

<p>1 Monday, 23 November 2015</p> <p>2 (10.30 am)</p> <p>3 JUDGE GERO FISCHER (continued)</p> <p>4 Cross-examination by MR DICKER</p> <p>5 (All answers are interpreted</p> <p>6 unless otherwise indicated)</p> <p>7 MR JUSTICE HILDYARD: Good morning.</p> <p>8 MR DICKER: Judge Fischer, we were discussing the</p> <p>9 requirement of a serious and definitive refusal on</p> <p>10 Friday. I want to move on to another point which</p> <p>11 Professor Mulbert makes which concerns section 323 of</p> <p>12 the BGB.</p> <p>13 <b>A. (Not interpreted) Ah, 32 -- yes, okay.</b></p> <p>14 Q. Now, you agreed on Friday, I think, that termination</p> <p>15 clauses which form part of the general business terms of</p> <p>16 a contract have to conform with the guiding principles</p> <p>17 of the BGB.</p> <p>18 THE INTERPRETER: Could you repeat?</p> <p>19 <b>A. (Not interpreted) The screen didn't come.</b></p> <p>20 THE INTERPRETER: It didn't come.</p> <p>21 MR DICKER: I gather the screen is not connected.</p> <p>22 THE INTERPRETER: Please just repeat the question, please.</p> <p>23 MR DICKER: Judge Fischer, I think you agreed on Friday the</p> <p>24 termination clauses which form part of general business</p> <p>25 terms of the contract have to conform with the guiding</p> <p style="text-align: right;">Page 1</p>	<p>1 Q. But in any event, to try and cut this short,</p> <p>2 a termination provision, the requirements for</p> <p>3 termination are dealt with in section 323.</p> <p>4 <b>A. The contractually agreed conditions for the termination</b></p> <p>5 <b>of a contract do not have to be in accordance with the</b></p> <p>6 <b>conditions of paragraph -- section 323.</b></p> <p>7 Q. Then can I rephrase my question.</p> <p>8 A termination in accordance with 323 will satisfy</p> <p>9 the general principles of the BGB.</p> <p>10 <b>A. (Not interpreted) Yes. Yes, my Lord, that's true. Yes.</b></p> <p>11 Q. Thank you. I'm sorry it took me a while to get there.</p> <p>12 <b>A. (Not interpreted) Okay.</b></p> <p>13 Q. Now, if you turn on to section 323, it's at tab S.</p> <p>14 Now, I want to explain -- I want to set out what</p> <p>15 I understand Professor Mulbert is saying, and then ask</p> <p>16 you some questions.</p> <p>17 <b>A. (Not interpreted) Yes.</b></p> <p>18 Q. Now, as I understand it, Professor Mulbert says</p> <p>19 section 323, subsection (4) --</p> <p>20 <b>A. (Not interpreted) Yes.</b></p> <p>21 Q. -- states:</p> <p>22 "The creditor may revoke the contract before</p> <p>23 performance is due if it is obvious the requirements for</p> <p>24 revocation will be met."</p> <p>25 <b>A. (Not interpreted) Yes.</b></p> <p style="text-align: right;">Page 3</p>
<p>1 principles of the BGB?</p> <p>2 <b>A. (Not interpreted) Yes.</b></p> <p>3 Q. Could we just look at two sections? The first is</p> <p>4 section 307 which you should have, I think, in bundle 2</p> <p>5 of the authorities, tab 83 of letter Q.</p> <p>6 <b>A. (Not interpreted) Yes.</b></p> <p>7 Q. Just so we see section 307 in the English translation it</p> <p>8 states:</p> <p>9 "Provisions in standard business terms are</p> <p>10 ineffective if, contrary to the requirements of good</p> <p>11 faith, they unreasonably disadvantage the other party to</p> <p>12 the contract."</p> <p>13 Then subsection (2):</p> <p>14 "An unreasonable disadvantage is in case of doubt to</p> <p>15 be assumed to exist if a provision is not compatible</p> <p>16 with essential principles of the statutory provision</p> <p>17 from which it deviates."</p> <p>18 <b>A. (Not interpreted) Yes.</b></p> <p>19 Q. Now, as I understand it, in relation to termination,</p> <p>20 that requires you to look at section 323 of the BGB.</p> <p>21 <b>A. I don't know if I've quite grasped the question. You</b></p> <p>22 <b>asked whether section 323 is to be interpreted that the</b></p> <p>23 <b>contractual conditions should comply entirely with</b></p> <p>24 <b>section 323. That does not actually result from</b></p> <p>25 <b>section 307.</b></p> <p style="text-align: right;">Page 2</p>	<p>1 Q. What Professor Mulbert says is what that does ask</p> <p>2 whether it's obvious that the requirements for</p> <p>3 revocation set out in subclauses (1) and (2) will not be</p> <p>4 met.</p> <p>5 <b>A. As I understand the question is whether 323 applies</b></p> <p>6 <b>when the conditions under sections 1 and 2 are not</b></p> <p>7 <b>present.</b></p> <p>8 Q. Yes.</p> <p>9 <b>A. (Not interpreted) Yes, yes, that's -- that's right.</b></p> <p>10 Q. Thank you.</p> <p>11 What Professor Mulbert says is that if you then look</p> <p>12 at section 323, subsection 2.1, one of the requirements</p> <p>13 for revocation is if the debtor seriously and</p> <p>14 definitively refuses to perform.</p> <p>15 <b>A. (Not interpreted) Yes.</b></p> <p>16 Q. What Professor Mulbert says is that phrase, "seriously</p> <p>17 and definitively refuses to perform", in section 323,</p> <p>18 has the same meaning as it does in section 286 which</p> <p>19 we've looked at.</p> <p>20 <b>A. The content of conditions for serious and definitive</b></p> <p>21 <b>refusals of performance in section 323(2), first</b></p> <p>22 <b>sentence, are the same as in section 286(2), third</b></p> <p>23 <b>sentence.</b></p> <p>24 Q. Thank you. Now, Professor Mulbert, therefore, says if</p> <p>25 the facts are such that one is entitled to revoke the</p> <p style="text-align: right;">Page 4</p>

<p>1 contract, then it follows that the requirements of</p> <p>2 section 286 that you just mentioned are also satisfied.</p> <p>3 <b>A. I didn't understand that question.</b></p> <p>4 Q. Again, that may be me, I'll rephrase it.</p> <p>5 Professor Mulbert says that if you have a serious</p> <p>6 and definitive refusal that entitles the creditor to say</p> <p>7 "I revoke the contract", he is also entitled to say the</p> <p>8 requirement -- the exception under 286 is also</p> <p>9 satisfied.</p> <p>10 <b>A. I can only agree that within limits, my Lord. The</b></p> <p>11 <b>serious and definitive reasons for -- under 323.2.1 can</b></p> <p>12 <b>lead to the drawing back from the contract, so not the</b></p> <p>13 <b>cancellation or revocation but to withdraw from the</b></p> <p>14 <b>contracts -- 323 only concerns a withdrawal from the</b></p> <p>15 <b>contract, a -- turning back from the contract --</b></p> <p>16 <b>contract. Not termination. Not cancellation.</b></p> <p>17 Q. But if there is a serious and definitive refusal</p> <p>18 sufficient for section 323, the creditor can refuse to</p> <p>19 continue to perform the contract.</p> <p>20 <b>A. Well, no, there is no refusal necessary because</b></p> <p>21 <b>according to 323, he can step back from the contract and</b></p> <p>22 <b>when he does that, he has no longer any obligations to</b></p> <p>23 <b>fulfil.</b></p> <p>24 Q. Thank you.</p> <p>25 Now, Professor Mulbert's last point on this is that</p> <p style="text-align: center;">Page 5</p>	<p>1 Q. Number 7. Professor Mulbert's point as I understand it</p> <p>2 is that if there is a material reason within clause 7.1,</p> <p>3 or an insolvency within clause 7.2, the creditor is no</p> <p>4 longer obliged to perform the contract.</p> <p>5 Professor Mulbert says that's confirmed if you look</p> <p>6 at 7.3, because 7.3 states:</p> <p>7 "Neither party should be obliged to make any further</p> <p>8 payment or perform any other obligation."</p> <p>9 <b>A. Well, the question of termination or revocation is not</b></p> <p>10 <b>relevant here because those terms have not been</b></p> <p>11 <b>explained.</b></p> <p>12 <b>(Not interpreted) It must be explained and there</b></p> <p>13 <b>isn't any termination or withdrawal of the treatment.</b></p> <p>14 Q. So the creditor is no longer obliged to perform the</p> <p>15 contract.</p> <p>16 <b>A. It's if he has not given notice and not -- has drawn the</b></p> <p>17 <b>implications, the consequences from such a termination,</b></p> <p>18 <b>then it's -- then it stays with the contract. Then</b></p> <p>19 <b>what -- concerns the contract.</b></p> <p>20 <b>And this applies to -- with 323 it is the same. If</b></p> <p>21 <b>he does not avail himself of the possibilities in the</b></p> <p>22 <b>provision for withdrawal, then the contract remains so.</b></p> <p>23 Q. Can I try and rephrase it slightly. Assume there is</p> <p>24 a serious and definitive refusal, Professor Mulbert says</p> <p>25 if there is a serious and definitive refusal, that</p> <p style="text-align: center;">Page 7</p>
<p>1 if a creditor in respect of the German master agreement</p> <p>2 is entitled to -- whether one calls it revoke, terminate</p> <p>3 or step back from the contract in the event of a serious</p> <p>4 and definitive refusal -- is also entitled to say that</p> <p>5 there has been a serious and definitive refusal for the</p> <p>6 purposes of section 286.</p> <p>7 <b>A. I don't agree with respect to one point, my Lord. 323</b></p> <p>8 <b>allows the right for a -- for a withdrawal in serious</b></p> <p>9 <b>and -- for serious and definitive reasons before</b></p> <p>10 <b>performance becomes due.</b></p> <p>11 <b>On the other hand, if I require -- if I demand</b></p> <p>12 <b>default damages, then it is necessary that the</b></p> <p>13 <b>performance has become due.</b></p> <p>14 Q. Let's turn to clause 7.</p> <p>15 THE INTERPRETER: Clause 7, yes.</p> <p>16 <b>A. (Not interpreted) Number 7 of the German master</b></p> <p>17 <b>agreement.</b></p> <p>18 Q. Let's just discuss clause 7 of the German master in that</p> <p>19 context.</p> <p>20 It's in English, obviously, core bundle tab 9.</p> <p>21 The German version is in bundle 5, tab 8.</p> <p>22 THE INTERPRETER: Bundle 5, tab 8.</p> <p>23 MR DICKER: Sorry, I should have said.</p> <p>24 Now, Professor --</p> <p>25 <b>A. (Not interpreted) Yes, number 7, yes.</b></p> <p style="text-align: center;">Page 6</p>	<p>1 entitles the creditor to do two things; one of which is</p> <p>2 to revoke the contract, and the other of which is to say</p> <p>3 there's an exception to the need for a warning notice</p> <p>4 under section 286.</p> <p>5 <b>A. If those conditions exist, then under 286 there is no</b></p> <p>6 <b>need for a warning notice, but the effect of the refusal</b></p> <p>7 <b>only occur -- occur once the claim has become due.</b></p> <p>8 <b>Any claim to default damage applies when he -- have</b></p> <p>9 <b>to apply when he invokes 282, paragraph -- subparagraph</b></p> <p>10 <b>2.3.</b></p> <p>11 <b>That is the definitive refusal and the due date --</b></p> <p>12 <b>the becoming due of the claim.</b></p> <p>13 <b>The provisions of 323 are special provisions</b></p> <p>14 <b>applying to withdrawal from a contract which cannot be</b></p> <p>15 <b>transferred to a claim for damages.</b></p> <p>16 Q. I understand your point in relation to due, and we</p> <p>17 discussed that on Friday. At the moment I am just</p> <p>18 focusing on concept of a serious and definitive refusal.</p> <p>19 <b>A. Insofar as it applies to serious and definitive refusal,</b></p> <p>20 <b>the conditions under 323 are the same as under</b></p> <p>21 <b>paragraph 286.</b></p> <p>22 Q. Thank you.</p> <p>23 All I am trying to establish is that if you have</p> <p>24 a serious and definitive refusal, that can lead to two</p> <p>25 consequences. The first of which is creditor is</p> <p style="text-align: center;">Page 8</p>

