claimant had been informed that the liquidity shortage leading to the bankruptcy would be resolved within days and the court relied on the former section 17 of the German Bankruptcy Code (equivalent to section 103 InsO), stating that the commencement of the insolvency proceedings did not prevent the administrator from electing to perform the contract. This reasoning is not relevant in the current case due to the automatic termination of the GMA pursuant to clause 7(2).

82 As a purely technical matter, until 2008, the requirement to file an insolvency petition was found in corporate law rather than in insolvency law.

paragraphs, I consider that a non-mandatory filing would, of itself, constitute a definitive and serious refusal to perform (in addition to any specific fact pattern that might satisfy the requirements referred to in paragraphs [100] – [102] above).

Analogy with other provisions of BGB

105. Given the lack of any case law directly on point regarding the meaning of a "serious and definitive refusal to perform" for the purposes of Exception 3, I have considered whether there is any commentary on other provisions of the BGB which assist with the analysis either because they explicitly use the identical phrase "serious and definitive refusal" (as is the case with section 323(2) no. 1 BGB and section 281(2) BGB) or which, at least in part, rely on that concept (as is the case with section 323(4) BGB). It is generally accepted that, because of the identical wording, the term "serious and definitive refusal" is to be read identically for Exception 3, sections 281(2) and section 323(2) no. 1 BGB. [83] Moreover, one of the two broad pre-conditions for an anticipatory breach within the meaning of section 323(4) BGB is a "serious and definitive refusal" within the exact meaning of the three provisions. [84]

106. Unfortunately, there are no additional court decisions or legal literature, explicitly dealing with the meaning of "serious and definitive refusal" in the context of the sections referred to above. However, a consideration of the two broad pre-conditions for an anticipatory breach[85] under section 323(4) BGB is, in my opinion, helpful given the analysis in paragraphs [72] to [73] above and my conclusion that, even though clause 7(2) of the GMA has provided for a different *method* of termination (i.e automatic termination rather than notice of acceptance of repudiatory breach), there is still a need for breach or cause as a pre-condition to such automatic termination given that clause 7(2) of the GMA is a GBT. I have therefore examined below which of the two pre-conditions to an anticipatory breach set out in section 323(4) would be satisfied by LBIE's administration application (as the trigger for automatic termination under clause 7(2) of the GMA) to see if this sheds any light on the meaning of a "serious and definitive refusal of performance" for the purposes of Exception 3.

107. Furthermore, any case law or authority[86] preventing the rescission of an agreement following the commencement of insolvency proceedings does not cut across the analysis set out above. Such discussion arises because, as a matter of German insolvency law, it is not possible to exclude an administrator's right to elect whether to perform or cancel an executory agreement. However, this right only arises upon the commencement of a German insolvency proceeding. I understand from the summary

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[83] See e.g., *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 323, no. 98.

[84] *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 323 no. 137.

[85] Just to be clear, I do not think that there was a repudiatory breach pursuant to section 323(4) BGB when LBIE applied for its own administration. Given the automatic termination provided for by clause 7(2) of the GMA, it was not necessary for the non-defaulting counterparty to rely on any repudiatory breach (which, under German law, allows a creditor to rescind) pursuant to section 323(4) BGB. My point is rather that the pre-conditions for a repudiatory breach pursuant to section 323(4) BGB are merely statements of the pre-conditions that need to be satisfied for any termination clause that is a GBT rather than being individually negotiated to be effective. In addition, I am not arguing that clause 7(2) of the GMA only covers the same situations as section 323(4) BGB covers. Indeed, clause 7(2) of the GMA applies more broadly both to individual transactions where the parties have already performed their obligations and to individual transactions where the parties have only entered into but not yet performed their obligations. By contrast, section 323(4) BGB applies only to executory contracts (i.e. where there are outstanding obligations) whereas the right to terminate a contract for good cause pursuant to section 314 BGB applies to contracts where performance has already commenced ("*in Vollzug gesetzt*"). However, whereas the two provisions do not differ in substance with respect to the pre-condition for termination (section 314 BGB) or rescission (section 323(4) BGB), case law and legal doctrine is more elaborated with respect to section 323(4) BGB and, thus, more informative with respect to what constitutes a serious and definitive refusal within the meaning of Exception 3.

[86] *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 323 no. 140.

of the English administration procedure that the administration does not commence upon the application but rather upon the making of the order unless the court provides otherwise.

Pre-conditions for repudiatory breach pursuant to section 323(4) BGB

Introduction

108. Section 323(4) BGB reads as follows: "The creditor may revoke[87] the contract before performance is due if it is obvious that the requirements for revocation will be met". The rule extends a creditor's right pursuant to 323(1) BGB to rescind a reciprocal contract, if "the debtor does not render an act of performance which is due, or does not render it in conformity with the contract".

109. Section 323(4) BGB, thus, deals with the consequences in cases of an anticipatory breach of contractual duties. It entitles the creditor to immediately rescind the contract if it is obvious that, in the future, a breach of contract will occur that would entitle the creditor to rescind the contract. The prognosis of whether a breach will occur must be based on objective factors.[88] A creditor's right to early rescission pursuant to section 323(4) BGB is to be distinguished from section 323(2) BGB which exempts the creditor from the obligation of setting a period of grace after a breach of contract by the debtor has occurred.

110. For certain types of contract (for example contracts giving rise to ongoing obligations (*Dauerschuldverhältnisse*) including loan contracts and employment contracts), the rescission right is substituted by the statutory right to terminate the contract for cause (see section 314 BGB) once the contract has become effective. The substitution of a right of recission for a right of termination does not alter the pre-conditions that have to be satisfied for a right of termination or a right of recission to apply.[89] Similarly, the right to automatic termination under clause 7(2) of the GMA also has to satisfy the relevant pre-conditions as explained above at paragraph [106]. Hence, for the sake of clarity I will focus in the following analysis solely on section 323(4) BGB.

111. Section 323(4) BGB, also introduced in 2002, codified earlier case law on repudiatory breach in the event of (i) a highly probable risk of a failure to perform (*Erfüllungs-, Leistungsgefährdung*) when performance will become due and (ii) a serious and definitive refusal of performance by the debtor.[90]

Risk of failure to perform

112. The first category "risk of failure to perform" requires a prediction about an expected non-performance or poor performance on the due date. The risk of performance failure at the due date has to be definite from the *ex-ante* perspective of an objective creditor in the position of the actual creditor.[91] This includes cases that constitute an almost certain risk of performance failure, except cases of serious and definitive refusal of performance which fall under section 323(4) BGB. An indication of a risk

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87 Although the English translation of this section refers to "revoke" and "revocation", I prefer the expressions "rescind" and "rescission".

88 See *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, section 323 no. 134.

89 C.f. *H. Schmidt* in Bamberger/Roth, BGB, 2014, section 323 no. 8.

90 BT-Drs. 14/6040, p. 186.

91 *Schwarze* in Staudinger, BGB, 2015, section 323 no. B 168.

of performance failure could be the announcement of performance problems by the debtor itself,[92] in particular if these indications have crystallized into a near-certain impending insolvency of the debtor.

Refusal of performance

113. The other category is a serious and definitive refusal to perform.[93] The relevant perspective with respect to these cases is slightly different from the perspective referred to above with respect to the risk of failure to perform-category. For a risk of failure to perform, one focuses on the probability of the future non-performance as a breach of contract; for a refusal to perform, one focuses on the behavior of the debtor who willingly acts in breach of contract.

Characterisation of filing an insolvency petition

114. For the reasons given in paragraphs [100] – [102] above, there may be a serious and definitive refusal of performance based on a particular fact pattern, i.e. if the debtor states or conducts itself in a way where it can be implied that it will not pay its debts when due. I have not been asked to consider any particular fact pattern relating to LBIE but instead, I have considered (in the abstract) whether LBIE's application for administration might constitute such a serious and definitive refusal of performance.

115. Against the two categories of grounds for rescission under section 323(4) BGB referred to above, and for the purpose of characterising the filing of an application for an insolvency proceeding, one has to differentiate *in abstracto* between mandatory and non-mandatory filings. In my view, a mandatory filing is an insolvency petition which a debtor or the directors of a debtor (as the case may be) are required to file pursuant to insolvency law or some other body of law (e.g. corporate law) (for example, pursuant to section 15a InsO) whereas a non-mandatory one is an insolvency petition filed where there is no obligation on the part of the debtor or its directors to do, but when the law permits a non-mandatory filing, e.g. during the period of impending illiquidity (*drohende Zahlungsunfähigkeit*) pursuant to section 15 InsO.

116. For GBTs such as clause 7(2) of the GMA where the filing of an application has certain legal consequences, either form of filing would be sufficient to trigger the automatic termination but that does not mean that both types of application would be treated as a serious and definitive refusal of performance.

117. In my view, a mandatory filing of an application is likely, on balance, to fall into the first category (risk of failure to perform) above. If the law requires the debtor or its directors to file an insolvency application in certain circumstances (for example because of illiquidity (*Zahlungsunfähigkeit*) and over-indebtedness (*Überschuldung*) as is the case pursuant to section 15a InsO) a clause that entitles the creditor to exercise a termination right or (as is the case with clause 7(2) of the GMA) even provides for an automatic early termination upon the filing of an insolvency application, is focused on the debtor's almost certain future failure to perform.

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92 *Schwarze* in Staudinger, BGB, 2015, section 323 no. B 168.

93 See above para. 20 and for the comparable CISG provision *Huber* in in Münchener Kommentar zum BGB, Vol. 3, 6th ed. 2012, CISG, section 72 no. 2, section 64 no.8.

118. By contrast, a non-mandatory filing of an application including one where the directors may be liable in damages for any loss incurred by the creditors due to their failure to file is closer to a refusal of performance, rather than an indication of a future failure to perform. In such a situation the debtor exercises an optional right by choosing to file an application for insolvency proceedings thereby opening up the way for a restructuring of all its debts. It is acknowledged that, even where the debtor files an insolvency petition on a voluntary basis, it could be argued that this should be seen as giving rise of a risk of performance failure falling into the first category. However, whether the non-mandatory filing of an application falls into the first or the second category is a question of emphasis. The emphasis, given the categories established by section 323(4) BGB, is on the debtor's behavior, not on the assessment of the risks of future performance at the time performance will be due.

Further analysis regarding Exception 3

119. I consider that an application for an administration petition will be a serious and definitive refusal to perform for the purposes of Exception 3 even though the application was filed with the court and the court may not serve as a representative of the creditors (which is the case under German law, English law might be different in that aspect). A refusal of performance is neither a declaration of intent (*Willenserklärung*) nor a very similar quasi-declaration of intent (*geschäftsähnliche Handlung*) which both – in general – need to be declared to the recipient. Instead a refusal of performance qualifies as a so-called real act (*Realakt*).[94] Such acts become effective without having to comply with the requirements that a declaration of intent would need to comply with to become effective. As a consequence, LBIE's deliberate behavior is both essential and sufficient.

120. Furthermore, Exception 3 will apply notwithstanding the fact that the BGB and the prevailing opinion in legal literature agree that the exemptions in section 286(2) BGB as well as those of section 323(2) and section 323(4) BGB are subject to strict conditions.[95] The rationale is to prevent the creditor from being in a position to claim these rights in situations where the debtor's threat not to perform is solely a strategic move in his negotiations with the creditor, but not his "final say". That concern does not apply in situations where the debtor files an insolvency petition.

Exception 3 in the context of the Single Compensation Claim

121. For the reasons given in paragraph [74] above, the Single Compensation Claim only arises upon LBIE's administration. I have therefore considered whether the same event (i.e. the administration application) could constitute both a trigger for the payment obligation becoming due and the event triggering Exception 3.

122. The arguments above regarding Exception 3 apply equally to future claims that, with necessity, will come into existence as they do in the case of the Single Compensation Claim which is automatically created with the filling of the application. This can be illustrated by referring to the example of a single securities lending transaction entered into pursuant to a German master agreement. The German master agreement specifically designed for securities lending transactions (*Rahmenvertrag für Wertpapierdarlehen*) (the **SLA**), a copy of which I have enclosed as Annex F to this

[94] See BGH, NJW-RR 1990, 1300, 1301; *Gernhuber* in Festschrift Medicus, 1999, p. 145, 152.
[95] See only *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 286 no. 24 and for example BGH, NJW 2014, 1521, 1524.

report, provides for a close-out mechanism that, in substance, is identical to clauses 7 to 9 of the GMA. In particular, the SLA provides for a Single Compensation Claim in clause 9(3) that is the same as the mechanism in clause 9(1) of the GMA.

123. Under German law, a securities lending transaction qualifies as a loan in kind contract. As a matter of German law, there is a debate as to whether the claim for repayment of the loan comes into existence when the parties enter into the contract, when the money is paid out or only at the moment of termination of the loan contract.[96] Yet, even if one were to take the last position, where there is a high possibility of a future non-performance by the debtor with respect to the repayment of the loan, the creditor would be entitled, upon becoming aware of such a high possibility, to terminate the contract (i.e. it would not have to wait until performance was due). Given that it is possible for Exception 3 to be satisfied before performance is due, I can see no reason why the same event (i.e. the administration application) should not satisfy Exception 3 and be the reason why the amount has become due pursuant to clause 9(3) of the SLA, and by analogy, clause 9(1) of the GMA.

124. In addition, as stated above, the Single Compensation Claim is the functional equivalent of contractual claims in respect of individual transactions that, without clauses 7 to 9 of the GMA, in relation to which the debtor would be in default as a result of the date specified for performance in clause 3 (i.e. Exception 1). Put differently, in the absence of a substitution of all claims in respect of individual transactions entered into under the GMA by the Single Compensation Claim, LBIE would have been in default in respect of these claims. The fact that the parties substituted the Single Compensation Claim for these individual claims cannot exonerate the debtor LBIE from being in default.

B. ISSUE 21

Issue 21 - If the answer to question 20 is that a further claim for damages can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9), how in such circumstances, is the relevant rate to be determined? In particular:

(i) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?

125. Provided that the Damages Interest Claim[97] has been included in the transfer to the third party, it will be calculated by reference to the assignor's losses for the period prior to the transfer and by reference to the assignee's losses for the period following the transfer for the reasons given below. That is the case even if the effect is that the debtor may have to pay more as a consequence of the assignment.[98]

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[96] In the latter sense *Muelbert* in Staudinger, BGB, 2015, section 488 no. 288, 291.

[97] As Issue 21 assumes that the further claim for damages can be included as part of the "rate" applicable to the debt apart from the administration, I have focused on the Damages Interest Claim and not the part of the Damages Claim that cannot be expressed as a rate. I have also considered both the Minimum Damages Interest Claim and the Further Damages Interest Claim (together the Damages Interest Claim) as it makes sense to deal with both together although the definition of Damages Interest Claim in Issue 20 suggests that this question is only really concerned with what I have defined as the Further Damages Interest Claim.

[98] *Busche* in Staudinger, BGB, 2012, section 398 n. 82 with further references; *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 398 n. 19; cf BGH, NVwZ-RR 2008, 674 n. 19, 22 et seq; BGH, NJW-RR 1992, 219 sub II (not taking a stand).

126. As a starting point it should be noted that the transfer of a relevant claim by way of an assignment agreement pursuant to section 398 BGB does not have the effect of *ex lege*[99] also transferring a Minimum Damages Interest Claim or a Further Damages Interest Claim.

127. However, a creditor may transfer the interest claims separately pursuant to section 398 BGB. Such a transfer can be effected under German law either by a separate assignment agreement or by a specific sub-clause in the same assignment agreement. Such an agreement can take the form of an implied agreement accompanying the express assignment agreement transferring the principal claim. Whether such an implied agreement exists regarding Minimum Damages Interest Claims and Further Damages Interest Claims depends on the parties' intentions and their behavior. If the parties' actions and other given circumstances do not suffice in determining whether the parties transferred the claims or not, the following distinction becomes crucial: whether such claims have already come into existence before the transfer or whether, at that time, it is only possible that such claims will come into existence in the future. In cases of doubt, existing claims will not be transferred by an implied agreement while potential future claims will be transferred.[100]

128. For these purposes, a Damages Interest Claim (including both Minimum Damages Interest Claims and Further Damages Interest Claims) will be treated as having already come into existence if, at the time the transfer becomes effective, the debtor is already in default[101] and, in addition, the assignor has already suffered an actual loss. If, at the time the transfer becomes effective, the assignor/former creditor has not suffered any loss, only a claim for Default Interest (pursuant to sections 280, 286 and 288(1) BGB) will be treated as having come into existence (thus requiring express language to transfer such a claim).

129. From the foregoing, it follows that Damages Interest Claims that arose prior to the assignment of the principal claim are calculated by way of an award of damages to the transferor/assignor for losses incurred by him.[102] The assignor can only claim damages for those losses he actually incurred until the transfer became effective. If that Damages Interest Claim is assigned, the assessment of damages for the pre-transfer period will relate to the assignor even though the assignee will be entitled to receive those damages by virtue of the assignment.

130. Conversely, if future (potential) Damages Interest Claims are transferred by way of an (express or implied) assignment agreement, the assignee is entitled to assert any Damages Interest Claims arising from that time onwards. For the purposes of determining whether the relevant person suffered any loss, the assignee is the relevant person, not the assignor. In other words, since, pursuant to sentence 2 of section 398 BGB, the assignment has the effect that the new creditor steps into the shoes of the previous creditor, the assignee is the only person who can claim damages and he is only able to claim compensation for those losses that he incurred himself.[103]

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[99] Section 401 BGB, which provides for a transfer ex lege in certain situations, does not apply. See *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 401 n. 6 with further references.

[100] BGH, NJW-RR 1992, 219 sub II; *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 401 n. 6 (with further references); cf. BGH, BGHZ 35, 172, 173 sub 2; BGH, NJW 2006, 1662 n 9-10.

[101] Pursuant to section 286 BGB, see above 20.2(a).

[102] *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 401 n. 6 with further references.

[103] BGH, NJW 2006, 1662 n. 9; BGH, NJW-RR 1992, 219 sub I; BGH, BGHZ 128, 371, 376 sub II 3 a and *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 288 n. 6. By way of exception, if the parties transfer the relevant (principal) claim as an assignment by way of

131. Finally, it should be noted that the Minimum Damages Interest Claim, awarding a rate determined by statute or by contract, does not depend on the situation of the assignor or of the assignee.

(ii) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?

132. A third party will be precluded from asserting a Damages Interest Claim if such a claim arose prior to the assignment and was not transferred to the third party by an (express or implied) assignment agreement. In addition, a third party will be precluded from asserting a Damages Interest Claim in respect of its own losses incurred after the date of the assignment if, as an exception to the general rule referred to in paragraphs [127] and [130] above, the parties did not transfer the future (potential) Damages Interest Claim.

(iii) where does the burden of proof lie in establishing a Damages Interest Claim, and what is required to demonstrate, that a relevant creditor has or has not met such requirement?

133. The burden of proof in establishing a Damages Interest Claim lies with the claimant. As a general principle of German civil law the creditor has to carry forward and to prove the facts necessary to establish a claim.

134. Whether a relevant creditor has or has not met such requirement, as a matter of German law, is not determined by German civil law but by the rules of German civil procedure on the standard of proof, in particular by section 286 ZPO.

21.1 If LBIE's counterparty has transferred its claim against LBIE under the German Master Agreement (the "relevant claim") to a transferee, in what circumstances, if any, can the transferee of that relevant claim assert any entitlement to a claim for default interest under section 288(1) BGB or a Damages Interest Claim[104] as a matter of German law?

135. The transferee of the relevant claim can assert both a claim for default interest under section 288(1) BGB (a Minimum Damages Interest Claim) and a Further Damages Interest Claim for losses he actually incurred after the date of transfer (sections 280, 286, 288(4) BGB) if the parties expressly or impliedly (see paragraphs [127] to [130] transferred future claims (i.e. claims arising after the transfer becoming legally effective) for default interest as well as Further Damages Interest Claims.

136. Moreover, the transferee will be entitled to assert Minimum Damages Interest Claims and Further Damages Interest Claims for the period before the transfer becoming effective if the parties transferred these claims, as well. Such pre-existing Damages Interest Claims will be assessed by reference to the losses actually incurred by the transferor.

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security, the assignor will be the relevant person to determine the losses suffered for the purpose of determining the default damages. See BGH, NJW 2006, 1662 n. 10 et seq.

[104] I use the expression Further Damages Interest Claim.

137. In paragraph 13 of his original report, Dr Fischer states that, in his opinion, "*the debtor must not be exposed to the disadvantage of a greater damage of the assignee*". This conclusion, which Dr Fischer seeks to explain at paragraphs 96 – 106 of his original report is apparently based on the case law of the German Federal Court of Justice and section 404 BGB. At paragraph 105 of his original report, Dr Fischer states as follows:

> "*The considerations of the German Federal Court of Justice – which in my view are correct – together with the general principle in German Civil Law that contracts cannot be made that impose obligations on third parties, support the view that a change of creditor cannot entail greater obligations for the debtor, including in the sphere of damages, than there would have been to the original creditor.*"

138. I disagree with this conclusion. Provided that the Damages Interest Claim[105] has been included in the transfer to a third party, it will be calculated by reference to the assignor's losses for the period prior to the transfer and by reference to the assignee's losses for the period following the transfer. That is the case even if the effect is that the debtor may have to pay more as a consequence of the assignment. As admitted in Dr Fischer's original report (paragraph 101) this corresponds with the prevailing opinion in the German legal literature,[106] while only a few authors take a contrary point of view.[107]

139. Sections 404, 406 and 407 BGB provide for several explicit rules which protect the debtor against legal disadvantages as a result of the assignment, i.e. disadvantages in his legal position as a consequence of the assignment, clearly demonstrating that the protection of the debtor provided by statutory law is not absolute.[108] Even if, as stated in Dr Fischer's original report (paragraph 105), sections 404, 406 and 407 BGB imply a general principle that a debtor should not suffer any disadvantages as a consequence of the transfer, this principle would be limited to legal disadvantages. It cannot be extended to factual disadvantages, e.g. disadvantages that may result from the fact that the new creditor (assignee) is behaving differently from the former creditor (assignor). This limitation is broadly accepted; even in Dr Fischer's original report (paragraph 104) the generally applicable principle is limited to "*the legal position of the debtor*".

140. Insofar as damages are higher by referring to the person of the assignee than by referring to the person of the assignor, this presents a factual disadvantage, not a "legal" disadvantage.[109] The assignment does not affect the legal basis for calculating damages laid down in sections 249, 252 BGB.[110] The only difference is a factual one: a change in the person serving as the point of reference for calculating damages. A comparison of the situations dealt with by sections 404, 406 and 407 BGB and the question at hand, namely the replacement of the person serving as the point of

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105 Any claim pursuant to section 280(1), in conjunction with sections 280(2), 286 and 288 BGB for damages incurred which are capable of being expressed as a rate (see paragraph [26] of my opinion).

106 *Busche* in Staudinger, BGB, 2012, section 398 n. 82; *Grüneberg* in Palandt, BGB, 74th ed. 2015, section 398 n. 19; *Schwenzer* in AcP 182 (1982), 214, 234; *Hoffmann* in WM 1994, 1464, 1466; *Gernhuber* in Festschrift Raiser, 1974, p. 57, 86; cf BGH, NVwZ-RR 2008, 674 n. 19 et seq (by citing *Grüneberg* in Palandt, 67th ed. 2008, section 398 no. 18a); BGH, NJW-RR 1992, 219 sub (not taking a stand).

107 See paragraph. 103 of Dr Fischer's original report for references.

108 *Busche* in Staudinger, BGB, 2012, section 404 n. 2.

109 See *von Olshausen*, Gläubigerrechte und Schuldnerschutz bei Forderungsübergang und Regreß, 1988, p. 52 f.

110 Moreover, the Minimum Damages Interest Claim (section 288 BGB), awarding a rate determined by statute or by contract, does not depend on the situation of the assignor or of the assignee.

reference for calculating damages, offers obvious support for the categorization as a mere factual disadvantage. Sections 404, 406 and 407 BGB deal with a debtor's contractual or statutory position vis-à-vis the creditor and which should not be affected by the assignment. Therefore, as stated in Dr Fischer's original report (paragraph 105) these provisions "govern the question of objections, the capacity to offset, and the question of performance", which are all legal objections – in a broad sense – against the assigned claim. These provisions cannot be extended also to protect the debtor against factual disadvantages that result from facing a different person as creditor.

21.2 If such a transferee can assert either claim as a matter of German law, is the claim for damages (only) that of LBIE's original counterparty, or is the transferee entitled to assert a claim for damages in place of or in addition to that of LBIE's original counterparty?

141. The transferee is entitled to assert a claim for damages with respect to those losses he suffered after the transfer became legally effective. Whether, in place of LBIE's original counterparty, he is also entitled to assert a claim for damages with respect to losses suffered by LBIE's original counterparty depends on whether the parties transferred that claim, as well. See paragraphs [127] to [130] above in this respect.

21.3 If such a transferee is entitled to assert either claim for damages either in place of or in addition to that of LBIE's original counterparty, what has to be established as a matter of fact and law for such a claim to be sustained as a matter of German law?

142. For Damages Interest Claims to be asserted by the transferee as a matter of German law, the requirements set out in paragraph [29] above must be established.

143. As regards the calculation of damages, what has to be established depends on whether:

(a) the transferee asserts a claim for damages in respect of losses suffered by himself after the date of transfer or losses suffered by the transferor prior to the date of transfer (see paragraphs [127] to [130] above); and

(b) whether the creditor is a bank or another investor entitled to use the simplified method of calculating damages or another creditor which is only entitled to use a somewhat simplified method of calculating losses from foregone investment opportunities (see paragraphs [51] to [56] above).

21.4 What should the calculation of damages in respect of the relevant claim measure: the damages of LBIE's original counterparty (transferor), the damages of the transferee, or (for example on a *pro rata temporis* basis) the damages of both the transferor and the transferee?

144. The calculation of the Damages Interest Claims has to take into account both the damages of LBIE's original counterparty and of the transferee on a *pro rata temporis* basis, i.e.

(a) the damages of LBIE's original counterparty from the time when LBIE was in default until the time of the assignment becoming legally effective, and

(b) the damages of the transferee from the time of the assignment becoming legally effective until damages have been awarded.

21.5 In particular, under what circumstances are assigned claims precluded, for example because an assignee claiming default interest and/or (further) damages has been aware of the obligor's default prior to the assignment?

145. The mere fact that a transferee asserting a Minimum Damages Interest Claim and/or Further Damages Interest Claim was aware of the debtor's default prior to the assignment does not preclude the transferee from asserting the claim.

21.6 Where does the burden of proof lie in relation to such issues, as a matter of German law?

146. In general, as a matter of German civil law, the burden of proof lies with the party which benefits from the specific aspect that needs to be proven.

IV. STATEMENT REGARDING THE EXPERT'S DUTY TO THE COURT

147. I have understood that I owe an overriding duty to the court to assist the court by providing objective, unbiased opinions within the areas of my expertise and that I should not assume the role of an advocate on behalf of the party from whom I receive instructions.