<p>1 entitled to revoke the contract. And the second is,</p> <p>2 subject to the point about due, that he can say, "I</p> <p>3 don't need to serve a warning notice".</p> <p>4 <b>A. If he has made use of the right to withdrawal, then the</b></p> <p>5 <b>obligations are extinguished and he does not need</b></p> <p>6 <b>a warning notice.</b></p> <p>7 Q. Thank you.</p> <p>8 Right, I want to turn to another topic, the question</p> <p>9 of insolvency?</p> <p>10 <b>A. (Not interpreted) Yes.</b></p> <p>11 Q. Now, you've already discovered some of the ground in</p> <p>12 your answers on Friday. So I think I can take this</p> <p>13 reasonably shortly.</p> <p>14 <b>A. (Not interpreted) Yes.</b></p> <p>15 Q. The first thing I want to do is to look at the way the</p> <p>16 German master agreement has been drafted to take account</p> <p>17 of the German insolvency code.</p> <p>18 <b>A. (Not interpreted) Mm-hm.</b></p> <p>19 Q. Now, my first point is this. The German master</p> <p>20 agreement is a framework agreement.</p> <p>21 <b>A. (Not interpreted) Yes.</b></p> <p>22 Q. All of the transactions are treated as forming part of</p> <p>23 a single agreement.</p> <p>24 <b>A. (Not interpreted) Yes.</b></p> <p>25 Q. Can I just show you how that's dealt with in one of the</p> <p style="text-align: right;">Page 9</p>	<p>1 Q. Thank you.</p> <p>2 Judge Fischer, if you keep open that tab because we</p> <p>3 are going back to it.</p> <p>4 <b>A. (Not interpreted) Yes.</b></p> <p>5 Q. Go to tab 53. There's one other passage in a work by</p> <p>6 Jahn I just want to show you.</p> <p>7 <b>A. (Not interpreted) Yes.</b></p> <p>8 Q. The second numbered paragraph, paragraph 37 --</p> <p>9 <b>A. (Not interpreted) 37. Yes.</b></p> <p>10 Q. -- it's five lines from the end of that paragraph.</p> <p>11 <b>A. Yes, that is correct.</b></p> <p>12 Q. The purpose of the uniform agreement was to preserve the</p> <p>13 legal uniformity of all transactions that are already</p> <p>14 uniform from an economic perspective in a German</p> <p>15 insolvency.</p> <p>16 <b>A. Yes, that's correct, for this reason, section 104 was</b></p> <p>17 <b>created in order to secure that this objective, this</b></p> <p>18 <b>goal, could be achieved.</b></p> <p>19 <b>This is why paragraph 104.2.3 mentions -- expressly</b></p> <p>20 <b>mentions the master agreement.</b></p> <p>21 Q. Thank you. Now, my second point is this. Clause 7.2 of</p> <p>22 the master agreement.</p> <p>23 <b>A. (Not interpreted) 7.2, yes.</b></p> <p>24 Q. Provides for the contract to terminate automatically on</p> <p>25 insolvency?</p> <p style="text-align: right;">Page 11</p>
<p>1 commentators, if you go to bundle 2 of the authorities,</p> <p>2 tab 75. There's an extract from a book on financial</p> <p>3 derivatives by Zerey. The paragraph I wanted to show</p> <p>4 you was paragraph 18.</p> <p>5 <b>A. (Not interpreted) Yes.</b></p> <p>6 Q. The point that the author is making in paragraph 18 is</p> <p>7 that the purpose of having this framework agreement,</p> <p>8 this -- this uniform agreement, is to limit risk that</p> <p>9 would have occurred if there were separate transactions.</p> <p>10 To limit the risk of that in the event that one of the</p> <p>11 parties becomes insolvent?</p> <p>12 <b>A. Yes, that, my Lord, is correct in principle. That is</b></p> <p>13 <b>why in 1999, paragraph 104, section 104 of the</b></p> <p>14 <b>Insolvency Act was included in the insolvency order in</b></p> <p>15 <b>the InsO.</b></p> <p>16 <b>Without 104 InsO the goal of the German master</b></p> <p>17 <b>agreement here could not be obtained, as in this case</b></p> <p>18 <b>this would contradict the provisions of paragraph 103</b></p> <p>19 <b>InsO, which entitles the insolvency administrator to</b></p> <p>20 <b>decide whether the conditions of the contract have been</b></p> <p>21 <b>fulfilled or not.</b></p> <p>22 <b>104 InsO excludes 103 in this respect in that</b></p> <p>23 <b>contracts according to GMA 104 terminate and cannot --</b></p> <p>24 <b>and therefore performance cannot be demanded by the</b></p> <p>25 <b>administrator.</b></p> <p style="text-align: right;">Page 10</p>	<p>1 <b>A. (Not interpreted) Yes.</b></p> <p>2 Q. That again was done to deal with consequences that</p> <p>3 otherwise arise under the German insolvency code.</p> <p>4 Mr Fischer, just before you answer it may be easiest</p> <p>5 if I show you the passage from Zerey. That may make it</p> <p>6 slightly clearer, the point I am making?</p> <p>7 <b>A. (Not interpreted) Yes.</b></p> <p>8 Q. If you go back to tab 75, two paragraphs, paragraph 38</p> <p>9 and 39. It's the second sentence at paragraph 38.</p> <p>10 It's volume 2, tab 75. Then paragraph numbered 38.</p> <p>11 <b>A. (Not interpreted) Yes, okay.</b></p> <p>12 Q. What the author is saying in the first six lines of</p> <p>13 paragraph 8 is that the insolvency was brought forward</p> <p>14 in time to ensure that no question arose about the --</p> <p>15 what's referred to there is the dissolution clauses.</p> <p>16 What he says -- just to finish this extract -- in</p> <p>17 paragraph 39, first sentence, was that the automatic</p> <p>18 termination was intended to ensure the efficacy of</p> <p>19 contract termination and close-out netting in the event</p> <p>20 of the initiation of a German bankruptcy proceeding.</p> <p>21 <b>A. (Not interpreted) Yes.</b></p> <p>22 Q. And that's correct?</p> <p>23 <b>A. It is correct that the -- the GMA, because the</b></p> <p>24 <b>termination has been forwarded -- the termination of the</b></p> <p>25 <b>contract has been brought forward by the application for</b></p> <p style="text-align: right;">Page 12</p>

<p>1 insolventy, wants to avoid the consequences insofar --</p> <p>2 the consequences of bankruptcy.</p> <p>3 This is the aim -- the object of the contract. The</p> <p>4 object of the contract would not have been achieved if</p> <p>5 104 had not existed.</p> <p>6 In German law there are a number of different</p> <p>7 contracts, not framework contracts but individual ones,</p> <p>8 which provide that the -- the contract terminates when</p> <p>9 the application for insolvency is made.</p> <p>10 This especially applies to contracts for current</p> <p>11 ongoing supplies of energy and other goods.</p> <p>12 The BGH, the highest court, in its judgment of 2012</p> <p>13 which I have quoted in my expert opinion, in that</p> <p>14 judgment the court considered clauses 103 to 118 as</p> <p>15 having no effect. Inapplicable.</p> <p>16 Only by the provision 104 InsO, this provision</p> <p>17 secured that the goal of the -- the master agreement is</p> <p>18 achieved.</p> <p>19 Q. Thank you. But just to ensure we are clear. The very</p> <p>20 short point I wanted to establish was that the</p> <p>21 termination date is brought forward to the date of the</p> <p>22 application.</p> <p>23 A. (Not interpreted) Yes.</p> <p>24 Q. To ensure that the contractual netting provisions</p> <p>25 operate in the way set out in clause 9.</p> <p style="text-align: center;">Page 13</p>	<p>1 replaced by a claim for the balance.</p> <p>2 A. Yes. I agree in German law a distinction is made</p> <p>3 between netting and set-off, but the result is the same.</p> <p>4 Q. We have the same distinction in English law and the</p> <p>5 result is generally the same.</p> <p>6 A. (Not interpreted) Oh, okay.</p> <p>7 Q. Now, we obviously don't have a German insolvency in this</p> <p>8 case.</p> <p>9 A. (Not interpreted) Yes.</p> <p>10 Q. As I understand it, there's no German case law dealing</p> <p>11 with when a foreign insolvency proceeding may amount to</p> <p>12 a serious and definitive refusal.</p> <p>13 A. That's correct, yes.</p> <p>14 Q. To state the obvious, foreign insolvency proceedings may</p> <p>15 be different from German insolvency proceedings, they</p> <p>16 may have different underlying policies, they may have</p> <p>17 different provisions.</p> <p>18 A. The -- of course there may be a difference. The -- the</p> <p>19 definitive and serious refusal under 286 answers that</p> <p>20 question. In German law it should be asked whether an</p> <p>21 application for a foreign insolvency procedure should</p> <p>22 lead to the inference that the reasons for this</p> <p>23 application justifying the question of a -- whether the</p> <p>24 application for insolvency is a definitive and -- and is</p> <p>25 an application for definitive and serious reasons should</p> <p style="text-align: center;">Page 15</p>
<p>1 A. (Not interpreted) Yes. Yes. Yes.</p> <p>2 Q. Now, the next point is this. Clause 9 of the German</p> <p>3 master agreement --</p> <p>4 A. (Not interpreted) Yes.</p> <p>5 Q. -- the German version is bundle 5, tab 8.</p> <p>6 A. (Not interpreted) Okay, yes. Yes.</p> <p>7 Q. Clause 9 provides for all claims and cross-claims to be</p> <p>8 combined into a single compensation sum.</p> <p>9 A. (Not interpreted) Yes.</p> <p>10 Q. So to the extent there is a claim and a cross-claim of</p> <p>11 equal amount, they're effectively paid by each other.</p> <p>12 A. (Not interpreted) And under. Set off against each</p> <p>13 other.</p> <p>14 Q. So in English terms we'd say they are treated as due and</p> <p>15 payable and one is set off against the other to</p> <p>16 extinguish both.</p> <p>17 A. (Not interpreted) Yes.</p> <p>18 (Interpreted) Yes, according to section 9 of the</p> <p>19 agreement and also according to 104, there is no set-off</p> <p>20 necessary; a netting, simple netting, is sufficient.</p> <p>21 But it may also be done by way of set-off. That is</p> <p>22 clear.</p> <p>23 Q. Whether one uses the word "netting" or "set-off", claim</p> <p>24 and cross-claim are effectively, as I think you've just</p> <p>25 agreed, treated as due and payable and extinguished and</p> <p style="text-align: center;">Page 14</p>	<p>1 be treated differently if the effect of the foreign</p> <p>2 proceedings are different from the effect of the German</p> <p>3 proceedings.</p> <p>4 Q. Thank you. So it's a question of looking at the facts</p> <p>5 in relation to the foreign proceedings.</p> <p>6 A. In that case the -- an examination should be made of</p> <p>7 foreign procedural law to ask whether the reasons</p> <p>8 according to German law for a serious and definitive</p> <p>9 refusal in -- in insolvency application exists in the</p> <p>10 foreign law system or whether there are -- or whether</p> <p>11 the justification should be different. The reason</p> <p>12 should be justified in a different way.</p> <p>13 Q. Now, in case it's relevant, and it may not be in the</p> <p>14 light of your answer, I want to ensure I understand what</p> <p>15 the position is if we did have a German insolvency in</p> <p>16 this case.</p> <p>17 A. (Not interpreted) Yes.</p> <p>18 Q. Now --</p> <p>19 A. If German procedure were applied, then, for the reasons</p> <p>20 mentioned, a default under 286 should be denied.</p> <p>21 Q. Professor Mulbert says that the question of whether</p> <p>22 filing a German insolvency petition may amount to</p> <p>23 a serious and definitive refusal has not been discussed</p> <p>24 by the German courts or in the literature.</p> <p>25 A. It's correct to say that the question of whether</p> <p style="text-align: center;">Page 16</p>

<p>1 <b>an insolvency application constitutes a definitive and</b>  2 <b>serious refusal has not been dealt with either in German</b>  3 <b>case law or in the literature.</b>  4 Q. The only authority I think anyone's been able to find  5 which is potentially relevant is a decision of the  6 Munich Court of Appeal --  7 <b>A. (Not interpreted) Yes.</b>  8 Q. -- and I'd just like to ask you about that. It's in  9 bundle 3, tab 98.  10 <b>A. (Not interpreted) Yes.</b>  11 Q. Now, two paragraphs. The first is in the summary --  12 <b>A. (Not interpreted) Yes.</b>  13 Q. -- at the start. And it's the paragraph numbered 2.  14 <b>A. (Not interpreted) Yes.</b>  15 Q. The statement that is being made there, as I understand  16 it, is that merely opening the bankruptcy doesn't on its  17 own amount to a serious and definitive refusal.  18 <b>A. (Not interpreted) Yes.</b>  19 Q. Again, just so we understand the facts of this case, if  20 you go on to the last two sentences of the extract, so  21 right at the end.  22 <b>A. (Not interpreted) Yes.</b>  23 Q. In that case the debtor was suffering only a temporary  24 liquidity bottleneck which it was hoped would be cleared  25 away and which would make the bankruptcy proceedings</p> <p style="text-align: center;">Page 17</p>	<p>1 debtor and demand performance from the other party.  2 <b>A. (Not interpreted) Okay, yes.</b>  3 Q. So the insolvency officer has a right to perform the  4 contract under section 103?  5 <b>A. (Not interpreted) Under -- under section 103. Not after</b>  6 <b>104, 103, yes, that's right.</b>  7 Q. One issue, I suppose, for a German court in deciding  8 whether a serious and definitive refusal was constituted  9 by an application for a -- for an insolvency order,  10 would be that if -- if you said yes, that was a serious  11 and definitive refusal, you might be cutting across the  12 policy in 103.  13 Can I just explain, before you answer, just to make  14 sure that we are clear? In other words, if the debtor  15 could say there's a serious and definitive refusal for  16 the purposes of section 323, the insolvency office  17 holder may not be able to enforce his rights under  18 section 103.1 of the German insolvency code.  19 That, all I am suggesting to you, is -- may be one  20 factor which a German court would take into account in  21 deciding whether a petition in Germany amounted to  22 a serious and definitive refusal?  23 <b>A. I agree with you that also with reference to</b>  24 <b>paragraph 3, section 3, in German law one could argue</b>  25 <b>that if one assumes a refusal under 286.2.3, the</b></p> <p style="text-align: center;">Page 19</p>
<p>1 unnecessary.  2 <b>A. (Not interpreted) Yes.</b>  3 Q. Now, it's right, isn't it, that, as you mentioned  4 a few minutes ago, whether there is a serious and  5 definitive refusal may depend in part on the provisions  6 of the German insolvency code.  7 <b>A. That is not quite correct. My Lord, what I meant was</b>  8 <b>that if I measure 286, section 2.3 in respect of</b>  9 <b>an insolvency application in German law then the --</b>  10 <b>286.2.3 never applies in that case.</b>  11 <b>(Not interpreted) Yes.</b>  12 Q. Could I ask the question in a slightly different way.  13 If you go to the authorities bundle 2, tab 84.  14 Tab 84, subtab D. Section 103 of the insolvency code?  15 <b>A. (Not interpreted) Of the insolvency code, yes. Okay,</b>  16 <b>yes.</b>  17 Q. Now, you referred to this earlier.  18 <b>A. (Not interpreted) Yes.</b>  19 Q. As I understand it, what this says is that if  20 a reciprocal contract has not been performed or has not  21 been fully performed --  22 <b>A. (Not interpreted) Yes.</b>  23 Q. -- by the debtor and the other party at the time when  24 the insolvency proceedings are commenced, the insolvency  25 administrator may perform the contract in place of the</p> <p style="text-align: center;">Page 18</p>	<p>1 <b>manager, the insolvency manager could -- proceedings</b>  2 <b>manager, could no longer exercise his rights. That</b>  3 <b>is -- could be an argument, but an argument which needs</b>  4 <b>to be -- needs to be completed, added to.</b>  5 <b>In German law the -- an insolvency application is</b>  6 <b>considered -- such insolvency application is considered</b>  7 <b>not to be a definitive and serious one as it is</b>  8 <b>procedural -- procedural only and only addressed to the</b>  9 <b>court, and that in content it only expresses possibly or</b>  10 <b>certainty that the -- the debtor cannot or does not want</b>  11 <b>to pay.</b>  12 <b>And those two arguments take priority over what he</b>  13 <b>was saying.</b>  14 <b>The argument in your question, in contrast to the</b>  15 <b>two arguments mentioned, is in German law of a lower</b>  16 <b>priority, but it is correct insofar.</b>  17 Q. One other aspect of German insolvency law, as  18 I understand it, is that the debtor may be under a --  19 an obligation in certain circumstances to file  20 a insolvency petition.  21 <b>A. The obligation, whether the -- the question whether the</b>  22 <b>obligation exists in such an application under German</b>  23 <b>law is different according to the type of personality;</b>  24 <b>that is to say for natural persons, such an obligation</b>  25 <b>does not exist. This does exist for legal persons.</b></p> <p style="text-align: center;">Page 20</p>

5 (Pages 17 to 20)