V. STATEMENT OF TRUTH

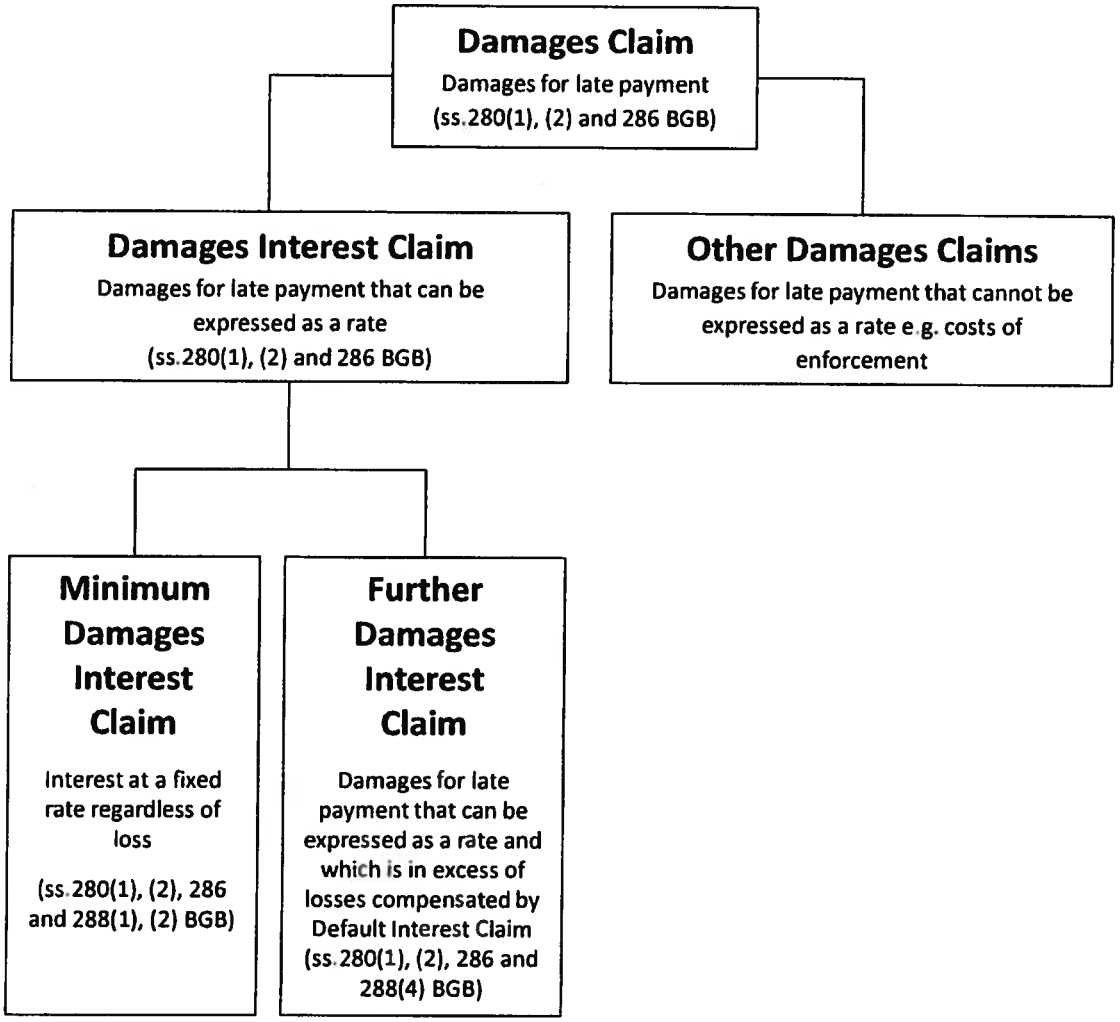
148. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those what are within my knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matter to which they refer.

Professor Peter O. Mülbert

Dated: 2 October 2015

SCHEDULE

DEFINITIONS USED IN GERMAN LAW REPORT



ANNEX A

BIOGRAPHY

CURRICULUM VITAE

Peter O. Mülbert

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Position:

Professor of Law, Faculty of Law and Economics, Fellow, Gutenberg Research College, and Director of the Center for German and International Law of Financial Services, University of Mainz

Occupational History:

Fellowship, Gutenberg Research College, University of Mainz (2010 -); Visiting Professor, Harvard Law School (2011, 2007); University of Tokyo (2013, 2009); Seoul National University (2012); Professor, University of Mainz (1999 -); University of Trier (1995 – 1999); University of Heidelberg (1994 – 1995)

Other Current and Recent Affiliations:

Panel of Financial Services Experts of the Committee on Economic and Monetary Affairs of the European Parliament (2006 - 2014)

Administrative Appeal Committee („Widerspruchsausschuss") at the Federal Financial Supervisory Authority („BaFin") (2002 -)

Advisory Council („Übernahmebeirat") at the Federal Financial Supervisory Authority (2002 -)

Research Associate, European Corporate Governance Institute (2003 -)

Executive Board, Bankrechtliche Vereinigung – wissenschaftliche Gesellschaft für Bankrecht e.V. (German association of lawyers for banking law and capital market law)

Advisory Board, Frankfurt Institute for Risk Management and Regulation (2015 -)

Editorial Board, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (2007 -) (journal for commercial law, corporate law, capital market law, competition law)

Editorial Advisory Board, *Wertpapiermitteilungen* (2002 -) (journal for banking law, capital market law, corporation law)

Editorial Board, *Neue Zeitschrift für Gesellschaftsrecht* (2007 -) (journal for corporation law)

Foreign Contributing Editor, *Banking & Finance Law Review* (2009 -)

Other Activities:

Expert Witness, Finance Committee of the German Parliament; Federal Ministry of Finance; Federal Financial Supervisory Authority; Hessian Ministry of Economy, Transport, Urban and Regional Development; The German Council of Economic Experts; Gesellschaft für Anlagen- und Reaktorsicherheit (GRS) mbH; Landgericht München I (court of first instance for the district Munich I)

Speaker, 67th German Jurists Forum („Deutscher Juristentag") (2008)

Reporter, 61st German Jurists Forum („Deutscher Juristentag") (1996)

Scientific Advisory Board at the Max-Planck-Institute for Comparative and International Private Law, Hamburg (2009 - 2014)

Editorial Advisory Board, *CORPORATE FINANCE law* (2010 - 2013)

Supervisory Board, DEURAG AG (2003-2005)

Chairman, Supervisory Board, mc munich capital AG (2000-2002)

Education:

University of Munich, „Habilitation" (1994)

Baden-Württemberg, Bar Exam („2. Staatsexamen"), 1985

University of Tübingen, Doctorate in Law (1984)

University of Tübingen, J.D. („1. Staatsexamen") (1981)

Principal Areas of Interest:

German and European company law, capital markets law, banking and financial services law

ANNEX B

MATERIALS RELIED UPON IN MAKING THE REPORT

1. Court decisions

1.1 Federal High Court (*Bundesgerichtshof – BGH*)

BGH, decision of 29 October 1952 – II ZR 47/52 = NJW 1953, 337

BGH, decision of 18 May 1961 – VII ZR 39/60 = BGHZ 35, 172

BGH, decision of 04 July 1963 – II ZR 174/61 =NJW 1963, 1823, 1824.

BGH, decision of 08 November 1973 – III ZR 161/71 = WM 1974, 128

BGH, decision of 01 February 1974 – IV ZR 2/72 = BGHZ 62, 103

BGH, decision of 26 April 1979 - VII ZR 188/78 = BGHZ 74, 231

BGH, decision of 19 September 1983 – VIII ZR 84/82 =NJW 1984, 48, 49

BGH, decision of 28 April 1988 – III ZR 57/87 = BGHZ 104, 337

BGH, decision of 05 July 1990 – VII ZR 352/89 =NJW-RR 1990, 1300, 1301

BGH, decision of 25 September 1991 – VIII ZR 264/90 = NJW-RR 1992, 219

BGH, decision of 08 October 1991 – XI ZR 259/90 = NJW 1992, 109

BGH, decision of 18 February 1992 – XI ZR 134/91 = NJW 1992, 1620

BGH, decision of 09 February 1995 – III ZR 174/93 = BGHZ 128, 371

BGH, decision of 03 March 1998 – X ZR 70-96 = NJW 1998, 2132

BGH, decision of 25 April 2002 – IX ZR 313/99 = NZI 2002, 375, 376

BGH, decision of 30 November 2004 – XI ZR 285/03 = BGHZ 161, 196

BGH, decision of 22 November 2005 – VI ZR 126/04 = NJW 2006, 687

BGH, decision of 07 April 2005 – IX ZR 138/04, NZI 2005, 384 (II.2.b.aa)

BGH, decision of 09 February 2006 – I ZR 70/03 = NJW 2006, 1662

BGH, decision of 12 July 2006 – X ZR 157/05 = NJW 2006, 3271

BGH, decision of 28 September 2007 – V ZR 139/06 = NJW-RR 2008, 210

BGH, decision of 12 June 2008 – III ZR 38/07 = NVwZ-RR 2008, 674

BGH, decision of 17 December 2009 – IX ZR 214/18 = NZI 2010, 180

BGH, decision of 20 July 2011 – IV ZR 75/09 = NJW 2011, 3648

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BGH, decision of 08 May 2012 – XI ZR 262/10 = NJW 2012, 2427

BGH, decision of 14 June 2012 – VII ZR 148/10 = NJW 2012, 3714, 3716

BGH, decision of 12 February 2014 – XII ZR 76/13 = NJW 2014, 1521, 1524

BGH, decision of 29 April 2015 – VIII ZR 104/14 = (juris) sub II 2 c aa

1.2 Higher Regional Courts and Regional Courts

Higher Regional Court of Köln (Oberlandesgericht – OLG), decision of 09 January 1969 – 12 U 149/68 = NJW 1969, 1388

Higher Regional Court of Berlin (Kammergericht – KG), decision of 18 February 2014 – 26a U 60/13 (juris)

Regional Court of Verden (Landgericht – LG), decision of 23 May 1967 – 2 S 53/67 = VersR 1967, 869

Higher Regional Court of München (Oberlandesgericht – OLG), decision of 06 July 2001 - 25 U 1549/01 = NJOZ 2002, 1561

RG (Reichsgericht = former High Court of Germany until 1945), decision of 06 June 1928 – I 338/27 =RGZ 121, 207, 211

2. Books and Articles

Bamberger/Roth, Bürgerliches Gesetzbuch, 36th ed., 2014

Fuchs, Close-out Netting, Collateral und systemisches Risiko, 1st ed., 2013

Gernhuber, Synallagma und Zession, in: Festschrift für Ludwig Raiser, 1974, p. 57, 86

Häsemeyer, Insolvenzrecht, 4th ed., 2007

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Soergel, Bürgerliches Gesetzbuch, volume 3/2, 13th ed. 2014

Staudinger, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), §§ 255-304, 2014

Staudinger, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), §§ 315-323, 2015

Staudinger, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), §§ 397-432, 2012

Staudinger, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), §§ 488-490; 607-697, revised ed. 2015

Uhlenbruck, Insolvenzordnung (Commentary on the German Insolvency Code), 14th ed, 2015

von Olshausen, Gläubigerrecht und Schuldnerschutz bei Forderungsübergang und Regreß, 1988

Zerey, Finanzderivate, 3rd ed., 2013

3. Statutory materials

3.1 The German Civil Code (*Bürgerliches Gesetzbuch - BGB*)

Section 242 Performance in good faith (*Leistung nach Treu und Glauben*)

Section 246 Statutory interest rate (*Gesetzlicher Zinssatz*)

Section 247 Basic rate of interest, (*Basiszinssatz*)

Section 249 Nature and extent of damages (*Art und Umfang des Schadensersatzes*)

Section 252 Lost profits (*Entgangener Gewinn*)

Section 271 Time of performance (*Leistungszeit*)

Section 276 Responsibility of the obligor (*Verantwortlichkeit des Schuldners*)

Section 280 Damages for breach of duty (*Schadensersatz wegen Pflichtverletzung*)

Section 281 Damages in lieu of performance for nonperformance or failure to render performance as owed (*Schadensersatz statt der Leistung wegen nicht oder nicht wie geschuldet erbrachter Leistung*)

Section 286 Default of the obligor (*Verzug des Schuldners*)

Section 288 Default interest and other damage due to default (*Verzugszinsen und sonstiger Verzugsschaden*)

Section 307 Test of reasonableness of contents (*Inhaltskontrolle*)

Section 314 Termination, for a compelling reason, of contracts for the performance of a continuing obligation (*Kündigung von Dauerschuldverhältnissen aus wichtigem Grund*)

Section 323 Revocation for non-performance or for performance not in conformity with the contract (*Rücktritt wegen nicht oder nicht vertragsgemäß erbrachter Leistung*)

Section 398 Assignment (*Abtretung*)

Section 401 Passing of accessory rights and preferential rights (*Übergang der Neben- und Vorzugsrechte*)

Section 404 Objections of the obligor (*Einwendungen des Schuldners*)

Section 406 Set-off in relation to the new creditor (*Aufrechnung gegenüber dem neuen Gläubiger*)

Section 407 Legal acts in relation to the previous creditor (*Rechtshandlungen gegenüber dem bisherigen Gläubiger*)

3.2 The German Civil Procedure (*Zivilprozessordnung - ZPO*)

Section 286 Evaluation of evidence at the court's discretion and conviction (*Freie Beweiswürdigung*)

Section 287 Investigation and determination of damages; amount of the claim (*Schadensermittlung; Höhe der Forderung*)

3.3 German Insolvency Code (*Insolvenzordnung - InsO*)

Section 15 Right of Legal Entities and Companies without Legal Personality to Apply for Commencement of Insolvency Proceedings (*Antragspflicht bei juristischen Personen und Gesellschaften ohne Rechtspersönlichkeit*)

Section 80 Transfer of Right of Management and Right of Disposal (*Übergang des Verwaltungs- und Verfügungsrechts*)

Section 103 Insolvency Administrator's Right of Choice (*Wahlrecht des Insolvenzverwalters*)

Section 109 Debtor as Tenant or Lessee (*Schuldner als Mieter oder Pächter*)

3.4 Old Bankruptcy Code (*Konkursordnung*)

Section 17 Administrator's Right of Choice concerning bilateral agreements [*Wahlrecht des Verwalters bei zweiseitigen Verträgen*]

4 Bundestag-printed paper (*Bundestag-Drucksache*)

BT-Drs. 14/6040

ANNEX C

GERMAN MASTER AGREEMENT

	Rahmenvertrag vom

Rahmenvertrag für Finanztermingeschäfte

Zwischen

Name und Anschrift des Vertragspartners

(nachstehend „Vertragspartner" genannt)

und

Name und Anschrift der Bank

(nachstehend „Bank" genannt)

wird Folgendes vereinbart:

1. Zweck und Gegenstand des Vertrages

(1) Die Parteien beabsichtigen, zur Gestaltung von Zinsänderungs-, Währungskurs- und sonstigen Kursrisiken im Rahmen ihrer Geschäftstätigkeit Finanztermingeschäfte abzuschließen, die

a) den Austausch von Geldbeträgen in verschiedenen Währungen oder von Geldbeträgen, die auf der Grundlage von variablen oder festen Zinssätzen, Kursen, Preisen oder sonstigen Wertmessern, einschließlich diesbezüglicher Durchschnittswerte (Indices), ermittelt werden, oder

b) die Lieferung oder Übertragung von Wertpapieren, anderen Finanzinstrumenten oder Edelmetallen oder ähnliche Leistungen

zum Gegenstand haben. Zu den Finanztermingeschäften gehören auch Options-, Zinsbegrenzungs- und ähnliche Geschäfte, die vorsehen, dass eine Partei eine Leistung nur dann zu erbringen oder dass Leistungen von einer Bedingung abhängig sind.