<p>1 <b>I would add this obligation exists for a legal</b>  2 <b>person which -- for legal persons which are not</b>  3 <b>represented by a natural person as -- which is</b>  4 <b>personally liable, that is to say limited companies and</b>  5 <b>GmbH.</b>  6 <b>In content one should also differentiate in cases of</b>  7 <b>insolvency or overindebtedness, a legal person has to</b>  8 <b>make an application for insolvency.</b>  9 Q. Sorry ...  10 <b>A. On the other hand, if there is only a risk, a threat of</b>  11 <b>insolvency, then it may make an application, but is not</b>  12 <b>obliged to do so.</b>  13 Q. Leave aside the detail of when the application has to be  14 made. There are circumstances in which a debtor may be  15 under an obligation to file a petition. Breach of that  16 obligation, as I understand it, may constitute  17 a criminal offence.  18 <b>A. That's correct, there are circumstances when there is</b>  19 <b>not only an obligation in existence but the -- to admit</b>  20 <b>to such an obligation can give rise to a criminal</b>  21 <b>prosecution.</b>  22 Q. Thank you. Can we turn now to warning notices again in  23 a German insolvency.  24 Now, Professor Mulbert and you agree that filing  25 a proof of debt, filing a claim in a German insolvency,</p> <p style="text-align: center;">Page 21</p>	<p>1 conclusion that a warning notice can't work in a German  2 insolvency, and that those two other points were,  3 I think, firstly that the debtor has lost the power to  4 dispose of his assets in a German insolvency?  5 <b>A. (Not interpreted) Yes, that's correct.</b>  6 Q. That's another reason why a proof of debt can't amount  7 to a warning notice, because there's nothing the debtor  8 can do.  9 <b>A. (Not interpreted) Yes, that's right.</b>  10 Q. The second point I think you made is that the debt also  11 needs to be, you say, enforceable.  12 <b>A. (Not interpreted) Yes.</b>  13 Q. And that, after German insolvency proceedings have  14 started, any claim is no longer enforceable because the  15 creditor is not allowed to bring a claim against the  16 debtor.  17 <b>A. This is correct, but there is a limitation. In one</b>  18 <b>point, that is to say that this is correct if the</b>  19 <b>insolvency assets are part of the overall mass capital,</b>  20 <b>but there is a possibility that if the administrator has</b>  21 <b>freed part of the assets, and then there is</b>  22 <b>a possibility that there is a claim for -- against the</b>  23 <b>debtor for this part of the assets which has been freed.</b>  24 <b>But those are exceptional cases.</b>  25 <b>This only really applies in such cases if the debtor</b></p> <p style="text-align: center;">Page 23</p>
<p>1 does not amount to a warning notice.  2 <b>A. (Not interpreted) Yes.</b>  3 Q. Again, what I want to suggest to you is that the reason  4 for that may depend in part on features of German  5 insolvency law. Again, if I can just explain what  6 I mean by that by giving you an example.  7 As I understand it, German insolvency law does not  8 permit a creditor to improve his position by serving  9 a warning notice after the start of the insolvency, so  10 as to give him a right to interest.  11 The reason for that, as I understand it, is because  12 under German insolvency law, that would be contrary for  13 treating all creditors equally?  14 <b>A. That's correct, my Lord, a creditor should not be able</b>  15 <b>to improve its situation because of the -- because a --</b>  16 <b>a notice, a warning notice, has been served, when the</b>  17 <b>insolvency proceedings have been started.</b>  18 <b>German law -- that is why German law provides that</b>  19 <b>after opening insolvency procedure, the claims can only</b>  20 <b>be made valid by serving the -- a notice with the</b>  21 <b>administrator.</b>  22 Q. And as I understand --  23 <b>A. And the notice procedure is an exclusive one.</b>  24 Q. I think you make two other points about the way in which  25 German insolvency law operates, which leads to the</p> <p style="text-align: center;">Page 22</p>	<p>1 <b>is a -- a free profession.</b>  2 Q. So the basic position is that the debtor, his only right  3 is to go against the assets in the estate.  4 <b>A. (Not interpreted) Yes.</b>  5 Q. He can't, absent those exceptional circumstances, bring  6 proceedings against the debtor.  7 <b>A. That is correct, my Lord.</b>  8 Q. Now, those three features of German insolvency law as  9 I understand it support the general policy under German  10 insolvency code that debtors aren't allowed to improve  11 their position by serving a warning notice and claiming  12 interest after the insolvency has started.  13 <b>A. This is an essential principle of German law that once</b>  14 <b>insolvency has -- proceedings have been opened, that no</b>  15 <b>one is entitled to improve its position in insolvency.</b>  16 Q. Thank you.  17 My Lord, I wonder if that's a convenient moment?  18 MR JUSTICE HILDYARD: Yes. Five minutes.  19 (11.47 am)  20 (A short break)  21 (11.55 am)  22 MR DICKER: The third topic that I want to ask you about  23 concerns the effect of an assignment.  24 <b>A. (Not interpreted) The effect -- yes.</b>  25 Q. Now, both you and Professor Mulbert agree that after an</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 assignment, the focus of any default damages claim is on</p> <p>2 the transferee and not the transferor.</p> <p>3 <b>A. (Not interpreted) Yes, yes.</b></p> <p>4 Q. You both agree that that's the effect of section 398 of</p> <p>5 the BGB. Perhaps we can just turn that up, it's in</p> <p>6 volume 2, tab 83.</p> <p>7 <b>A. (Not interpreted) Volume 2?</b></p> <p>8 Q. Volume 2 of the authorities. Tab 83, subtab T.</p> <p>9 <b>A. (Not interpreted) Oh yes.</b></p> <p>10 Q. Tab 83, subtab T, section 398.</p> <p>11 <b>A. (Not interpreted) 98?</b></p> <p>12 Q. 398, yes.</p> <p>13 <b>A. (Not interpreted) Okay, yes.</b></p> <p>14 Q. Which says in English:</p> <p>15 "A claim may be transferred by the creditor to</p> <p>16 another person by contract with that person. When the</p> <p>17 contract is entered into, the new creditor steps into</p> <p>18 the shoes of the previous creditor."</p> <p>19 <b>A. (Not interpreted) Yes.</b></p> <p>20 Q. As I think we've agreed, that provision says you need to</p> <p>21 focus on the transferee and not the transferor.</p> <p>22 <b>A. The rule is until the assignment, it is the position of</b></p> <p>23 <b>the -- the transferor after the assignment, it is that</b></p> <p>24 <b>of the transferee.</b></p> <p>25 Q. In other words, after the assignment you focus on the</p> <p style="text-align: center;">Page 25</p>	<p>1 <b>A. That's correct, my Lord, that the prevailing opinion</b></p> <p>2 <b>says that there is no limitation, that the transferee</b></p> <p>3 <b>can only claim the same as the transferor would have</b></p> <p>4 <b>done.</b></p> <p>5 Q. The first thing I want to do is just look quickly at</p> <p>6 some of the legal commentators before turning to ask you</p> <p>7 about your --</p> <p>8 <b>A. (Not interpreted) Yes.</b></p> <p>9 Q. So if we go to the authorities bundle 1, tab 42.</p> <p>10 <b>A. (Not interpreted) 42, yes.</b></p> <p>11 Q. The passage from this work I wanted to show you was on</p> <p>12 page 161.</p> <p>13 <b>A. (Not interpreted) Yes, 161.</b></p> <p>14 Q. Under the heading, paragraph (vii). So (vii).</p> <p>15 <b>A. (Not interpreted) Yes, yes, okay.</b></p> <p>16 Q. It's numbered 82 on the right-hand side.</p> <p>17 <b>A. (Not interpreted) Yes.</b></p> <p>18 Q. The author says:</p> <p>19 "The assignee is entitled to all subsequent claims</p> <p>20 resulting from the claim. The assignee can therefore eg</p> <p>21 raise the defence the contract was not fulfilled against</p> <p>22 the debtor or autonomously assert claims if the debtor</p> <p>23 is in default."</p> <p>24 Then this:</p> <p>25 "The amount of default damages is in principle</p> <p style="text-align: center;">Page 27</p>
<p>1 position of the transferee.</p> <p>2 <b>A. (Not interpreted) Transferee, yes.</b></p> <p>3 Q. Now, the disagreement between you and Professor Mulbert</p> <p>4 is whether such damages are capped.</p> <p>5 <b>A. (Not interpreted) Yes.</b></p> <p>6 Q. By reference to an amount that could have been claimed</p> <p>7 by the transferor.</p> <p>8 <b>A. (Not interpreted) Yes, that's right. Yes, it's correct.</b></p> <p>9 Q. You both agree that section 398 of the BGB does not</p> <p>10 directly address this question?</p> <p>11 <b>A. (Not interpreted) Yes.</b></p> <p>12 Q. And that the only case that we found leaves the question</p> <p>13 open.</p> <p>14 <b>A. Yes, that's correct. In the literature the question is</b></p> <p>15 <b>controversial. There are two decisions by the</b></p> <p>16 <b>Reichsgericht, the previous courts, which are different,</b></p> <p>17 <b>but the federal courts have not issued a decision up to</b></p> <p>18 <b>the present.</b></p> <p>19 <b>The BGH, the highest court, says that in principle</b></p> <p>20 <b>it is the transferee after the transfer has taken place,</b></p> <p>21 <b>but the question as to whether the damages can be higher</b></p> <p>22 <b>than those of the transferor has been left open</b></p> <p>23 <b>expressly, intentionally, by the court.</b></p> <p>24 Q. But you agree that the view that prevails in most of the</p> <p>25 recent legal literature is that there is no cap.</p> <p style="text-align: center;">Page 26</p>	<p>1 calculated based on the person of the assignee."</p> <p>2 The next sentence:</p> <p>3 "This applies even if the damages incurred by the</p> <p>4 new creditor are higher than those presumably incurred</p> <p>5 by the old creditor."</p> <p>6 <b>A. (Not interpreted) Yes.</b></p> <p>7 Q. Then the explanation given for this is in the next</p> <p>8 sentence. The author says:</p> <p>9 "The debtor who must expect the assignment at any</p> <p>10 time cannot reclaim protection of confidence with regard</p> <p>11 to a less beneficial development of damages."</p> <p>12 <b>A. (Not interpreted) Yes.</b></p> <p>13 Q. Now, as I understand it, what the author is saying is</p> <p>14 effectively that the debtor, having agreed to permit</p> <p>15 an assignment, isn't entitled to say that his damage</p> <p>16 should be limited by the damage suffered by the</p> <p>17 assignor?</p> <p>18 <b>A. Yes, this comment is correct. Only one thing. There is</b></p> <p>19 <b>no express permission from -- necessary from the debtor</b></p> <p>20 <b>for the making of the transfer. On the contrary, the</b></p> <p>21 <b>reverse is true that the creditor can make the transfer</b></p> <p>22 <b>unless there is an express prohibition for the creditor</b></p> <p>23 <b>to effect such a transfer.</b></p> <p>24 Q. Thank you for that clarification.</p> <p>25 Now, the one protection that the author identifies</p> <p style="text-align: center;">Page 28</p>

<p>1 in the next sentence --</p> <p>2 <b>A. (Not interpreted) Yes.</b></p> <p>3 Q. -- is that the new creditor may be under a duty to</p> <p>4 minimise damages in the form of an obligation to provide</p> <p>5 notice of the potential of increased damages.</p> <p>6 Now, as I understand it, what the author is saying</p> <p>7 is that if -- if damages may be greater in the hands of</p> <p>8 the assignee, the new creditor, the assignee, may have</p> <p>9 to notify the debtor of that to be able to recover such</p> <p>10 damage.</p> <p>11 <b>A. (Not interpreted) Yes, yes.</b></p> <p>12 <b>(Interpreted) That is in accordance with the</b></p> <p>13 <b>prevailing opinion, that a claim for damages, increased</b></p> <p>14 <b>damages, can be denied, in such a case. However, the</b></p> <p>15 <b>transferee has to draw the attention of the transferor</b></p> <p>16 <b>to that effect.</b></p> <p>17 Q. Thank you.</p> <p>18 Now, the second commentary I wanted to show you and</p> <p>19 ask you about is in bundle 2. So if you put away</p> <p>20 bundle 1 and take bundle 2 of the authorities, tab 77.</p> <p>21 Just picking up two passages from this. The first</p> <p>22 passage is right at the start.</p> <p>23 <b>A. (Not interpreted) Yes.</b></p> <p>24 Q. First five lines. What the author is saying in the</p> <p>25 second sentence there is that after an assignment, it's</p> <p style="text-align: center;">Page 29</p>	<p>1 sentences, I'm sorry --</p> <p>2 <b>A. (Not interpreted) Yes.</b></p> <p>3 Q. -- what the author is saying is that the law does want</p> <p>4 to protect the debtor so far as his legal position is</p> <p>5 concerned, but it's not interested in protecting him or</p> <p>6 it's relatively indifferent to protecting him in the</p> <p>7 event of breach of contract.</p> <p>8 <b>A. (Not interpreted) Mm-hm, yes.</b></p> <p>9 Q. Thank you.</p> <p>10 <b>A. I --</b></p> <p>11 Q. Similarly on page 87 if you go over to the second</p> <p>12 paragraph.</p> <p>13 <b>A. (Not interpreted) Yes.</b></p> <p>14 Q. Again, as I understand it, the point that the author is</p> <p>15 making here is similar to a point we saw earlier. There</p> <p>16 may be some protection for the debtor because the</p> <p>17 assignee may be required to alert the debtor to the risk</p> <p>18 of an extraordinarily high amount of damage.</p> <p>19 <b>A. (Not interpreted) Yes.</b></p> <p>20 Q. So this is consistent with the commentary we saw</p> <p>21 previously.</p> <p>22 <b>A. (Not interpreted) Yes.</b></p> <p>23 Q. Now, the third commentary I just want to ask you about</p> <p>24 is at tab 79.</p> <p>25 <b>A. (Not interpreted) 79?</b></p> <p style="text-align: center;">Page 31</p>
<p>1 the new creditor whose rights have been offended.</p> <p>2 (Pause)</p> <p>3 <b>A. Is this -- the author, is he Gernhuber?</b></p> <p>4 Q. Let me see if I can -- if you turn -- I'm sorry, I think</p> <p>5 you have the benefit of rather more text than we have,</p> <p>6 but if you go to -- I think it's page 86.</p> <p>7 <b>A. (Not interpreted) Ah, yes, 86.</b></p> <p>8 Q. Dr Fischer, I'm sorry, would you give me a moment and</p> <p>9 we'll see if we can find the equivalent passage.</p> <p>10 <b>A. (Not interpreted) Okay. (Pause)</b></p> <p>11 Q. So page 86.</p> <p>12 <b>A. (Not interpreted) Yes.</b></p> <p>13 Q. It's the first full paragraph.</p> <p>14 <b>A. (Not interpreted) Yes [German] yes.</b></p> <p>15 Q. Yes. The first five lines of that, as I understand it,</p> <p>16 one point the author is making there is that after an</p> <p>17 assignment, it's the creditor whose rights have been</p> <p>18 offended. In other words, it's the creditor who is</p> <p>19 entitled to payment. Therefore, it's the new creditor</p> <p>20 who can demand compensation for his damage.</p> <p>21 <b>A. (Not interpreted) Mm-hm, yes.</b></p> <p>22 Q. They can do so, however much higher they may be than the</p> <p>23 damages that the assignor might have suffered.</p> <p>24 <b>A. (Not interpreted) Yes.</b></p> <p>25 Q. Then in the last sentence of that paragraph or last two</p> <p style="text-align: center;">Page 30</p>	<p>1 Q. 79, yes.</p> <p>2 <b>A. (Not interpreted) Yes. Yes.</b></p> <p>3 Q. At the bottom of the first page on the right-hand side,</p> <p>4 there's a section numbered 2.</p> <p>5 <b>A. (Not interpreted) Yes.</b></p> <p>6 Q. Higher damages incurred by the assignee in comparison to</p> <p>7 the assignor.</p> <p>8 If you go over the page, about halfway down, there's</p> <p>9 a paragraph beginning:</p> <p>10 "Aber auch~..."</p> <p>11 <b>A. (Not interpreted) Ah yes, mm-hm.</b></p> <p>12 Q. What the author is saying there is that constructions</p> <p>13 which would identify an interest of the debtor worth</p> <p>14 protecting in his view are not convincing. Yes?</p> <p>15 <b>A. (Not interpreted) Yes.</b></p> <p>16 Q. Then he goes on to explain that.</p> <p>17 <b>A. (Not interpreted) Yes, mm-hm.</b></p> <p>18 Q. One point he makes a couple of lines further on is that</p> <p>19 even if the assignment were not executed, the debtor</p> <p>20 could not have relied on the default damages in the</p> <p>21 person of the original creditor remaining the same</p> <p>22 amount for ever.</p> <p>23 So in other words, as I understand it, even if there</p> <p>24 had not been an assignment, damages might have changed,</p> <p>25 the amount of damages might have changed in any event.</p> <p style="text-align: center;">Page 32</p>