(2) Für jedes Geschäft, das unter Zugrundelegung dieses Rahmenvertrages abgeschlossen wird (nachstehend „Einzelabschluss" genannt), gelten die nachfolgenden Bestimmungen. Alle Einzelabschlüsse bilden untereinander und zusammen mit diesem Rahmenvertrag einen einheitlichen Vertrag (nachstehend der „Vertrag" genannt), sie werden im Sinne einer einheitlichen Risikobetrachtung auf dieser Grundlage und im Vertrauen darauf getätigt.

2. Einzelabschlüsse

(1) Haben sich die Parteien über einen Einzelabschluss geeinigt, so wird die Bank dem Vertragspartner schriftlich, fernschriftlich, telegraphisch, durch Telefax oder in ähnlicher Weise dessen Inhalt bestätigen.

(2) Jede Partei ist berechtigt, eine unterzeichnete Ausfertigung des Einzelabschlusses zu verlangen, die jedoch keine Voraussetzung für dessen Rechtswirksamkeit ist.

(3) Die Bestimmungen des Einzelabschlusses gehen den Bestimmungen dieses Rahmenvertrages vor.

3. Zahlungen und sonstige Leistungen

(1) Jede Partei wird die von ihr geschuldeten Zahlungen und sonstigen Leistungen spätestens an dem im Einzelabschluss genannten Fälligkeitstagen an die andere Partei erbringen.

(2) Sämtliche Zahlungen sind in der aufgrund des Einzelabschlusses geschuldeten Vertragswährung kostenfrei und in der Zahlungen in dieser Währung handelsüblichen Weise auf das im Einzelabschluss genannte Konto des Zahlungsempfängers in am Fälligkeitstag frei verfügbaren Mitteln zu leisten.

(3) Haben beide Parteien an demselben Tag aufgrund des Vertrages Zahlungen in der gleichen Währung zu leisten, zahlt die Partei, die den höheren Betrag schuldet, die Differenz zwischen den geschuldeten Beträgen. Die Bank wird dem Vertragspartner den zu zahlenden Differenzbetrag rechtzeitig vor dessen Fälligkeit mitteilen.

(4) Zahlt eine Partei nicht rechtzeitig, so werden bis zum Zeitpunkt des Eingangs der Zahlung des fälligen Betrages Zinsen hierauf zu dem Satz berechnet, der um den in Nr. 17 Abs. 3 festgelegten Zinszuschlag über dem Zinssatz liegt, den erstklassige Banken für jeden Tag, für den diese Zinsen zu berechnen sind, untereinander für täglich fällige Einlagen am Zahlungsort in der Währung des fälligen Betrages berechnen. Die Geltendmachung eines weiteren Schadens ist nicht ausgeschlossen.

(5) Ist ein Fälligkeitstag kein Bankarbeitstag, so sind die Zahlungen und sonstigen Leistungen nach Maßgabe des Einzelabschlusses wie folgt zu erbringen:

a) am unmittelbar vorhergehenden Bankarbeitstag oder
b) am unmittelbar folgenden Bankarbeitstag oder
c) am unmittelbar folgenden Bankarbeitstag, sofern dieser jedoch in den nächsten Kalendermonat fällt, am unmittelbar vorhergehenden Bankarbeitstag.

4. Bankarbeitstag

„Bankarbeitstag" im Sinne dieses Vertrages ist jeder Tag, an dem die Banken an dem in Einzelabschluss genannten Primärplatz/Finanzplätzen für Geschäfte, einschließlich des Handels in Fremdwährungen und der Entgegennahme von Fremdwährungseinlagen, geöffnet sind (mit Ausnahme des Samstags und des Sonntags).

5. Berechnungsgröße

(1) Ist in einem Einzelabschluss ein variabler Zinssatz, Kurs, Preis oder sonstiger Wertmesser („variable Größe") vereinbart, so wird die Bank dem Vertragspartner an dem Tag, an dem diese variable Größe zu bestimmen ist („Feststellungstag"), oder unverzüglich danach die zugrunde liegende Berechnungsgröße mitteilen.

(2) Sollte die im jeweiligen Einzelabschluss vereinbarte Bezugsgröße an einem Feststellungstag nicht ermittelt werden können, werden die Parteien diese unter Rückgriff auf Berechnungsgrundlagen festlegen, die den im Einzelabschluss vereinbarten möglichst nahe kommen. Falls die Bezugsgröße ein interbankenZinssatz ist und innerhalb von 30 Tagen nicht einvernehmlich festgelegt worden ist, gilt als Bezugsgröße das arithmetische Mittel der Zinssätze, zu denen zwei von der Bank zu benennende, international angesehene Banken auf dem interbankenmarkt erstklassigen Banken Termingelder mit entsprechender Laufzeit in der Vertragswährung in ungefähr Höhe des Bezugsbetrages gegen 11:00 Uhr (Ortszeit am betreffenden interbankenmarkt) am Feststellungstag angeboten hatten.

(3) Ein als Bezugsgröße dienender Zinssatz („Basis-Satz") ist gegebenenfalls auf den nächsten ¹/₁₀₀ Prozentpunkt aufzurunden.

6. Berechnungsweise bei zinssatzbezogenen Geschäften

(1) Der aufgrund eines Einzelabschlusses jeweils zu zahlende Festbetrag ist das Produkt aus (a) dem dafür vereinbarten Bezugsbetrag, (b) dem nach Nr. 5 und dem Einzelabschluss errechneten variablen Zinssatz („variabler Satz"), als Dezimalzahl ausgedrückt, sowie (c) dem Quotienten im Sinne des Abs. 5.

(2) Der aufgrund eines Einzelabschlusses jeweils zu zahlende Festbetrag ist, falls er im Einzelabschluss betragsmäßig festgelegt wird, der dort genannte Betrag. Andernfalls ist er das Produkt aus (a) dem dafür vereinbarten Bezugsbetrag, (b) dem im Einzelabschluss vereinbarten festen Zinssatz („Festsatz"), als Dezimalzahl ausgedrückt, sowie (c) dem Quotienten im Sinne des Abs. 5.

(3) Im Fall von Zinsbegrenzungsgeschäften ist der variable Satz nach Maßgabe des Einzelabschlusses vorbehaltlich Absatz 4 jeweils

a) für Zahlungen durch die als Überschuss-Zahler (oder Cap-bzw. FRA-Verkäufer) bezeichnete Partei der vereinbarte Basis-Satz abzüglich des Betrags, der im Einzelabschluss als Höchstsatz (oder Cap-Rate) bzw. Terminsatz festgelegt wird, und

b) für Zahlungen durch die als Mindestbetrags-Zahler (oder Floor-Verkäufer bzw. FRA-Käufer) bezeichnete Partei der Satz, der im Einzelabschluss als Mindestsatz (oder Floor-Rate) bzw. Terminsatz festgelegt wird, abzüglich des vereinbarten Basis-Satzes.

(4) Wird eine Zahlung nicht nach Absatz 3 berechnet, so ist zu Beginn des betreffenden Berechnungszeitraums gemäß Nr. 8 der nach Abs. 1 oder 2 zu ermittelnde Betrag abzuändern, indem er durch einen Betrag dividiert wird, der sich aus einem Berechnungszeitraum von einem Jahr oder weniger nach der Formel

$$1 + \frac{L \times D}{B}$$

und bei einem Berechnungszeitraum von mehr als einem Jahr nach der Formel

$$(1 + L)^{\frac{D}{B}}$$

errechnet.

Dabei ist

L der für den betreffenden Berechnungszeitraum ermittelte Basis-Satz oder sonstige vereinbarte Diskontsatz, als Dezimalzahl ausgedrückt, also z. B. 0,07 im Fall eines Basis- oder Diskontsatzes von 7%,

D die Anzahl der Tage des Berechnungszeitraums,

B 360, es sei denn, die vereinbarte Vertragswährung ist eine Währung, für die der Basis- oder sonstige vereinbarte Diskontsatz nach Marktusance auf der Grundlage von 365 Tage im Falle eines Schaltjahres 366 Tagen berechnet wird, in diesem Fall ist B = 365 bzw. 366.

Diese Regelung gilt, sofern nichts anderes vereinbart ist, stets für Terminsatzvereinbarungen (Forward Rate Agreements). Bei sonstigen Geschäften gilt sie nur dann, wenn im Einzelabschluss eine Diskontierung vereinbart ist.

(5) „Quotient" ist nach Maßgabe des Einzelabschlusses

a) die Anzahl der tatsächlich abgelaufenen Tage des Berechnungszeitraums, für den der Betrag zu berechnen ist, dividiert durch die Zahl 360 („360/360"), oder

b) die Anzahl der abgelaufenen Tage dieses Berechnungszeitraums, berechnet auf der Basis eines 360-Tage-Jahres mit 12 Monaten zu je 30 Tagen, dividiert durch die Zahl 360 („360/360"), oder

c) die Anzahl der tatsächlich abgelaufenen Tage dieses Berechnungszeitraums, dividiert durch die Zahl 365 bzw. im Fall von Schaltjahren 366 („365/365"), oder

d) die Anzahl der tatsächlich abgelaufenen Tage dieses Berechnungszeitraums, dividiert durch die Zahl 365 („365/365").

(6) „Berechnungszeitraum" ist der Zeitraum, der mit dem Anfangsdatum des Einzelabschlusses oder einem Zahlungstermin (einschließlich) beginnt und mit dem nächstfolgenden Zahlungstermin oder dem Enddatum (ausschließlich) endet, oder sofern die Parteien im Einzelabschluss in Bezug auf variable Beträge „Festsetzungstag/Festsetzungstag" vereinbart haben, der Zeitraum, der mit dem Anfangsdatum des Einzelabschlusses oder einem Festsetzungstag (einschließlich) beginnt und mit dem nächstfolgenden Festsetzungstag oder dem Enddatum (ausschließlich) endet. „Zahlungstermin" ist jeder Tag, an dem nach Maßgabe des Vertrages ist der Tag, an dem, gegebenenfalls auf Grund einer Anpassung gemäß Nr. 3 Abs. 5, die Zahlung tatsächlich zu leisten ist. „Festsetzungstag" ist der vertraglich vorgesehene Zahlungstag ohne Berücksichtigung einer solchen Anpassung.

(7) Ist ein variabler Betrag oder ein nach Abs. 2 Satz 2 zu berechnender Festbetrag zu zahlen, so wird die Bank diesen im ersten Fall [illegible] mit der jeweils anwendbaren Bezugsgröße des Vertragspaares ermitteln.

7. Beendigung

(1) Sobald Einzelabschlüsse gültig und noch nicht vollständig abgewickelt sind, ist der Vertrag nur aus wichtigem Grund kündbar. Ein solcher liegt auch dann vor, wenn eine fällige Zahlung oder sonstige Leistung – aus welchem Grund auch immer – nicht innerhalb von fünf Bankarbeitstagen nach Benachrichtigung des Zahlungs- oder Leistungspflichtigen vom Ausbleiben des Eingangs der Zahlung oder sonstigen Leistung beim Empfänger eingegangen ist. Die Benachrichtigung und die Kündigung müssen schriftlich, fernschriftlich, telegraphisch, durch Telefax oder in ähnlicher Weise erfolgen. Eine Teilkündigung, insbesondere die Kündigung einzelner und nicht aller Einzelabschlüsse, ist ausgeschlossen. Nr. 12 Abs. 5 (b) bleibt unberührt.

(2) Der Vertrag endet ohne Kündigung im Insolvenzfall. Dieser ist gegeben, wenn das Konkurs- oder ein sonstiges Insolvenzverfahren über das Vermögen einer Partei beantragt wird und diese Partei entweder den Antrag selbst gestellt hat oder Zahlungsunfähig oder [illegible] in einer Lage ist, die die Eröffnung eines solchen Verfahrens rechtfertigt.

(3) Im Fall der Beendigung durch Kündigung oder Insolvenz (nachstehend „Beendigung" genannt) ist keine Partei mehr zu Zahlungen oder sonstigen Leistungen nach Nr. 3 Abs. 1 verpflichtet, die gleichzeitig oder später fällig geworden wären, an die Stelle dieser Verpflichtungen treten Ausgleichsforderungen nach Nrn. 8 und 9.

8. Schadenersatz und Vorteilsausgleich

(1) Im Fall der Beendigung steht der kündigenden bzw. der sonstigen Partei (nachstehend „ersatzberechtigte Partei" genannt) ein Anspruch auf Schadenersatz zu. Der Schaden wird auf der Grundlage von unverzüglich abzuschließenden Ersatzgeschäften ermittelt, die dazu führen, dass die ersatzberechtigte Partei alle Zahlungen und sonstigen Leistungen erhält, die ihr bei ordnungsgemäßer Vertragsabwicklung zugestanden hätten. Sie ist berechtigt, nach dieser Auffassung dazu geeignete Verträge abzuschließen. Wenn sie von dem Abschluss derartiger Ersatzgeschäfte absieht, kann sie denjenigen Betrag der Schadensberechnung zugrunde legen, den sie für solche Ersatzgeschäfte auf

der Grundlage von Zinssätzen, Terminsätzen, Kursen, Marktpreisen, Indices und sonstigen Wertmessern solche Kosten und Abzüge zum Zeitpunkt der Kündigung bzw. der Kenntniserlangung von dem Insolvenzfall hätte aufwenden müssen. Der Schaden wird unter Berücksichtigung aller Einzelabschlüsse berechnet, ein finanzieller Vorteil, der sich aus der Beendigung von Einzelabschlüssen (einschließlich solcher, aus denen die ersatzberechtigte Partei bereits alle Zahlungen oder sonstigen Leistungen der anderen Partei erhalten hat) ergibt, wird als Minderung des im übrigen ermittelten Schadens berücksichtigt.

(2) Erlangt die ersatzberechtigte Partei aus der Beendigung von Einzelabschlüssen insgesamt einen finanziellen Vorteil, so schuldet sie vorbehaltlich Nr. 9 Abs. 2 und, falls vereinbart, Nr. 12 Abs. 4 der anderen Partei einen Betrag in Höhe dieses ihres Vorteils, höchstens jedoch in Höhe des Schadens der anderen Partei. Bei der Berechnung des finanziellen Vorteils finden die Grundsätze des Absatzes 1 über die Schadensberechnung entsprechende Anwendung.

9. Abschlusszahlung

(1) Rückständige Beträge und sonstige Leistungen und der zu ersetzende Schadensersatz werden von der ersatzberechtigten Partei zu einer einheitlichen Ausgleichsforderung in Euro zusammengefasst, wobei für rückständige sonstige Leistungen entsprechend Nr. 8 Abs. 1 Sätze 2 bis 4 der Gegenwert in Euro ermittelt wird.

(2) Eine Ausgleichsforderung gegen die ersatzberechtigte Partei wird nur fällig, soweit diese keine Ansprüche aus irgendeinem rechtlichen Grund gegen die andere Partei („Gegenansprüche") hat. Bestehen Gegenansprüche, so ist deren Wert zur Ermittlung des fälligen Teils der Ausgleichsforderung vom Gesamtbetrag der Ausgleichsforderung abzuziehen. Zur Berechnung des Werts der Gegenansprüche hat die ersatzberechtigte Partei diese, (i) soweit sie sich nicht auf Euro beziehen, zu einem nach Möglichkeit auf der Grundlage des am Berechnungstag geltenden amtlichen Devisenkurses zu bestimmenden Euro-Kurs in Euro umzurechnen, (ii) soweit sie sich nicht auf Geldzahlungen beziehen, in eine in Euro ausgedrückte Schadensersatzforderung umzuwandeln und (iii) soweit sie nicht fällig sind, mit ihrem Barwert (unter Berücksichtigung auch der Zinsansprüche) zu berücksichtigen. Die ersatzberechtigte Partei kann die Ausgleichsforderung der anderen Partei gegen die nach Satz 3 errechneten Gegenansprüche aufrechnen. Soweit sie dies unterlässt, wird die Ausgleichsforderung fällig, sobald und soweit ihr keine Gegenansprüche mehr gegenüberstehen.

10. Übertragung

Die Übertragung von Rechten oder Verpflichtungen aus dem Vertrag bedarf der vorherigen ausdrücklichen, nicht stillschweigend, teilweise oder durch Vertreter oder Bevollmächtigte möglichen Zustimmung der jeweils anderen Partei. Nr. 2 Abs. 3 gilt entsprechend.

11. Verschiedenes

(1) Sind Bestimmungen des Vertrages unwirksam oder undurchführbar, so bleiben die übrigen Vorschriften hiervon unberührt. Gegebenenfalls hierdurch entstehende Vertragslücken werden durch ergänzende Vertragsauslegung unter angemessener Berücksichtigung der Interessen der Parteien geschlossen.

(2) Der Vertrag unterliegt dem Recht der Bundesrepublik Deutschland.

(3) Nicht ausschließlicher Gerichtsstand ist der Ort der Niederlassung der Bank, durch die der Vertrag abgeschlossen wird.

(4) Der Rahmenvertrag in der hiermit vereinbarten Fassung gilt auch für alle etwaigen Einzelabschlüsse der Parteien unter dem Rahmenvertrag in einer früheren Fassung. Diese gelten als Einzelabschlüsse unter dem Rahmenvertrag in dieser neuen Fassung. Für diese Einzelabschlüsse bleibt die bisherige Fassung jedoch insoweit maßgeblich, als dies zum Verständnis der in ihnen getroffenen Regelungen erforderlich ist.

12. Besondere Vereinbarungen

(1) Die folgenden Absätze 2 bis 5 gelten nur, soweit die dazu bestimmten Felder angekreuzt oder ausgefüllt sind.

☐ (2) In Nr. 3 Abs. 1 werden die Worte „des Vertrages" durch „desselben Einzelabschlusses" ersetzt.

☐ (3) Der Zinsrunsatztag gemäß Nr. 3 Abs. 4 beträgt

[ ] Tage.

(4) Nach Nr. 6 Abs. 2 Satz 1 wird folgender Satz eingefügt:

„Ferner

☐ Dies gilt vorbehaltlich Nr. 12 Abs. 5 (C) a) nur, falls die ersatzberechtigte Partei aus mindestens einem Einzelabschluss (i) alle von der anderen Partei geschuldeten Zahlungen oder sonstigen Leistungen endgültig und unanfechtbar erhalten hat und (ii) bei Fortführung des Vertrages selbst noch unbedingte oder bedingte Zahlungs- oder sonstige Leistungsverpflichtungen hätte"

oder

☐ Dies gilt vorbehaltlich Nr. 12 Abs. 5 (C) a) nur, falls die ersatzberechtigte Partei (i) aus sämtlichen (jeweils mindestens eine von der anderen Partei geschuldeten Zahlungen oder sonstigen Leistungen endgültig und unanfechtbar erhalten hat und (ii) bei Fortführung des Vertrages selbst noch unbedingte oder bedingte Zahlungs- oder sonstige Leistungsverpflichtungen hätte".

☐ (5) Internationale Geschäfte

(A) Falls eine Partei verpflichtet ist oder verpflichtet sein wird, von einer durch die zu leistende Zahlung einen Steuer- oder Abgabenbetrag abzuziehen oder einzubehalten, wird sie die zusätzlichen Beträge an die andere Partei zahlen, die erforderlich sind, damit die andere Partei den vollen Betrag erhält, der ihr im Zeitpunkt einer solchen Zahlung zustehen würde, wenn kein Abzug oder Einbehalt erforderlich wäre. Dies gilt nicht, wenn die betreffende Steuer oder Abgabe vom Heimatstaat des Zahlungsempfängers oder einer in diesem Staat ansässigen Steuerbehörde auferlegt oder erhoben wird. Heimatstaat ist der Staat, in dem der Zahlungsempfänger seinen Sitz hat bzw. als ansässig angesehen wird oder in dem sich die Niederlassung des Zahlungsempfängers befindet, die unter dem betreffenden Einzelabschluss handelt.

(B) Falls aufgrund einer nach dem Abschlussdatum eines Einzelabschlusses erfolgenden Änderung von Rechtsvorschriften oder von deren Anwendung oder amtlichen Auslegung

a) zu erwarten ist, dass eine Partei am nächsten Fälligkeitstag in Bezug auf eine durch die zu leistende Zahlung zu tätigende Beträge gemäß vorstehendem Unterabsatz (A) zu zahlen hat außer auf Zinsen gemäß Nr. 3 Abs. 4 oder

b) eine Partei den Vertrag nicht mehr erfüllen darf,

so kann diese Partei (nachstehend die „betroffene Partei" genannt) und im Falle b) auch die andere Partei (nachstehend die „Gegenpartei" genannt) den von der Änderung betroffenen Einzelabschluss unter Einhaltung einer Frist von zwei Wochen auf einen von ihr zu bestimmenden Termin kündigen, dieser Termin darf nicht mehr als einen Monat vor dem Zeitpunkt liegen, an dem die Änderung wirksam wird. Nr. 7 Abs. 3 bestimmt sich im Fall einer solchen Kündigung nur auf den oder die betroffenen Einzelabschlüsse. Die Gegenpartei darf im Falle einer Kündigung durch die Gegenpartei die betroffene Partei kann jedoch innerhalb einer Woche nach Zugang der Kündigungserklärung durch Erklärung an die kündigende Partei bestimmen, dass die Kündigung für den Vertrag insgesamt gilt. Für die Form der Kündigung und der Erklärung nach Satz 3 gilt Nr. 7 Abs. 1 Satz 3.

(C) Im Falle einer Kündigung aufgrund eines der in Unterabsatz (B) genannten Kündigungsgründe gilt Nr. 8 mit folgender Maßgabe:

a) Ersatzberechtigte Partei ist die Gegenpartei. Nr. 12 Abs. 4, falls vereinbart, findet keine Anwendung.

b) Sind beide Parteien betroffene Parteien und erleidet eine von ihnen einen Schaden, so hat die Partei, die insgesamt einen Vorteil aus der Beendigung erlangt oder den kleineren Schaden erleidet, der anderen Partei einen Betrag in Höhe der Hälfte der Differenz zwischen Vorteil und Schaden bzw. zwischen dem größeren und kleineren Schaden zu zahlen. Diese Rechtsfolge tritt auch dann ein, wenn die Kündigung nach Unterabsatz (B) Satz 1 Buchstabe b) oder die Erklärung nach Unterabsatz (B) Satz 3 durch die Gegenpartei abgegeben wird.

c) Für Zwecke der Berechnung des eigenen Vorteils oder Schadens gilt in vorstehendem Fall b) jede Partei als ersatzberechtigte Partei.

(D) Für etwaige Rechtsstreitigkeiten oder sonstige Verfahren vor deutschen Gerichten bestellt der Vertragspartner hiermit die unter (F) oder gegebenenfalls in mindestens einem Einzelabschluss zu diesem Zweck benannte Person zum Zustellungsbevollmächtigten.

(E) Jede Partei verzichtet hiermit unwiderruflich darauf, in Verfahren betreffend sie selbst oder ihr Vermögen aufgrund etwaiger Souveränitäts- oder ähnlicher Rechte Immunität vor Klage, Urteil, Vollstreckung, Pfändung (sei es vor oder nach Urteilserlass) oder anderen Verfahren zu genießen oder geltend zu machen.

(F) Anschrift des Zustellungsbevollmächtigten in der Bundesrepublik Deutschland

(6) Sonstige Vereinbarungen

Unterschrift(en) der Bank	
Unterschrift(en) des Vertragspartners	

ANNEX D

INSTRUCTION LETTER

ROPES & GRAY

ROPES & GRAY
5 NEW STREET SQUARE
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UNITED KINGDOM
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May 28, 2015

Professor Dr. Peter Mülbert
Fachbereich Rechts- und Wirtschaftswissenschaften
Johannes Gutenberg-Universitaet Mainz
55099 Mainz
Germany

Dear Professor

Re: Lehman Brothers Waterfall Application (Nos. 7942 of 2008) (Waterfall II)

We are sending this letter on behalf of CVI GVF (Lux) Master Sarl, Hutchinson Investors LLC, Burlington Loan Management Limited, and their relevant affiliates (together the **Senior Creditor Group**) and its contents have been approved by Freshfields Bruckhaus Deringer LLP and Schulte Roth & Zabel International LLP, their respective legal advisers. The Senior Creditor Group has authorised us to enter into this letter on their behalf, and we are authorised to bind the Senior Creditor Group to this letter.

The Senior Creditor Group would like to appoint you as an expert witness in this matter. This letter sets out the terms of your appointment (should you choose to accept them), contains your instructions and highlights your duties. Please read it carefully as it contains important information and then sign and return a copy to us indicating your agreement to its terms. Please be aware that we do not act as your legal representative, nor does any legal adviser to any member of the Senior Creditor Group.

1. TERMS OF APPOINTMENT

1.1 Although you are instructed by the Senior Creditor Group as an expert witness, your overriding duty as an expert is to help the court with matters within your expertise, and not to act as an advocate for the Senior Creditor Group. This means you must act with objectivity and independence in carrying out your instructions and are required to comply with the relevant provisions of the English Civil Procedure Rules (known as the **CPR**).

1.2 We enclose a copy of Part 35 of the CPR (**CPR 35**) and its Practice Direction (**PD 35**) together with a copy of the Guidance for the Instruction of Experts in Civil Claims 2014 produced by the Civil Justice Council (**Guidance**), which we hope you may find helpful in preparing your report. As much of this may be unfamiliar to you, please let us know if you do not understand any of these materials.

2. YOUR OBLIGATIONS AS AN EXPERT

2.1 By signing a copy of this letter you also agree that:

(a) you are representing that you have the relevant qualifications and experience to provide expert evidence in relation to this matter. If this is not the case please let us know immediately;

(b) you will use reasonable skill and care when carrying out your instructions;

(c) when instructed to report to the court, you will do so in compliance with the relevant requirements of the CPR and within any agreed time limit;

(d) when ordered to meet with an expert for an opposing party, you will conduct such meeting in accordance with the CPR;

(e) you will deal with written questions from an opposing party on any report you write within any time limit set by the court, any replies to such questions form part of your report or a supplemental report (as applicable);

(f) you will deal with all other matters promptly and, where appropriate, within any time limits agreed by us or set by the court;

(g) unless otherwise agreed, you will prepare a report at a cost proportionate to the sums in issue;

(h) you will make yourself available for court hearings, conferences and other meetings;

(i) you will preserve the confidentiality of all information supplied to you by us or by any member of the Senior Creditor Group or their legal advisers (including information supplied to you before the date of this letter) except to the extent that they are included in your final report(s);

(j) you have no conflict of interest in acting as an expert appointed by any member of the Senior Creditor Group in this matter. If and when further parties become involved in the dispute, we will inform you and you should confirm again (if applicable) that you do not have a conflict of interest.