8 (Pages 29 to 32)



<p>1 <b>A. (Not interpreted) Mm-hm.</b></p> <p>2 Q. Then if you go down to the last paragraph on that first</p> <p>3 column, there's a reference to section 404, 406 and</p> <p>4 following of the BGB.</p> <p>5 <b>A. (Not interpreted) Yes.</b></p> <p>6 Q. As I understand it, what the author is saying at the</p> <p>7 start of this paragraph is that at times an attempt is</p> <p>8 made to assist the debtor by way of an analogue</p> <p>9 application of section 404, 406 and following of the</p> <p>10 BGB, and he says this too shall be denied. In other</p> <p>11 words in his view this isn't correct.</p> <p>12 <b>A. (Not interpreted) Yes.</b></p> <p>13 Q. The reason why, as I understand it, the author says</p> <p>14 that's not correct, is because what 404 and 406 do is</p> <p>15 indicate where the legislature thought the debtor was</p> <p>16 worthy of protection, and go no further than the terms</p> <p>17 of those sections.</p> <p>18 <b>A. (Not interpreted) Yes.</b></p> <p>19 Q. So that's an extract from the third -- just to give you</p> <p>20 one last example -- if you go on to tab 82. It's at</p> <p>21 page 234.</p> <p>22 <b>A. (Not interpreted) 234.</b></p> <p>23 Q. You'll see a reference to -- on the bottom half of the</p> <p>24 left-hand page, a commentary by Frank Peters. We'll</p> <p>25 come back to that?</p> <p style="text-align: right;">Page 33</p>	<p>1 So, as I understand it, you -- you accept the</p> <p>2 prevailing view is that damages are not capped.</p> <p>3 <b>A. (Not interpreted) Yes.</b></p> <p>4 Q. And those articles presumably, or can I ask you, those</p> <p>5 articles fairly summarise the prevailing view?</p> <p>6 <b>A. This is the prevailing opinion in literature. In case</b></p> <p>7 <b>law such a tendency towards this is not to be discerned</b></p> <p>8 <b>that it is open.</b></p> <p>9 Q. Yes.</p> <p>10 <b>A. This -- however in the jurisprudence of the highest</b></p> <p>11 <b>court, there is one case where there is a -- a tension</b></p> <p>12 <b>between these opinions. The -- the court has several</b></p> <p>13 <b>times decided that paragraph -- section 404 BGB goes</b></p> <p>14 <b>beyond the case -- beyond the case of an objection, is</b></p> <p>15 <b>the -- paragraph is an expression of the legal opinion,</b></p> <p>16 <b>the position, that -- the position of the debtor should</b></p> <p>17 <b>not be worse.</b></p> <p>18 <b>And I would say quite openly that I think the</b></p> <p>19 <b>opinions in the commentaries are acceptable, but I do</b></p> <p>20 <b>not share the -- these opinions.</b></p> <p>21 <b>The -- the argument that this is only factual and</b></p> <p>22 <b>not -- these are only factual questions dependent on</b></p> <p>23 <b>factual questions and not legal questions, I do not see</b></p> <p>24 <b>in that way.</b></p> <p>25 <b>If the transferee has suffered higher damage, then</b></p> <p style="text-align: right;">Page 35</p>
<p>1 <b>A. (Not interpreted) Frank Peters, yes.</b></p> <p>2 Q. Yes. Then on the right-hand page, 235.</p> <p>3 <b>A. (Not interpreted) Yes.</b></p> <p>4 Q. The first paragraph.</p> <p>5 <b>A. (Not interpreted) Yes.</b></p> <p>6 Q. As I understand it, what the author is saying is that</p> <p>7 various starting points and justifications for limiting</p> <p>8 the assignee are not workable.</p> <p>9 In the second sentence what the author says is that</p> <p>10 the principles of legal protection for bona fide acts of</p> <p>11 trust do not manifest themselves in German law on</p> <p>12 damages.</p> <p>13 Now, as I understand it, what the author is saying</p> <p>14 there is similar to a previous comment. In other words,</p> <p>15 the debtor who is in breach of contract isn't entitled</p> <p>16 to complain about an increased loss.</p> <p>17 <b>A. (Not interpreted) Mm-hm. Mm-hm.</b></p> <p>18 Q. Again, if you go down to, on 235, the paragraph</p> <p>19 beginning in the middle of the page, we can see another</p> <p>20 reference to section 254.</p> <p>21 <b>A. (Not interpreted) Yes.</b></p> <p>22 Q. That's a similar reference to the debtor being protected</p> <p>23 potentially by a requirement of notice.</p> <p>24 <b>A. (Not interpreted) Yes.</b></p> <p>25 Q. Thank you.</p> <p style="text-align: right;">Page 34</p>	<p>1 it's -- this is not a question of fact but it is</p> <p>2 a question of the legal transactions. And there is</p> <p>3 a second point.</p> <p>4 And the second point concerns the argument we see</p> <p>5 several times that the transferor could have suffered</p> <p>6 higher damage than could have been assumed at the</p> <p>7 conclusion of the contract.</p> <p>8 I say that if a transferor in fact has damage which</p> <p>9 would have been higher, then the transferee would be</p> <p>10 entitled at least to the amount to which the transferor</p> <p>11 would have been entitled. That is to say that the</p> <p>12 debtor can only say that the transferor has suffered</p> <p>13 such higher damage if it has actually suffered such</p> <p>14 damage -- would, could have suffered such damage. But</p> <p>15 this has to be subject to proof.</p> <p>16 Q. So, as I understand it, if there is an assignment and</p> <p>17 the assignor would have suffered greater loss, the</p> <p>18 assignee can recover that greater loss?</p> <p>19 <b>A. No, the transferee can only claim -- the only thing it</b></p> <p>20 <b>can claim after the transfer is its own damage.</b></p> <p>21 <b>(Not interpreted) Its own damage.</b></p> <p>22 <b>(Interpreted) The principle is that the transferee</b></p> <p>23 <b>can assert his damage, his damage, but only his damage.</b></p> <p>24 <b>So it's only if the creditor says that his damage</b></p> <p>25 <b>would have been higher without the transfer to the</b></p> <p style="text-align: right;">Page 36</p>