(k) you will assist us in identifying the issues which need to be addressed;

(l) you will participate in a discussion between you and the expert for Wentworth (and if applicable, the expert for the Administrators) to identify and discuss the expert issues in the proceedings; and where possible, reach agreed opinion on those issues;

(m) you will contribute to an experts' joint statement; and

(n) if directed by the court you will give evidence in court concurrently with the expert for Wentworth (and if applicable, the expert for the Administrators) in accordance with CPR 35.11(1)-(4).

2.2 If you consider that you need further direction from the court to assist you with carrying out your functions as an expert, you may file a written request with the Court for directions. If you intend to file a request for directions, please discuss this with us immediately.

2.3 If you think that your obligations and duties as an expert under the CPR conflict with these instructions, you may consider withdrawing from your role as an expert in these proceedings. If you are considering withdrawing from your role as an expert, you must discuss this with us immediately.

2.4 If you do not comply with any of your obligations under the CPR, you could be faced with personal sanctions against you. These are described in the Guidance and we recommend you make yourself familiar with them.

3. COMPENSATION

3.1 You will provide us with an estimate of your fees and expenses if such an estimate is requested by the court. You should be aware that the court may limit the amount you are to be paid by reference to any estimate you give. It is important that you review your estimate regularly. If it seems likely that you may exceed your estimate, please let us know as soon as you become aware of this, and we will pass this information on to the Senior Creditor Group and, if necessary, the court.

3.2 You should be aware of the overriding objective of the CPR that courts deal with cases justly and that you are under an obligation to assist the court in this respect. This includes dealing with cases proportionately (keeping the work and costs in proportion to the value and importance of the case to the parties), expeditiously and fairly.

4. INSTRUCTIONS

(a) *Background to the matter*

4.1 We have set out below a brief summary of the procedural history, parties and German law issues involved in Waterfall II.

Procedural History

(a) Waterfall II involves an application to the English court by the administrators (**Administrators**) of Lehman Brothers International (Europe) (**LBIE**) on a number of questions that impact on the nature and extent of creditors' entitlements to a share in the surplus assets in LBIE's estate now that creditors' provable debts have been paid in full.

(b) LBIE was the English operating entity of the Lehman Brothers group. At the time of the global collapse of the Lehman Brothers group, LBIE was not balance sheet insolvent and the Administrators have found that there will be a large surplus of assets in the LBIE estate after repaying the provable claims of unsecured creditors. This surplus has led to the claims against LBIE trading well above par on the expectation that creditors will receive interest on their debts out of the surplus.

(c) The Waterfall I application (**Waterfall I**) concerned a number of questions on the ranking of various claims to the surplus assets in LBIE's estate (together with LBIE's shareholders' obligations to contribute to the debts of LBIE). The judgment in Waterfall I was handed down on 14 March 2014 (**the Waterfall I Judgment**). The Waterfall I Judgment was appealed by all parties, with the appeal recently heard by the Court of Appeal. Some of the parties have sought leave to appeal to the Supreme Court with respect to the decision of the Court of Appeal. It is too early to say whether that leave will be granted.

(d) The Waterfall II application was made in light of the failure of a proposal for the consensual resolution of claims to the surplus and to address issues not covered by Waterfall I on the nature and extent of creditors' entitlements to share in the distribution of the surplus. A copy of the Waterfall II application is included with these instructions as Annex I.

The Parties to Waterfall II

(e) The following entities were selected as respondents on the Waterfall II application:

(i) The Administrators (advised by Linklaters LLP);

(ii) Burlington Loan Management Limited, part of the DK group (**Burlington**);

(iii) CVI GVF (LUX) Masters SARL, part of the CarVal group (**CVI**);

(iv) Hutchinson Investors, LLC, part of the Baupost group (**Hutchinson**);

(v) Wentworth Sons Sub-Debt SARL, a joint venture comprising the US parent company Lehman Brothers Holdings Inc and the hedge funds King Street and Elliott (**Wentworth**); and

(vi) York Global Finance BDH LLC (**York**).

(f) As mentioned above, Burlington, CVI and Hutchinson are together referred to as the "Senior Creditor Group" although this title may be misleading because the funds hold ordinary unsecured (and not subordinated) claims rather than secured claims. They are arguing for a position that would maximise the returns to unsecured creditors (and so support arguments that would maximise the claims to post-administration interest). The members of the Senior Creditor Group hold between them exposures under swaps with LBIE documented under:

(i) English law governed and New York law governed ISDA Master Agreements;

(ii) French law governed FBF Master Agreements, AFB Master Agreements, AFTB Master Agreements and AFTI Master Agreements; and

(iii) German law governed German Master Agreements.

(g) Wentworth has purchased the subordinated debt owed by LBIE and also has an economic interest in the equity. It is therefore arguing for a position that would minimise claims to interest so that more of the surplus would flow to the subordinated debt and equity. It is advised by Kirkland & Ellis.

(h) York has a special interest because it bought a very large claim (referred to as the Liberty View claim) against LBIE that was only closed out and agreed last year. Broadly it supports the position of the Senior Creditor Group. It is advised by Michelmores LP.

The German Law Issues

(i) The key German law issues in the Waterfall II application (which deals with a number of issues in 39 detailed questions) are:

(i) whether, in calculating the amount of interest due under section 3(4) of the German Master Agreement, it is possible (and if so, in what circumstances and to what extent) to include an amount in respect of "further claims for damages" (**Damages Interest Claim**) so that this would constitute part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) of the Insolvency Rules 1986 (**Issue 20**); and

(ii) If the answer to Issue 20 is that a further claim for damages can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9), how in such circumstances is the relevant rate to be determined? In particular:

(A) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party, is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?

(B) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?

(C) where does the burden of proof lie in establishing a Damages Interest Claim, and what is required to demonstrate, that a relevant creditor has or has not met such requirement?

(Issue 21)

(j) A summary of the other issues in the Waterfall II Application is enclosed, for reference only at Annex IX. We do not require you to consider these issues for the purpose of your report.

The requirement for German law expert evidence

(k) On 21 November 2014, the High Court made an order that the Senior Creditor Group and Wentworth may adduce and rely upon expert evidence for the purposes of assisting the court with determining (among other things) Issue 20 and Issue 21 (the **21 November Order**). Following the 21 November Order, Wentworth and the Senior Creditor Group together with the Administrators agreed a list of questions to be addressed by experts in relation to issues 19 to 26 (the **Agreed Questions**). The Agreed Questions include questions on Issue 20 and Issue 21 to be put to the parties' respective German law experts (the **German Law Questions**). The Senior Creditor Group would like you to provide your expert opinion on the answers to the German Law Questions. The Agreed Questions are included with these instructions in Annex II.

(l) On 7 May 2015 the High Court made orders that are applicable to the German law expert evidence (among others) (the **7 May Order**). Paragraphs 20-25 of the 7 May Order set out a timetable to which you must adhere. This timetable is described at paragraph 4.4 below. A copy of the 7 May Order is included in Annex VII to this letter.

(b) Documents provided

4.2 To assist you further in the preparation of your report, we enclose the following documents:

(a) the Waterfall II application, filed with the High Court of Justice on 12 June 2014 (provided in Annex I);

(b) the Agreed Questions (provided in Annex II);

(c) the ninth witness statement of Tony Lomas, one of the Administrators, which sets out the background to the Application as well as the issues regarding the construction of Rule 2.88 of the Insolvency Rules 1986 (see paragraph 40 ff) (provided in Annex III);

(d) the position papers of (i) the Administrators, (ii) the Senior Creditor Group, (iii) Wentworth and (iv) York (provided in Annex IV);

(e) the reply position papers of (i) the Senior Creditor Group, (ii) Wentworth and (iii) York (provided in Annex V);

(f) an extract from the skeleton argument of the Senior Creditor Group dealing with the construction of Rule 2.88 (provided in Annex VI);

(g) the 7 May Order (provided in Annex VII);

(h) a copy of the German Master Agreement and a standard form Confirmation (provided in Annex VIII); and

(i) a summary of the other issues in the Waterfall II application (provided in Annex IX).

(c) Outline of expert process and scope of work

4.3 The typical court process for expert witness evidence will involve some or all of the following events:

(a) drafting of expert reports;

(b) exchange of expert reports written by the Senior Creditor Group's, Wentworth's and (if applicable) the Administrators' respective expert witnesses;

(c) review of expert evidence served by Wentworth and (if applicable) the Administrators;

(d) drafting of expert reply reports which respond to issues raised by the other parties' expert witness in their first expert report;

(e) meeting of both parties' expert witnesses;

(f) joint statement by both parties' expert witnesses;

(g) drafting of a supplemental report by each party's expert witnesses if necessary; and

(h) attendance at court hearing.

4.4 In these proceedings, the following timetable has been set down by the Court:

(a) The trial will commence **on 9 November 2015** and is expected to run for **7- 10 business days**.

(b) Ahead of this trial date, the court has ordered that the parties and their German law experts comply with the timetable set out below. Each date specified is the deadline, that is the latest date on which the specified event may occur:

(i)	**10 July 2015**	Senior Creditor Group and Wentworth to file and serve reports of their respective German law experts
(ii)	**31 July 2015**	Senior Creditor Group's German law expert's reply report to Wentworth's German law expert report to be filed with the court
(iii)	**21 August 2015**	Administrators to file and serve on the Senior Creditor Group and on Wentworth a report of a German law expert (if they decide to appoint an expert)
(iv)	**21 September 2015**	Senior Creditor Group's, Wentworth's and (if applicable) the Administrators' respective German law experts to hold a discussion for the purpose of (i) identifying the issues (if any) in dispute between them; and (ii) reaching an agreement on those issues (where possible)

(v)	**12 October 2015**	A joint statement by the Senior Creditor Group's, Wentworth's and (if applicable) the Administrators' German law experts to be filed with the court. The joint statement must show (i) those issues on which the joint experts are agreed; and (ii) those issues on which the joint experts disagree and a summary of their reasons for disagreeing.
(vi)	**19 October 2015**	Senior Creditor Group, Wentworth and (if applicable) the Administrators to file any supplemental reports by their respective German law experts.

4.5 If the matter proceeds to trial, you may have to present oral evidence to the court, be cross-examined on your evidence and attend when the other party's expert witnesses give their evidence. In the unlikely event that you are called to give expert evidence orally in court, you could be required to attend court in London on any one or more of the trial days and we will not know which day until closer to the time

4.6 There is a mechanism for parties other than the Senior Creditor Group to pose questions to you. We will let you know when this is the case. The CPR includes an express requirement for written questions put to experts about their reports to be "proportionate".

(d) Your report

Duties in preparing the report

4.7 In addition to your overriding duty to the court, by signing a copy of this letter you agree to comply with PD 35 including the Guidance. In particular:

(i) your evidence will be an independent product uninfluenced by the pressures of litigation (for example you would express the same opinion if you were given the same instructions by another party);

(ii) you must aim to assist the court by providing an objective, unbiased opinion on matters within your expertise, and should not assume the role of an advocate;

(iii) you should consider all material facts, including those which might detract from your opinion (and your report should include reference to facts and materials which detract from your opinion as well as facts that support it);

(iv) when addressing questions of fact and opinion, you must be careful to keep the two separate. You must state clearly the facts (whether assumed or otherwise) upon which you base your opinions and you should have primary regard to these instructions. You must distinguish clearly between the facts that you know to be true and the facts that you assume;

(v) you should make it clear when a question or issue falls outside your expertise and when you are not able to reach a definite opinion, for example because you have insufficient information; and

(vi) if, after producing a report, you change your view on any material matter, this change of view should be communicated to all the parties without delay and, when appropriate to the court, so let us know immediately if this is the case.

Contents and timing of the report

4.8 We ask you to give your opinion on the basis of information provided to you on the German Law Questions. However as this matter proceeds, further instructions may be given to you. If so, these instructions will be in writing.

4.9 You are instructed to produce your report **by 10 July 2015** in accordance with the timetable set out above. Any delay in producing your report may result in costs penalties or the court not admitting your evidence.

4.10 We remind you that your report should be addressed to the court and not to the Senior Creditor Group.

4.11 You agree that any expert report you produce will include the additional information or statements set out below:

(i) a statement that you understand your duty to the court and have complied and will continue to comply with this duty.

(ii) a statement that you are aware of the requirements of CPR 35, PD 35 and the Guidance.

(iii) the substance of all material instructions from us, whether written or oral, on the basis of which your report was written. We will assist you with this as it is essential that this statement is as complete and as accurate as possible.

(iv) your report must contain a statement of truth in the following form:

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

4.12 In addition to the matters set out above, in order to comply with paragraph 3.2 of PD 35, your report should also contain the following:

(i) details of your qualifications;

(ii) details of any literature or other material on which you have relied in making the report;

(iii) a statement on who carried out any examination, measurement, test or experiment which you have used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under your supervision;

(iv) where there is a range of opinion on the matters dealt with in the report, a summary of the range of opinion, and reasons for your own opinion;

(v) an indication of which of the facts stated in the report are within your own knowledge;

(vi) a summary of the conclusions reached; and

(vii) if you are not able to give your opinion without qualification, state the qualification.

5. GENERAL

5.1 The terms of this letter and any non-contractual obligations arising out of or in connection with this letter shall be governed by English law. The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with the terms of this letter and the parties submit to the exclusive jurisdiction of the English courts.

5.2 Please inform us before accepting these instructions if you do not consent to any of the above. Please also let us know as soon as possible if any of your details set out above are incorrect or change.

We look forward to working with you.

Yours faithfully,

Ropes & Gray International LLP.

Ropes & Gray International LLP

ANNEX E

REVISED QUESTIONS AND SUPPORTING MATERIAL

REVISED QUESTIONS FOR THE GERMAN LAW EXPERTS ON ISSUE 20

Clauses 7 to 9 of the German Master Agreement (GMA)

1. On the true construction of clauses 7 to 9 of the GMA:

   (a) When does a close-out amount arising under clauses 7 to 9 of the GMA become due and payable?

   (b) Must a default have occurred within the meaning of section 286 of the BGB in order for there to be a claim for damages for late payment?