<p>1 transferee.</p> <p>2 Q. As I understand it, this always works for the benefit of</p> <p>3 the debtor?</p> <p>4 <b>A. Only if it can show that the damage of the transferee is</b></p> <p>5 <b>higher than it would have been in the case of the</b></p> <p>6 <b>transferee -- the transferor.</b></p> <p>7 THE INTERPRETER: Sorry.</p> <p>8 Q. If it were higher the transferee cannot recover?</p> <p>9 <b>A. If it is established that it is -- that the damage is</b></p> <p>10 <b>higher, I think it is -- if it is not, I understand 404</b></p> <p>11 <b>to mean, as does the higher court, that the -- it wishes</b></p> <p>12 <b>to assert that the situation, the position, of the</b></p> <p>13 <b>transferee should not be made worse.</b></p> <p>14 <b>It is a general principle of contract law that</b></p> <p>15 <b>through the transfer of a contract, the transferee's</b></p> <p>16 <b>position should not be made worse. The transfer</b></p> <p>17 <b>contract is a contract between the transferor and the</b></p> <p>18 <b>transferee, and there the principle is too that the</b></p> <p>19 <b>position of a third party, that is the debtor, should</b></p> <p>20 <b>not be made worse.</b></p> <p>21 MR JUSTICE HILDYARD: The debtor.</p> <p>22 MR DICKER: But the effect of this is to make the debtor</p> <p>23 better off in the sense that he only ever has to pay the</p> <p>24 lower of the damages suffered by the transferor and the</p> <p>25 transferee.</p> <p style="text-align: right;">Page 37</p>	<p>1 the fact that the assignor -- the damage asserted by the</p> <p>2 assignor would -- is -- would be higher than -- would</p> <p>3 have arisen -- the loss which would have arisen without</p> <p>4 the assignment.</p> <p>5 The condition -- the condition is that in my view,</p> <p>6 the debtor has to prove the -- to object to the</p> <p>7 assignment and only show the -- the height of the claim.</p> <p>8 Yes, the assignor only has to be -- (Not</p> <p>9 interpreted) the assignee.</p> <p>10 THE INTERPRETER: Yes.</p> <p>11 <b>A. The assignee has to prove the amount of his claim,</b></p> <p>12 <b>his --</b></p> <p>13 MR JUSTICE HILDYARD: Can I ask one further thing: under the</p> <p>14 German law, after an assignment, would the debtor have</p> <p>15 any rights or an ability to bring to court the assignor?</p> <p>16 Is there any remaining nexus between them?</p> <p>17 <b>A. Paragraph 404 does provide that the debtor can raise the</b></p> <p>18 <b>objections which have -- which consist -- exist with</b></p> <p>19 <b>regard to the assignor.</b></p> <p>20 <b>But for these objections the debtor has to carry the</b></p> <p>21 <b>burden -- is asked to carry the burden of proof.</b></p> <p>22 MR DICKER: Can we have a look at the sections on which you</p> <p>23 rely. They're in bundle 2 of the authorities, tab 83.</p> <p>24 First is section 404 which is at tab V.</p> <p>25 Section 404 in English says:</p> <p style="text-align: right;">Page 39</p>
<p>1 <b>A. The effect of this opinion is that the transferor and</b></p> <p>2 <b>transferee are prevented to make an agreement that the</b></p> <p>3 <b>higher damage could be -- have the effect that it be --</b></p> <p>4 <b>would be to the disadvantage of a third party.</b></p> <p>5 <b>The prevailing literature leads to the risk that the</b></p> <p>6 <b>transferor and transferee would be led to speculate at</b></p> <p>7 <b>the expense of the debtor.</b></p> <p>8 MR JUSTICE HILDYARD: Wouldn't -- so sorry to interrupt --</p> <p>9 would not this create a multiplicity of inquiry?</p> <p>10 Because every assignee would not only have to establish</p> <p>11 his loss, but also the other person's loss by way of</p> <p>12 showing that his loss was not reduced or increased?</p> <p>13 <b>A. The transferor can only claim that damage which would</b></p> <p>14 <b>have arisen in so -- as long as he was the owner of the</b></p> <p>15 <b>claim.</b></p> <p>16 <b>After an assignment the -- there is no longer</b></p> <p>17 <b>a legal basis for the assignor to claim a higher amount</b></p> <p>18 <b>of damages.</b></p> <p>19 MR DICKER: Judge Fischer, I think his Lordship will correct</p> <p>20 me if I'm wrong, I think the question his Lordship was</p> <p>21 asking was this. On your test the court has to decide</p> <p>22 two issues. It has to decide what loss the assignee</p> <p>23 suffered and it has to decide what loss the assignor</p> <p>24 would have suffered after the assignment.</p> <p>25 <b>A. This would only be necessary if the debtor relies on</b></p> <p style="text-align: right;">Page 38</p>	<p>1 "The debtor may raise against the new creditor the</p> <p>2 objections he was entitled to raise against the previous</p> <p>3 creditor at the time of assignment."</p> <p>4 As I understand it, section 404 is intended to</p> <p>5 ensure that if there is an assignment, the debtor</p> <p>6 doesn't -- isn't deprived of defences that he would have</p> <p>7 against the transferor. So that's the first. Just</p> <p>8 having a look at --</p> <p>9 <b>A. That is correct. The question raised under 404, 406 and</b></p> <p>10 <b>407 do not apply to our case only as regards 404 with</b></p> <p>11 <b>regard to the general principle, whether this is</b></p> <p>12 <b>a general principle or whether it is limited to the case</b></p> <p>13 <b>regulated under section 404.</b></p> <p>14 Q. 404 is expressed to apply to objections that the debtor</p> <p>15 was entitled to raise against the previous creditor at</p> <p>16 the time of assignment.</p> <p>17 <b>A. (Not interpreted) That's correct.</b></p> <p>18 Q. Then 406, if you turn on to tab W.</p> <p>19 <b>A. (Not interpreted) Yes.</b></p> <p>20 Q. "Debtor may set off a claim against the previous</p> <p>21 creditor to which he is entitled as well as the new</p> <p>22 creditor unless when acquiring a claim he was aware of</p> <p>23 the assignment or the claim only became due after he</p> <p>24 obtained knowledge of this and later than the assigned</p> <p>25 claim became due."</p> <p style="text-align: right;">Page 40</p>

<p>1 Again, as I understand it, this is to ensure that</p> <p>2 the debtor isn't deprived of rights of set-off.</p> <p>3 <b>A. (Not interpreted) Yes.</b></p> <p>4 Q. Which he would otherwise have had, unless and until he</p> <p>5 has notice of the assignment.</p> <p>6 <b>A. (Not interpreted) Yes, that's correct, yes.</b></p> <p>7 Q. Then 407, it's subsection (1). As I understand it, the</p> <p>8 effect of this is the new creditor must allow</p> <p>9 performance the debtor renders to the previous creditor</p> <p>10 after the assignment, unless the debtor is aware of the</p> <p>11 assignment on performance or undertaking the legal</p> <p>12 transaction.</p> <p>13 <b>A. (Not interpreted) Yes.</b></p> <p>14 Q. In other words the debtor can perform in favour of the</p> <p>15 transferor until he learns about the assignment.</p> <p>16 <b>A. (Interpreted) He can perform to the previous creditor as</b></p> <p>17 <b>long as he has no knowledge of the assignment.</b></p> <p>18 Q. These are the three provisions, three sections of the</p> <p>19 BGB on which you rely?</p> <p>20 <b>A. (Not interpreted) Yes.</b></p> <p>21 Q. The commentary that we've seen says they don't cover</p> <p>22 this situation because they are concerned with</p> <p>23 protecting the legal position of the debtor, not</p> <p>24 entitling him to say, "I shouldn't have to pay any more</p> <p>25 damages than the transferor would have been entitled</p> <p style="text-align: center;">Page 41</p>	<p>1 <b>that is the question of how the damage has developed is</b></p> <p>2 <b>not a question just -- just a factual question, but also</b></p> <p>3 <b>a question of the type of investments which the</b></p> <p>4 <b>transferee would have been -- would have made.</b></p> <p>5 <b>I can see that the decisions cited here do not lead</b></p> <p>6 <b>to a -- a conclusive result, and I can also not say how</b></p> <p>7 <b>the BGH, the highest court, will decide in this respect.</b></p> <p>8 Q. I mean you -- it's possible that the highest court may</p> <p>9 agree with the prevailing view.</p> <p>10 <b>A. (Not interpreted) Yes, or with the other. Yes.</b></p> <p>11 Q. You are not really in a position to predict which way</p> <p>12 the --</p> <p>13 <b>A. (Not interpreted) No, I -- I think I'm not able to</b></p> <p>14 <b>predict.</b></p> <p>15 Q. Now, you refer to various cases and I hope I can deal</p> <p>16 with this shortly.</p> <p>17 <b>A. (Not interpreted) Yes.</b></p> <p>18 Q. I think it's fair to say that all of the cases you refer</p> <p>19 to in this context are concerned with a debtor</p> <p>20 exercising legal rights; none of them are concerned with</p> <p>21 damages?</p> <p>22 <b>A. (Not interpreted) Yes.</b></p> <p>23 Q. So they deal with things like rights of set-off or</p> <p>24 counterclaims and things of that sort.</p> <p>25 <b>A. Yes, that -- that is the direction these decisions --</b></p> <p style="text-align: center;">Page 43</p>
<p>1 to".</p> <p>2 <b>A. The cited opinions in literature says -- is correct that</b></p> <p>3 <b>404 to 407 only protects the legal interests in favour</b></p> <p>4 <b>of the debtor.</b></p> <p>5 Q. Can I just remind you of a paragraph in your expert's</p> <p>6 report?</p> <p>7 <b>A. (Not interpreted) Yes.</b></p> <p>8 Q. It's bundle 4, tab 8.</p> <p>9 <b>A. (Not interpreted) Bundle 4.</b></p> <p>10 Q. Bundle 4, tab 8.</p> <p>11 <b>A. (Not interpreted) Paragraph?</b></p> <p>12 Q. It's paragraph 104.</p> <p>13 <b>A. (Not interpreted) Yes.</b></p> <p>14 Q. It's the sentence after the reference to section 404.</p> <p>15 It's the sentence which in translation reads:</p> <p>16 "In established case law the German Federal Court of</p> <p>17 Justice interprets the provision as stating that the</p> <p>18 legal position of the debtor should not be made worse by</p> <p>19 a transfer of the claim to the new creditor."</p> <p>20 What I want to suggest to you is that the provisions</p> <p>21 of the BGB we have seen, 404, 406 and 407, are all</p> <p>22 concerned with the legal position of the debtor and not</p> <p>23 with the factual question of how much damage is</p> <p>24 suffered.</p> <p>25 <b>A. This is the question which I already referred to before,</b></p> <p style="text-align: center;">Page 42</p>	<p>1 <b>into which these decisions go.</b></p> <p>2 Q. You also refer to some legal commentary consistent with</p> <p>3 your view. Now, just a short point. I think it's right</p> <p>4 to say -- I'll show you the commentary if you want --</p> <p>5 but it's right to say those authors acknowledge that the</p> <p>6 prevailing view is different from the view they express.</p> <p>7 <b>A. (Not interpreted) Yes, yes.</b></p> <p>8 <b>(Interpreted) Yes, they concede that.</b></p> <p>9 Q. That was all I was going to ask you in relation to</p> <p>10 assignment.</p> <p>11 I have a few questions in relation to the types of</p> <p>12 entities that are entitled to rely on an abstract</p> <p>13 calculation when claiming further damages for late</p> <p>14 payment.</p> <p>15 Now, as I understand it, both you and</p> <p>16 Professor Mulbert agree that damages for late payment</p> <p>17 defaulted debt can include compensation for a lost</p> <p>18 investment opportunity.</p> <p>19 <b>A. (Not interpreted) Yes, yes, that's true.</b></p> <p>20 Q. You also agree that such damages can be expressed as</p> <p>21 a rate.</p> <p>22 <b>A. These damages can be expressed in a rate if it concerns</b></p> <p>23 <b>lost profit on interest.</b></p> <p>24 <b>(Not interpreted) Yes, lost profit --</b></p> <p>25 <b>(Interpreted) Or costs.</b></p> <p style="text-align: center;">Page 44</p>