   (c) Is section 271 of the BGB relevant to the question in 1(a) above?

Section 286 of the BGB

2. What is the true construction of section 286? In particular:

   (a) Can a default occur including by the service by the non-defaulting party of a "*warning notice*" on a defaulting party once the defaulting party has entered into, and remains in, administration in England & Wales?

   (b) What are the formal and substantive requirements for a "*warning notice*" (as the phrase is used in section 286 of the BGB)?

   (c) Could: (1) the filing of a proof of debt in the LBIE administration and/or (2) the service of a termination notice pursuant to the GMA by a non-defaulting counterparty to LBIE, constitute the service of a "*warning notice*" for the purposes of section 286(2) BGB?

   (d) Can a non-defaulting party serve a "*warning notice*" on the defaulting party after the defaulting party has repaid the principal debt owing to the non-defaulting party? If so, would its damages interest claim relate back to the period prior to the defaulting party making payment in full of the principal debt?

   (e) What are the exceptions to the need for a "warning notice" in order for default to occur? Having regard to the Administration Summary, would there have been a serious and definitive refusal of performance by LBIE within the meaning of 286(2) no. 3 of the German Civil Code or would there have been special reasons, weighing the interests of both parties, justifying the immediate commencement of default within the meaning of the 286(2) no. 4 the German Civil Code when: (a) an administration application was made by or in relation to LBIE; and/or (b) LBIE went into administration, in each case meaning that there was no need for a warning notice?

ADMINISTRATION SUMMARY

1 Overview of an English administration

1.1 An administration is a corporate insolvency proceeding with the following statutory objectives:

1.1.1 the primary objective of an administration is to rescue the company as a going concern (the "**Primary Objective**");

1.1.2 the secondary objective is to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) (the "**Secondary Objective**").

1.2 An Administrator must perform his functions with the Primary Objective unless he thinks either that is not reasonably practicable to achieve that objective or that the Secondary Objective would achieve a better result for the company's creditors as a whole. Where the administrator thinks that it is not reasonably practicable to achieve either the Primary Objective or the Secondary Objective, the administrator may perform his functions with the objective of realising property in order to make a distribution to one or more secured or preferential creditors, so long as he does not unnecessarily harm the interests of company's creditors as a whole.

1.3 An administration can be commenced by an application to the court (by either the company, the directors or one or more creditors) or, in certain limited circumstances, by the filing of documents with the court without the need for a court hearing or order. Where there is an application to court that is made by any party other than the holder of a qualifying floating charge, the court may make an administration order only if satisfied that the company is or is likely to become unable to pay its debts and that the administration order is reasonably likely to achieve the purpose of the administration (as set out above). The administration will commence at the time appointed by the order or where no time is appointed by the order, when the order is made.

1.4 [Neither the directors nor the company is under any legal obligation to commence insolvency proceedings under the Insolvency Act 1986 simply because the company is unable to pay its debts on either a cash-flow or balance sheet basis. However, the directors may be liable for:

1.4.1 wrongful trading (which is a civil liability) if, after a time at which they knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, they failed to take every step with a view to minimising the potential loss to creditors; or

1.4.2 fraudulent trading (which is both a civil liability and a criminal one) if any business of a company is carried on with the intent to defraud creditors or for any fraudulent purpose.][111]

1.5 One or more administrators, being licensed insolvency practitioners, manage the affairs, business and property of the company in pursuance of the purpose of administration – being the achievement of the tiered statutory objectives described above.

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[111] This statement is not agreed by Wentworth.

1.6 The administrator may do anything necessary or expedient for the management of the affairs, business and property of the company and has the broad range of powers specified in Schedule B1 to the Insolvency Act 1986 ("**Schedule B1**"), set out, for convenience, at Annex 1.

1.7 An administrator acts as an agent of the company and is an officer of the court. The administrator may apply to the court for directions in connection with his functions. The administrator of a company must perform his functions as quickly and efficiently as is reasonably practicable.

1.8 The administrator may remove or appoint directors and no officer of the company may exercise a power which could be exercised so as to interfere with the exercise of the administrator's powers without the consent of the administrator.

1.9 Where a company goes into administration, a statutory moratorium applies automatically which has the effect, amongst other things, of restricting creditors' rights to enforce security over the company's property, to repossess goods in the company's possession under a hire-purchase agreement (as defined), to institute or continue legal process against the company or property of the company, in all cases, without the consent of the administrator or the permission of the court.

1.10 As a matter of English law, unless a contract provides otherwise, entry into administration does not trigger the automatic termination of existing contracts, whatever the governing law of the contract. The same is true of an application for an administration order or a notice to appoint an administrator out of court.

1.11 Depending on whether any of the statutory objectives have been achieved and, if so, which objective has been achieved, when the appointment of the administrator ceases to have effect, the company may be placed into liquidation, dissolved or placed into the hands of its former or newly appointed directors. In this latter case, the company will trade outside of any insolvency proceeding.

2 Distributions and proof of debt process

General process

2.1 Although an administrator of a company has a general power to make distributions to creditors, paragraph 65(3) of Schedule B1 provides that any distribution to a creditor who is neither secured nor preferential requires the court's permission. Following receipt of the court's permission, a distribution to a class of creditors other than secured creditors will be made in accordance with the rules set out in Part 2, Chapter 10 of the Insolvency Rules 1986. A full version of Chapter 10 is attached at Annex 2 to this Schedule.

2.2 Any person claiming to be an unsecured creditor of a company in administration and wishing to recover his debt, in whole or in part, must (subject to any order of the court to the contrary) submit his claim in writing to the administrator. A person who lodges a claim against the company in administration is "*proving*" for his debt and the document in which he sets out the particulars of his claim is the "*proof*" or "*proof of debt*".

2.3 A proof must, *inter alia*, set out: (i) the creditor's name and address; (ii) the total value of the creditor's claim as at the date on which the company entered administration, less any

payments made after that date in respect of the claim and any adjustment by way of set-off in accordance with the statutory rules; (iii) particulars of how and when the debt was incurred by the company (including details of any documents by reference to which the debt can be substantiated); and (iv) whether or not the claim includes outstanding uncapitalised interest.

2.4 Where a proved debt bears interest, that interest is provable as part of the debt up to and including the date on which the company entered into administration only.

2.5 An administrator adjudicates a proof on the basis of the information set out in the proof and any documents accompanying a proof that are submitted by the creditor. In adjudicating a proof, an administrator may request further information or documents in respect of the claim from a creditor.

Proofs of debt submitted by the GMA Creditors

2.6 On 2 December 2009, the Court ordered that the Joint Administrators be permitted to make distributions to the unsecured creditors of LBIE.

2.7 During LBIE's administration, the Joint Administrators have provided creditors with specific directions as to how their debts should be proved.

2.8 In respect of the fifteen claims pursuant to German Master Agreements existing in the LBIE administration (the "**GMA Creditors**"), the majority of proofs were submitted via the LBIE administration electronic portal on or after 9 July 2010 ("**Type 1 Proof**"). A redacted version of Type 1 Proof is attached as Annex 3 to this Schedule. The remaining GMA Creditors either submitted a proof of debt using the paper form issued by the Joint Administrators on 10 October 2008, attached as Annex 4 to this Schedule ("**Type 2 Proof**"), or submitted both a Type 1 and Type 2 Proof.

ANNEX F

GERMAN MASTER AGREEMENT FOR SECURITIES LENDING TRANSACTIONS

	Rahmenvertrag vom

Rahmenvertrag für Wertpapierdarlehen

zwischen

Name und Anschrift des Vertragspartners

nachstehend der „Vertragspartner" genannt

und

Name und Anschrift der Bank

nachstehend die „Bank" genannt

1. Vertragsgegenstand

(1) Die Parteien beabsichtigen, auf der Grundlage dieses Rahmenvertrages Wertpapierdarlehen abzuschließen. Jede der Parteien kann sowohl Darlehensgeber als auch Darlehensnehmer sein. Der Darlehensgeber wird dem Darlehensnehmer Wertpapiere darlehensweise überlassen. Der Darlehensnehmer ist zur Rückgewähr von Wertpapieren gleicher Art, Güte und Menge verpflichtet.

(2) Für jedes Geschäft, das unter Zugrundelegung dieses Rahmenvertrages abgeschlossen wird („Einzelabschluss"), gelten die nachfolgenden Bestimmungen. Alle Einzelabschlüsse bilden untereinander und zusammen mit diesem Rahmenvertrag einen einheitlichen Vertrag („Vertrag"); sie werden im Sinne einer einheitlichen Risikobetrachtung und im Vertrauen darauf getätigt.

2. Einzelabschlüsse

(1) Haben sich die Parteien über einen Einzelabschluss geeinigt, so wird die Bank dem Vertragspartner schriftlich, fernschriftlich, telegrafisch, durch Telefax oder in ähnlicher Weise dessen Inhalt bestätigen.

(2) Jede Partei ist berechtigt, eine unterzeichnete Ausfertigung des Einzelabschlusses zu verlangen, die jedoch keine Voraussetzung für dessen Rechtswirksamkeit ist.

(3) Die Bestimmungen des Einzelabschlusses gehen den Bestimmungen dieses Rahmenvertrages vor.

3. Lieferung der Darlehenspapiere, Eigentumsübergang

(1) Nach Maßgabe des Einzelabschlusses wird der Darlehensgeber dem Darlehensnehmer am für die Lieferung vereinbarten Tag („Valutierungstag") die vereinbarten Wertpapiere („Darlehenspapiere") anschaffen („Lieferung").

(2) Die Parteien sind sich einig, dass mit der Lieferung das unbeschränkte Eigentum oder eine andere am Verwahrort übliche, gleichwertige Rechtsstellung an den Darlehenspapieren auf den Darlehensnehmer übergeht. Hierzu wird der Darlehensgeber, soweit erforderlich, alle weiteren notwendigen Erklärungen abgeben. Bei vinkulierten Namensaktien ist der Darlehensnehmer bereits vor der Umschreibung im Aktionärsregister des Emittenten berechtigt, über die Aktien zu verfügen.

(3) Werden die Darlehenspapiere am Valutierungstag nicht geliefert, so ist der Darlehensnehmer nach Benachrichtigung des Darlehensgebers vom Ausbleiben der Lieferung und nach Ablauf einer Nachfrist von einem Bankarbeitstag berechtigt, Schadensersatz wegen Nichterfüllung des Einzelabschlusses zu verlangen oder von dem Einzelabschluss zurückzutreten.

4. Wertausgleich

(1) Unterschreitet an einem Bankarbeitstag die Darlehenssumme der einen Partei die Darlehenssumme der anderen Partei, so ist erstere jederzeit berechtigt, von letzterer Wertausgleich zu verlangen. Der Wertausgleich errechnet sich aus der Differenz der Darlehenssummen und ist zu leisten, wenn der in Nr. 11 Abs. 7 genannte Mindestbetrag erreicht ist.

(2) Die Darlehenssumme einer Partei errechnet sich aus:

(a) der Summe der gemäß Nr. 11 Abs. 2 berechneten Marktwerte aller ihr von der anderen Partei gelieferten Darlehenspapiere aus noch nicht vollständig abgewickelten Einzelabschlüssen unter Berücksichtigung gegebenenfalls im Einzelabschluss vereinbarter Aufschläge zum Ausgleich etwaiger Kurssteigerungen der Darlehenspapiere und

(b) dem Wert der von ihr noch nicht rückübertragenen Leistungen aus vorangegangenem Wertausgleich, der bei Geld-

zahlungen aus dem Nominalbetrag zuzüglich angefallener Zinsen ermittelt wird.

(3) Wertausgleichsleistungen sind vor Ende des ersten auf den Zugang der Mitteilung folgenden Bankarbeitstages zu erbringen. Der Wertausgleich erfolgt durch Leistungen, auf die sich die Parteien geeinigt haben. Die zum Wertausgleich verpflichtete Partei hat zunächst etwaige aus vorangegangenem Wertausgleich erhaltene und von ihr noch nicht rückübertragene Leistungen zu verwenden. Sofern keine ausdrückliche Bestimmung über die Art der zu erbringenden Leistungen getroffen wird, gilt die Lieferung von auf Euro lautenden Schuldverschreibungen der Bundesrepublik Deutschland als vereinbart.

(4) Die im Rahmen des Wertausgleichs erbrachten Leistungen können ganz oder teilweise ohne Zustimmung der anderen Partei durch Geldzahlungen in Euro oder auf Euro lautende Schuldverschreibungen der Bundesrepublik Deutschland ersetzt werden. Die Ersetzung erfolgt einen Bankarbeitstag nach Zugang einer entsprechenden Benachrichtigung gegen Rückgewähr der zu ersetzenden Leistungen. Steuern, Gebühren oder Kosten, die im Zusammenhang mit der Ersetzung entstehen, gehen zu Lasten der ersetzenden Partei.

(5) Auf Wertpapiere, die zum Zwecke des Wertausgleichs geliefert werden, finden die Bestimmungen dieses Rahmenvertrages über die Darlehenspapiere mit Ausnahme der Nr. 5, der Nr. 7 Abs. 1 bis 3 und der Nr. 8 entsprechende Anwendung.

5. Darlehensentgelt

(1) Der Darlehensnehmer zahlt dem Darlehensgeber für jedes Wertpapierdarlehen ein Entgelt („Darlehensentgelt").

(2) Das Darlehensentgelt errechnet sich aus dem im Einzelabschluss vereinbarten Prozentsatz p.a. bezogen auf den Marktwert der Darlehenspapiere an dem im Einzelabschluss näher bezeichneten Tag. Das Darlehensentgelt wird bestimmt für die Zeit vom Valutierungstag (einschließlich) bis zu dem Bankarbeitstag (ausschließlich), an dem die Darlehenspapiere an den Darlehensgeber zurückgeliefert worden sind („Rückgabetag"). Hierbei wird die Anzahl der tatsächlich abgelaufenen Tage durch 360 dividiert.

(3) Die Darlehensentgelte werden von der Bank am Monatsanfang für den zurückliegenden Monat berechnet und sind am zweiten Bankarbeitstag nach Zugang der Abrechnung fällig.

6. Zinsen, Dividenden, sonstige Ausschüttungen, Berichtigungsaktien und Bezugsrechte

(1) Die während der Laufzeit des Darlehens auf die Darlehenspapiere geleisteten Zinsen, Gewinnanteile sowie sonstige Ausschüttungen stehen dem Darlehensgeber zu. Den Gegenwert hat der Darlehensnehmer mit Wertstellung zum Tag der tatsächlichen Zahlung durch den Emittenten zuzüglich des Betrages einbehaltener Steuern und Abgaben sowie Steuergutschriften an den Darlehensgeber zu zahlen („Kompensationszahlung").

(2) Die Kompensationszahlung umfasst bei Schuldverschreibungen sämtliche auf sie gezahlten Zinsen, bei Aktien sämtliche Ausschüttungen wie Dividenden oder Zahlungen im Falle von Kapitalherabsetzungen. Der in der Kompensationszahlung enthaltene Ausgleich für Steuern und Abgaben wird nur nach Maßgabe der dem Darlehensnehmer mitgeteilten steuerlichen Erstattungs- bzw. Anrechnungsansprüche des Darlehensgebers gezahlt.

(3) Berichtigungsaktien sowie eventuell verbleibende Teilrechte, die während des Darlehenszeitraumes auf die Darlehenspapiere begeben werden, sind Gegenstand des betreffenden Einzelabschlusses und vom Darlehensnehmer am Rückgabetag an den Darlehensgeber zu liefern.

(4) Entfallen auf die Darlehenspapiere Bezugsrechte, so hat der Darlehensnehmer die Bezugsrechte dem Darlehensgeber spätestens am dritten Tag des Bezugsrechtshandels zur Verfügung zu stellen. Andernfalls ist der Darlehensgeber berechtigt, die Bezugsrechte am folgenden Bankarbeitstag für Rechnung des Darlehensnehmers zu kaufen oder Schadensersatz wegen Nichterfüllung zu verlangen. Die Geltendmachung eines weiteren Schadens ist nicht ausgeschlossen.

7. Kündigung, Rücklieferung von Darlehenspapieren

(1) Ein auf unbestimmte Zeit abgeschlossenes Wertpapierdarlehen kann ganz oder teilweise gekündigt werden

(a) durch den Darlehensgeber jederzeit mit einer Kündigungsfrist von wenigstens 3 Bankarbeitstagen;

(b) durch den Darlehensnehmer jederzeit mit einer Frist von wenigstens einem Bankarbeitstag.

(2) Die Kündigungserklärung muss dem Empfänger spätestens bis 15.00 Uhr (Ortszeit am Ort des Empfängers) zugegangen sein. Später eingehende Kündigungserklärungen werden erst am darauffolgenden Bankarbeitstag wirksam.

(3) Ein auf unbestimmte Zeit abgeschlossenes Darlehen endet spätestens ein Jahr nach dem Valutierungstag.

(4) Der Darlehensnehmer hat die Darlehenspapiere am Fälligkeitstag auf das vereinbarte Konto zurückzuliefern – Nr. 3 Abs. 2 gilt entsprechend. Im Falle der Rücklieferung vinkulierter Namensaktien trägt der Darlehensgeber das Risiko, von dem Emittenten nicht ins Aktionärsregister eingetragen zu werden.

(5) Bei Umtausch-, Abfindungs- oder sonstigen veröffentlichten Kaufangeboten sind die Darlehenspapiere am zweiten Bankarbeitstag vor dem Beginn der Frist zur Annahme bzw. zur Abgabe solcher Angebote zurückzuliefern, sofern die zur Rücklieferung verpflichtete Partei mindestens fünf Bankarbeitstage vor Fristbeginn von der Veröffentlichung des Angebots Kenntnis erlangt hat. Entsprechendes gilt für verzinsliche Wertpapiere, die für Auslosungszwecke in Serien oder Gruppen aufgeteilt oder vorzeitig zur Rückzahlung gekündigt werden.

8. Nicht fristgemäße Rücklieferung

(1) Liefert eine Partei („säumige Partei") am Fälligkeitstag die Darlehenspapiere nicht oder nicht vollständig an die andere Partei zurück, so hat diese gegen die säumige Partei für jeden Tag des Verzuges Anspruch auf Verzugszinsen gemäß Abs. 2. Darüber hinaus ist sie nach vorheriger Androhung mit Fristsetzung von mindestens einem Bankarbeitstag berechtigt, für Rechnung der säumigen Partei Wertpapiere gleicher Art, Güte und Menge zu kaufen („Eindeckung"). Der säumigen Partei ist unverzüglich eine Abrechnung zu erteilen. Der Aufwendungsersatzanspruch gegen die säumige Partei ist mit dem Zugang der Abrechnung fällig. Im Falle nicht fristgemäßer Rücklieferung liegt ein wichtiger Grund zur Kündi-

gung im Sinne von Nr. 9 Abs. 1 erst dann vor, wenn der Lieferpflichtige den Aufwendungsersatzanspruch nach Ablauf der Frist gemäß Nr. 9 Abs. 1 Satz 2 nicht erfüllt, es sei denn, es liegt ein anderer wichtiger Grund vor.

(2) Der Verzugszins ist der Euro-tagesgeldindizierte Referenzzinssatz EONIA wie er für jeden Tag, für den Verzugszinsen zu berechnen sind, von der Europäischen Zentralbank festgestellt und auf der Telerate-Seite 247 veröffentlicht wird. Er wird berechnet ab dem Fälligkeitstag (einschließlich) bis zu dem Tag der tatsächlichen Rücklieferung oder der Erfüllung des Aufwendungsersatzanspruches (ausschließlich). Hierbei wird die Anzahl der tatsächlich abgelaufenen Tage durch 360 dividiert.

(3) Die Geltendmachung eines weiteren Schadens oder der Nachweis eines geringeren Schadens ist nicht ausgeschlossen.

9. Beendigung, Schadensersatz

(1) Sofern Einzelabschlüsse getätigt und noch nicht vollständig abgewickelt sind, ist der Vertrag nur aus wichtigem Grund kündbar. Ein solcher liegt insbesondere dann vor, wenn der Aufwendungsersatzanspruch nach Nr. 8 Abs. 1 oder der Anspruch auf Wertausgleich nach Nr. 4 nicht innerhalb eines Bankarbeitstages nach Benachrichtigung des Zahlungs- oder Leistungspflichtigen vom Ausbleiben der Zahlung oder Leistung erfüllt worden ist. Die Kündigung hat schriftlich, fernschriftlich, telegrafisch oder durch Telefax zu erfolgen. Eine Teilkündigung, insbesondere die Kündigung einzelner und nicht aller Einzelabschlüsse aus wichtigem Grund ist ausgeschlossen.

(2) Der Vertrag endet ohne Kündigung im Insolvenzfall. Dieser ist gegeben, wenn das Konkurs- oder ein sonstiges Insolvenzverfahren über das Vermögen einer Partei beantragt wird und diese Partei entweder den Antrag selbst gestellt hat oder zahlungsunfähig oder sonst in einer Lage ist, die die Eröffnung eines solchen Verfahrens rechtfertigt.

(3) Im Falle der Beendigung durch Kündigung oder Insolvenz bestehen keine Ansprüche mehr auf Lieferung oder Rücklieferung von Wertpapieren und sonstigen Leistungen. An die Stelle dieser Ansprüche tritt eine einheitliche Forderung („Ausgleichsforderung"). Zu deren Ermittlung werden sämtliche Ansprüche der Parteien aus dem Vertrag einschließlich der nach Nr. 4 erhaltenen, noch nicht rückübertragenen Leistungen miteinander verrechnet. Letztere gelten als Anspruch der Partei, welche die Leistungen erbracht hat. Die Geltendmachung eines weitergehenden Schadens durch die ersatzberechtigte Partei ist nicht ausgeschlossen.

(4) Die den Vertrag kündigende bzw. solvente Partei („ersatzberechtigte Partei") wird die Ausgleichsforderung berechnen. Diese wird auf der Grundlage von unverzüglich abzuschließenden Ersatzgeschäften ermittelt, die dazu führen, dass die ersatzberechtigte Partei alle Zahlungen und sonstigen Leistungen erhält, die ihr bei ordnungsgemäßer Vertragsabwicklung zugestanden hätten. Sie ist berechtigt, nach ihrer Auffassung dazu geeignete Verträge abzuschließen. Wenn sie von dem Abschluss derartiger Ersatzgeschäfte absieht, kann sie denjenigen Betrag zugrunde legen, den sie für solche Ersatzgeschäfte auf der Grundlage von Zinssätzen, Terminsätzen, Kursen, Marktpreisen, Indizes und sonstigen Wertmessern sowie Kosten und Auslagen zum Zeitpunkt der Kündigung bzw. der Kenntniserlangung von dem Insolvenzfall hätte aufwenden müssen. Für die nach Nr. 4 erbrachten Leistungen gilt Vorstehendes entsprechend.

(5) Eine Ausgleichsforderung gegen die ersatzberechtigte Partei wird nur fällig, soweit diese keine Ansprüche aus irgendeinem rechtlichen Grund gegen die andere Partei („Gegenansprüche") hat. Bestehen Gegenansprüche, so ist deren Wert zur Ermittlung des fälligen Teils der Ausgleichsforderung vom Gesamtbetrag abzuziehen. Zur Berechnung des Wertes der Gegenansprüche hat die ersatzberechtigte Partei diese:

(a) soweit sie sich nicht auf Euro richten, am Berechnungstag in Euro umzurechnen,
(b) soweit sie sich nicht auf Geldzahlungen richten, in eine in Euro ausgedrückte Schadensersatzforderung umzuwandeln und
(c) soweit sie nicht fällig sind, mit ihrem Barwert (unter Berücksichtigung auch der Zinsansprüche) zu berücksichtigen.

Die ersatzberechtigte Partei kann gegen die Ausgleichsforderung der anderen Partei mit den nach Satz 3 errechneten Gegenansprüchen aufrechnen. Soweit sie dies unterlässt, wird die Ausgleichsforderung fällig, sobald und soweit ihr keine Gegenansprüche mehr gegenüberstehen.

10. Steuern und Abgaben

Soweit auf die Lieferung und Rücklieferung von Darlehenspapieren Steuern, Kosten, Gebühren oder Abgaben anfallen, werden diese vom Darlehensnehmer, bei Leistungen nach Nr. 4 vom Leistungspflichtigen getragen.

11. Sonstige Bestimmungen

(1) „Bankarbeitstag" im Sinne dieses Vertrages ist jeder Tag, an dem die Banken an dem/den im Einzelabschluss genannten Finanzplatz/Finanzplätzen der jeweils handelnden Niederlassungen der Vertragspartner für Geschäfte geöffnet sind und die jeweils eingeschalteten Clearingsysteme Geschäfte abwickeln. Ist ein Fälligkeitstag kein Bankarbeitstag, so ist der unmittelbar folgende Bankarbeitstag maßgeblich.

(2) Der „Marktwert" von Darlehenspapieren bestimmt sich bei Wertpapieren, die an einer Wertpapierbörse gehandelt werden, nach dem an der Frankfurter Wertpapierbörse festgestellten Kassakurs oder, falls ein solcher nicht besteht, nach dem Kassakurs der Heimatbörse der betreffenden Wertpapiere, bei verzinslichen Wertpapieren jeweils inklusive Stückzinsen. Handelt es sich um nicht an einer Wertpapierbörse gehandelte Wertpapiere, findet an einem Bankarbeitstag kein Handel in den betreffenden Wertpapieren statt oder wird an einem Tag kein Kassakurs festgestellt, so ist der Marktwert das arithmetische Mittel aus zwei Ankaufkursen, die von zwei Marktteilnehmern, von denen jede Partei einen benannt hat, gestellt werden, bei verzinslichen Wertpapieren jeweils inklusive Stückzinsen. Für die Feststellung des Marktwertes von Bezugsrechten gelten die vorstehenden Bestimmungen entsprechend.

(3) Die Übertragung von Rechten und Pflichten aus diesem Vertrag bedarf der vorherigen schriftlichen, fernschriftlichen, telegrafischen, durch Telefax oder in sonstiger Weise mitgeteilten Zustimmung der jeweils anderen Partei.

(4) Bei der Versendung von Telefaxen haftet der Absender für alle Schäden, die aufgrund verfälschter oder nicht lesbarer Benachrichtigungen oder Mitteilungen entstehen, es sei denn, der Empfänger hat die Kontrolle nicht mit der erforderlichen Sorgfalt vorgenommen.

(5) Dieser Vertrag unterliegt dem Recht der Bundesrepublik Deutschland. Nicht ausschließlicher Gerichtsstand ist der

Ort der Niederlassung der Bank, durch die der Vertrag abgeschlossen wird.

(6) Sind Bestimmungen des Vertrages unwirksam oder undurchführbar, so bleiben die übrigen Vorschriften hiervon unberührt. Gegebenenfalls hierdurch entstehende Vertragslücken werden durch ergänzende Vertragsauslegung unter angemessener Berücksichtigung der Interessen der Parteien geschlossen.

(7) Der nach Nr. 4 Abs. 1 zu vereinbarende Mindestbetrag beträgt:

Euro

(8) Dieser Absatz gilt nur, sofern das nachfolgende Feld angekreuzt ist:

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Der Vertrag in der hiermit vereinbarten Fassung gilt auch für alle etwaigen Einzelabschlüsse der Parteien unter dem Rahmenvertrag für Wertpapierleihgeschäfte. Diese gelten als Einzelabschlüsse unter diesem Rahmenvertrag. Der Rahmenvertrag für Wertpapierleihgeschäfte bleibt für die Auslegung der unter ihm getätigten Einzelabschlüsse insoweit maßgeblich, als dies zum Verständnis der in den Einzelabschlüssen getroffenen Regelungen erforderlich ist.

12. Sonstige Vereinbarungen

Unterschrift(en) der Bank

Unterschrift(en) des Vertragspartners