<p>1 (Not interpreted) Yes.</p> <p>2 (Interpreted) Expenses.</p> <p>3 Q. Both you and Professor Mulbert agree that in calculating</p> <p>4 such loss, banks are entitled to calculate it in the</p> <p>5 abstract?</p> <p>6 A. The banks are allowed to calculate this in the abstract.</p> <p>7 The banks, according to the case law, are only allowed</p> <p>8 to do this on the basis of the average interests</p> <p>9 received on loans or the average profits to be received</p> <p>10 on a business transaction.</p> <p>11 Q. As I understand Professor Mulbert's evidence, his</p> <p>12 evidence is that there are other types of investors</p> <p>13 including non-bank transaction institutions or hedge</p> <p>14 funds who -- who may also be entitled to rely on the</p> <p>15 same method of calculation?</p> <p>16 A. (Not interpreted) Yes.</p> <p>17 (Interpreted) The -- that is not my opinion. The</p> <p>18 case law shows this facilitation only in respect of</p> <p>19 banks. Particularly in the view of the present</p> <p>20 financial situation, it is necessary to have a concrete</p> <p>21 indication of how the amounts are to be -- would be</p> <p>22 invested. This is the opinion of the 11th and the 9th</p> <p>23 senate of the highest court. I have cited the opinion</p> <p>24 of the 11th senate of the civil chamber in my opinion,</p> <p>25 contrary opinion.</p> <p style="text-align: right;">Page 45</p>	<p>1 A. (Not interpreted) Yes, yes.</p> <p>2 Q. As I understand it at the start of 46, the authors say:</p> <p>3 "If the creditor is a bank, it must be assumed the</p> <p>4 sum of the funds intended for investment in its overall</p> <p>5 business is reduced by the amounts that are paid late.</p> <p>6 Therefore, if the bank only executes one type of</p> <p>7 transaction, the nominal interest standard for this type</p> <p>8 of transaction during the period in question should be</p> <p>9 used as a basis."</p> <p>10 In other words, as I understand it, the author is</p> <p>11 dealing with abstract calculation for banks in that</p> <p>12 paragraph?</p> <p>13 A. (Not interpreted) Yes.</p> <p>14 Q. Then in paragraph 47, again as I understand it, the</p> <p>15 author says:</p> <p>16 "What applies for banks also applies for other</p> <p>17 commercial capital investors such as investment</p> <p>18 companies and insurance companies that invest incoming</p> <p>19 sums unless they're required for ongoing business</p> <p>20 operations."</p> <p>21 A. Yes.</p> <p>22 Q. So the author's view appears to be, as I understand it,</p> <p>23 that there are other similar types of entities that may</p> <p>24 also be entitled to the abstract calculation?</p> <p>25 A. Yes, and I'm -- I know this -- the Lowisch/Feldmann</p> <p style="text-align: right;">Page 47</p>
<p>1 (Not interpreted) Yes.</p> <p>2 (Interpreted) The 9th view is -- arrived only later</p> <p>3 after my reply to the opinion had already been handed</p> <p>4 in.</p> <p>5 Q. I thought both you and Professor Mulbert agreed there</p> <p>6 wasn't a case specifically dealing with non-bank</p> <p>7 financial institutions or hedge funds?</p> <p>8 A. No, as far as I know there is no decision which relates</p> <p>9 to hedge funds.</p> <p>10 Q. Thank you.</p> <p>11 Can I show you one extract from a legal commentator.</p> <p>12 A. (Not interpreted) Yes.</p> <p>13 Q. It's in the authorities bundle and it's tab 59.</p> <p>14 A. (Not interpreted) Authorities bundle, number 59.</p> <p>15 Q. The extract I wanted to show you was behind tab B, so</p> <p>16 tab 59B.</p> <p>17 A. (Not interpreted) There is nothing.</p> <p>18 Q. It's --</p> <p>19 A. (Not interpreted) One moment.</p> <p>20 Q. Behind B --</p> <p>21 A. (Not interpreted) Ah, yes, now I got it.</p> <p>22 Q. It's the second extract behind tab B from Staudinger's</p> <p>23 commentary?</p> <p>24 A. (Not interpreted) Yes.</p> <p>25 Q. It's paragraph 46 and 47.</p> <p style="text-align: right;">Page 46</p>	<p>1 commentary, but I know that the other -- on the other</p> <p>2 hand, most other prevailing commentators reject this</p> <p>3 opinion and it is always cited as a -- another --</p> <p>4 a differing, diverging opinion.</p> <p>5 Q. If you have two entities, both of which always invest</p> <p>6 their surplus money, it doesn't make much sense, does</p> <p>7 it, to say that one of them that's called a bank is</p> <p>8 entitled to the abstract calculation, and the other,</p> <p>9 which does exactly the same thing, is not.</p> <p>10 A. Well, whether one should distinguish, we can argue about</p> <p>11 that. It is my personal view that all investors really</p> <p>12 must say what they've actually done. For banks, with</p> <p>13 respect to banks, however, I would like to contradict</p> <p>14 the view of the highest court, but I do see a trend</p> <p>15 developing in case law towards the concrete method of</p> <p>16 calculation.</p> <p>17 In contrast to what has been said, there is -- there</p> <p>18 is no decision of the BGH concerning hedge funds, and</p> <p>19 the opinion as regards the banks has not changed so far</p> <p>20 up to the present. However, the tendency, the trend</p> <p>21 which I see in case law, is one going towards more --</p> <p>22 imposing more severe requirements.</p> <p>23 MR DICKER: Thank you. My Lord, I'm conscious of the time.</p> <p>24 I only have couple more questions to ask, but inevitably</p> <p>25 they are likely to take more than a couple of minutes.</p> <p style="text-align: right;">Page 48</p>

12 (Pages 45 to 48)

<p>1 I don't know whether this will be a convenient moment.</p> <p>2 MR JUSTICE HILDYARD: I imagine there will be some</p> <p>3 re-examination. Is that right?</p> <p>4 MR ALLISON: My Lord, maybe very little, I will try and</p> <p>5 finesse it slightly.</p> <p>6 MR JUSTICE HILDYARD: With apologies to you, I think we'd</p> <p>7 better come back at five past two. Are you intending to</p> <p>8 launch straight into your submissions thereafter?</p> <p>9 MR DICKER: My Lord, I was hoping to accept the offer which</p> <p>10 I think your Lordship indicated on Friday might be made.</p> <p>11 MR JUSTICE HILDYARD: Pause for thought and then continuing</p> <p>12 tomorrow and such of Wednesday as you require.</p> <p>13 MR DICKER: I think that is correct. It is likely both to</p> <p>14 shorten the submissions and to make them rather more</p> <p>15 coherent and useful to your Lordship.</p> <p>16 MR JUSTICE HILDYARD: That sounds good!</p> <p>17 (1.05 pm)</p> <p>18 (The short adjournment)</p> <p>19 (2.05 pm)</p> <p>20 (Proceedings delayed)</p> <p>21 (2.10 pm)</p> <p>22 MR JUSTICE HILDYARD: Good afternoon.</p> <p>23 MR DICKER: Before lunch I showed you an extract from a work</p> <p>24 by Staudinger and you said there were other commentators</p> <p>25 expressing a different view, and I just want to show you</p> <p style="text-align: center;">Page 49</p>	<p>1 <b>A. (Not interpreted) Yes.</b></p> <p>2 Q. Now, the only point I wanted to make was the author</p> <p>3 doesn't appear to be specifically considering non-bank</p> <p>4 financial institutions.</p> <p>5 <b>A. (Not interpreted) Yes, yes. That's true, yes.</b></p> <p>6 Q. There's a similar point in relation to the other work</p> <p>7 you refer to, which is at tab 68B. You may have that in</p> <p>8 the other band.</p> <p>9 <b>A. (Not interpreted) 68?</b></p> <p>10 Q. 68, 6-8B.</p> <p>11 <b>A. (Not interpreted) Yes, yes.</b></p> <p>12 Q. Now, it's the second document in German at page 516.</p> <p>13 <b>A. (Not interpreted) Yes.</b></p> <p>14 Q. The English version is the version behind the blue slip.</p> <p>15 It begins "paragraph 8E".</p> <p>16 <b>A. (Not interpreted) Yes.</b></p> <p>17 Q. Just in the German version, on page 516, 8E at the start</p> <p>18 of that paragraph, if one then goes down four lines, as</p> <p>19 I understand it, what the author is saying is whilst</p> <p>20 banks may calculate their damages abstractly according</p> <p>21 to their average gross borrowing rate, all other</p> <p>22 creditors must declare and prove their interest losses</p> <p>23 concretely. Yes?</p> <p>24 <b>A. (Not interpreted) Yes.</b></p> <p>25 Q. Then there's a reference to Gruneberg in Palandt which</p> <p style="text-align: center;">Page 51</p>
<p>1 the two commentators you refer to in your report.</p> <p>2 The first is Gruneberg in Palandt. It's in the</p> <p>3 authorities bundle-tab 48 behind tab C, if you have</p> <p>4 that?</p> <p>5 <b>A. (Not interpreted) Yes.</b></p> <p>6 Q. In the German version there are two sentences I wanted</p> <p>7 to show you in paragraph number 5, subparagraph (a).</p> <p>8 The first was -- so 48C.</p> <p>9 <b>A. (Not interpreted) 48C. Yes.</b></p> <p>10 Q. Paragraph 5 --</p> <p>11 <b>A. (Not interpreted) Page 4 -- 415? Page 415?</b></p> <p>12 Q. Yes.</p> <p>13 <b>A. (Not interpreted) Yes, okay.</b></p> <p>14 Q. At line 13.</p> <p>15 <b>A. (Not interpreted) 13.</b></p> <p>16 Q. 13.</p> <p>17 <b>A. (Not interpreted) Okay.</b></p> <p>18 Q. The draftsman says the sentence at line 13, he says, as</p> <p>19 I understand it, banks may calculate their damages</p> <p>20 abstractly.</p> <p>21 <b>A. (Not interpreted) Yes.</b></p> <p>22 Q. Then if you go down to the note at B-B, about seven</p> <p>23 Lines from the end, as I understand it what he says</p> <p>24 there is all other creditors must show and prove the</p> <p>25 interest loss specifically.</p> <p style="text-align: center;">Page 50</p>	<p>1 I think is what we've just seen.</p> <p>2 <b>A. (Not interpreted) Mm.</b></p> <p>3 Q. So my point is again in this commentary the authors</p> <p>4 don't appear to be focusing specifically on non-bank</p> <p>5 financial institutions, hedge funds and things of that</p> <p>6 sort.</p> <p>7 <b>A. (Not interpreted) Yes, that's right. Yes.</b></p> <p>8 MR DICKER: That's very helpful, Judge Fischer.</p> <p>9 My Lord, subject to your Lordship, those were all</p> <p>10 the questions I had for Judge Fischer.</p> <p>11 Re-examination by MR ALLISON.</p> <p>12 MR ALLISON: Good afternoon, Judge Fischer.</p> <p>13 <b>A. Good afternoon.</b></p> <p>14 Q. On Friday Mr Dicker took you to the German master</p> <p>15 agreement and asked you questions about the meaning of</p> <p>16 its terms.</p> <p>17 <b>A. (Not interpreted) Yes.</b></p> <p>18 Q. That is a question for his Lordship, but there were</p> <p>19 a few points in the transcript where there may have been</p> <p>20 issues with translation. So I would like to ask you one</p> <p>21 follow-up question.</p> <p>22 The question is in relation to when the claim</p> <p>23 becomes due and payable for the purpose of section 286</p> <p>24 of the German civil code.</p> <p>25 <b>A. (Not interpreted) Yes.</b></p> <p style="text-align: center;">Page 52</p>

<p>1 Q. After an automatic termination of the German master 2 agreement on an application to commence insolvency 3 proceedings. 4 <b>A. (Not interpreted) Yes.</b> 5 Q. Now I have one question for you. Perhaps you can break 6 your answer into short sentences for the benefit of 7 his Lordship. 8 Would you like to remind yourself of the terms of 9 clauses 7 to 9 first, in the German master agreement. 10 My Lord, it's called tab 9, the English version. 11 <b>A. (Not interpreted) Tab 9. Yes.</b> 12 Q. It's something that is addressed in your report, but 13 I wonder if you could explain for his Lordship now when 14 you say the compensation claim becomes due and payable 15 for the purpose of section 286 on an automatic 16 termination by reason of an insolvency application. 17 <b>A. When the contract terminates according to clause 7 the 18 compensation claim arises, but the compensation claim 19 must be distinguished from the due date of the claim. 20 (Not interpreted) Yes. 21 (Interpreted) The -- when the claim arises it must 22 be assumed to arise immediately when the contract 23 terminates. But the due date presupposes a cooperation 24 of both parties according to clauses 8 and 9, which we 25 could call close-out netting.</b> Page 53</p>	<p>1 <b>A. (Not interpreted) Yes.</b> 2 Q. Could you explain to his Lordship what those words mean 3 in German? What's the difference between those two 4 words? 5 <b>A. (Not interpreted) Yes. 6 (Interpreted) "Entstehung" is, so to say, the legal 7 birth of a claim, the arising of a claim; on the other 8 hand the becoming due of a claim means that it can no 9 longer -- there is no longer a possibility of prevention 10 so that the claim becomes enforceable. 11 (Not interpreted) That's -- that's the important 12 thing, it's enforceable. Yes.</b> 13 Q. Just to make that clear because I don't think the word 14 was used in the answer, you said "Entstehung" is coming 15 into existence. 16 <b>A. (Not interpreted) Yes.</b> 17 Q. The second part of your answer, becoming enforceable, 18 which word is it you would use for that? 19 <b>A. (Not interpreted) Becoming in existence is "Entstehung", 20 and becoming enforceable is "Fälligkeit".</b> 21 MR ALLISON: Thank you very much, Judge Fischer. My Lord, 22 don't have any further questions. 23 Questions from THE BENCH 24 MR JUSTICE HILDYARD: Very few, Judge Fischer. Thank you 25 for your help. They relate to the issue of assignment. Page 55</p>
<p>1 <b>This becoming due presupposes that the -- the 2 close-out procedure of the reciprocal -- reciprocally of 3 the parties, that is all according to the decision in 4 9.2, the set-off happens. 5 Then, only then, the claim becomes due.</b> 6 Q. Judge Fischer, thank you very much. 7 One more question. 8 Mr Dicker took you to a passage in a book written by 9 Dr Zerey about financial derivatives. Do you recall 10 that? 11 <b>A. (Not interpreted) Yes.</b> 12 Q. Could you please go to the passage; you'll find it at 13 tab 75 of the authorities bundle. 14 <b>A. (Not interpreted) Yes.</b> 15 Q. Judge Fischer, do you have Zerey? It was paragraph 50 16 and paragraph 54 that he took you to. 17 Could you please remind yourself of what is said in 18 the third paragraph of paragraph 50, and also what is 19 said in paragraph 54, before I ask you the question. 20 <b>A. (Not interpreted) Yes.</b> 21 Q. Now, this is where I betray my lack of language skills. 22 In paragraph 50, there is the word "Entstehung". 23 <b>A. (Not interpreted) Yes.</b> 24 Q. In paragraph 54 there is the word "Fälligkeit", I think, 25 I may have got the pronunciation wrong. Page 54</p>	<p>1 I want to get one or two things straight in my mind. 2 <b>A. (Not interpreted) Yes.</b> 3 MR JUSTICE HILDYARD: In I think it's section 398. 4 <b>A. (Not interpreted) 398, yes.</b> 5 MR JUSTICE HILDYARD: Which we can find, I think it's 6 volume 2. 83T or somewhere around there. Yes, 83T. In 7 the English version -- 8 <b>A. (Not interpreted) yes, yes.</b> 9 MR JUSTICE HILDYARD: -- uses the phrase "steps into the 10 shoes of the previous creditor". A new creditor steps 11 into the shoes of the previous creditor. 12 <b>A. (Not interpreted) Yes.</b> 13 MR JUSTICE HILDYARD: First of all, I don't know whether 14 these translations are official translations or 15 translations by the parties. Do you happen to know? 16 <b>A. (Not interpreted) That's -- that I don't know. 17 (Interpreted) No, I don't know. 18 (Not interpreted) I don't know it.</b> 19 MR JUSTICE HILDYARD: Do you rely on the phrase "step into 20 the shoes" in support of your view that the assignee can 21 have no greater claim than the assignor? 22 <b>A. Yes, this is correct. I said in my -- as I said in my 23 expert opinion, that is an additional reason in my 24 opinion. "steps into the shoes" conveys very well, 25 the German which says -- "comes in the place of",</b> Page 56</p>

<p>1 <b>because it really means that there are -- it is -- there</b></p> <p>2 <b>is no availability of further shoes, it is just limited</b></p> <p>3 <b>to that.</b></p> <p>4 MR JUSTICE HILDYARD: Right. So what I need to consider are</p> <p>5 really two arguments apart from the literature on the</p> <p>6 point, which is the step into the shoes point, which is</p> <p>7 your secondary point; and your primary point which is</p> <p>8 404, 406 and 407. Is that right?</p> <p>9 <b>A. (Not interpreted) That is right. Yes. That is</b></p> <p>10 <b>absolutely correct.</b></p> <p>11 MR JUSTICE HILDYARD: Once the assignee has stepped into the</p> <p>12 shoes of the assignor, can you help me what happens on</p> <p>13 the netting or set-off arrangements?</p> <p>14 For example, does the assignee have any of the</p> <p>15 counterclaims of the assignor or is he restricted in any</p> <p>16 sense by those counterclaims?</p> <p>17 <b>A. Do you mean, my Lord, that after that this happens after</b></p> <p>18 <b>the assignment of the claim, that is to say after the</b></p> <p>19 <b>netting has been --</b></p> <p>20 MR JUSTICE HILDYARD: After the assignment, a crisis</p> <p>21 occurs -- sorry -- the assignment happens --</p> <p>22 <b>A. (Not interpreted) And then --</b></p> <p>23 MR JUSTICE HILDYARD: Then there is a crisis.</p> <p>24 <b>A. (Not interpreted) Yes.</b></p> <p>25 MR JUSTICE HILDYARD: Either default or insolvency.</p> <p style="text-align: center;">Page 57</p>	<p>1 actually found within 10 of the agreement, because</p> <p>2 I think the parties are proceeding on the basis someone</p> <p>3 becomes in effect the new contacting party rather than a</p> <p>4 behind the scenes --</p> <p>5 MR JUSTICE HILDYARD: I see, so they become bound by the</p> <p>6 contract.</p> <p>7 MR ALLISON: Precisely, rather than a behind the scenes</p> <p>8 assignment of the compensation claim as in this case.</p> <p>9 MR JUSTICE HILDYARD: Thank you very much.</p> <p>10 But would the same claims and counterclaims without</p> <p>11 restriction apply between the debtor and assignee as</p> <p>12 applied between the debtor and assignor?</p> <p>13 <b>A. Yes, I would see it like that.</b></p> <p>14 MR JUSTICE HILDYARD: No restriction on those?</p> <p>15 <b>A. (Not interpreted) No.</b></p> <p>16 MR JUSTICE HILDYARD: No. Thank you.</p> <p>17 No, I think that that helps me. Thank you.</p> <p>18 Judge Fischer, thank you very much for your assistance.</p> <p>19 Are there any other questions which arise from that?</p> <p>20 No.</p> <p>21 Thank you very much for your help.</p> <p>22 THE WITNESS: It was a honour to me to be here and give</p> <p>23 evidence, my Lord.</p> <p>24 MR JUSTICE HILDYARD: Thank you very much and thank you to</p> <p>25 your interpreter as well, I'm very grateful.</p> <p style="text-align: center;">Page 59</p>
<p>1 <b>A. (Not interpreted) Yes.</b></p> <p>2 MR JUSTICE HILDYARD: I am trying to work out in my own mind</p> <p>3 what the rights as between the assignee and the debtor</p> <p>4 are in terms of netting and set-off.</p> <p>5 <b>A. (Interpreted) The question is as we have a framework</b></p> <p>6 <b>contract, that is to say concerning a number of</b></p> <p>7 <b>transactions, different transactions, I assume that the</b></p> <p>8 <b>assignor has assigned all his claims to the assignee.</b></p> <p>9 MR JUSTICE HILDYARD: Well, what I had in mind was</p> <p>10 an assignment of the right, not -- not what we would</p> <p>11 think of as a vested claim.</p> <p>12 Supposing the assignor simply assigns the rights</p> <p>13 under the contract and the assignee steps into the shoes</p> <p>14 the assignor had.</p> <p>15 <b>A. (Not interpreted) But all the rights of -- of this</b></p> <p>16 <b>contract?</b></p> <p>17 MR JUSTICE HILDYARD: Yes.</p> <p>18 <b>A. (Not interpreted) Yes, yes.</b></p> <p>19 <b>(Interpreted) When the assignee has received the</b></p> <p>20 <b>rights under the contract and then the crisis comes,</b></p> <p>21 <b>then between the two, the same happens as would have</b></p> <p>22 <b>happened between the assignor and the assignee.</b></p> <p>23 MR ALLISON: My Lord, I am hesitant to rise. I think</p> <p>24 your Lordship's question happening pre the crisis and</p> <p>25 the termination, it may be that a clue to that is</p> <p style="text-align: center;">Page 58</p>	<p>1 Right. Well, the journey is over so enjoy yourself</p> <p>2 properly now. So thank you.</p> <p>3 MR DICKER: My Lord, I think on that basis it's tomorrow</p> <p>4 morning for closing submissions on the German law</p> <p>5 issues.</p> <p>6 MR JUSTICE HILDYARD: Yes. Have you agreed between you how</p> <p>7 long you are likely to need? It's a purely selfish</p> <p>8 question on my part in order that I can arrange other</p> <p>9 things.</p> <p>10 MR DICKER: My Lord, my learned friend and I had a brief</p> <p>11 discussion. My desire would be to try and conclude it</p> <p>12 tomorrow. It seems to me there may, however, be a risk</p> <p>13 that we use all or part of the morning on Wednesday.</p> <p>14 MR JUSTICE HILDYARD: Right. That's fine. That's what</p> <p>15 I promised you. It's only an internal inquiry. I've</p> <p>16 promised you the Wednesday, but of course I'll listen</p> <p>17 with even more zeal if I think it's going to finish by</p> <p>18 1 o'clock. But that's --</p> <p>19 MR DICKER: I think by Wednesday lunchtime, it's what we</p> <p>20 understood we had, and I think both my learned friend</p> <p>21 and I intend and believe that we can finish by then.</p> <p>22 MR JUSTICE HILDYARD: Yes. Well, that would be very good.</p> <p>23 It is the oral only and not preceded or accompanied</p> <p>24 by written material? Or is that still under review?</p> <p>25 MR DICKER: My Lord, I think the thought on this side was</p> <p style="text-align: center;">Page 60</p>

<p>1 that your Lordship might be assisted, at least in</p> <p>2 relation to the German law evidence, with something in</p> <p>3 writing, even if it's only extracts and references to</p> <p>4 the transcript and things of that sort.</p> <p>5 MR JUSTICE HILDYARD: I mean, any writing would assist.</p> <p>6 I mean I have the great benefit of -- of transcripts.</p> <p>7 But --</p> <p>8 MR ALLISON: My Lord, I confess we hadn't seen it that way.</p> <p>9 We didn't realise the SCG was proposing to do that.</p> <p>10 Subject to my Lord, we were proposing to point my Lord</p> <p>11 to the key passages in the transcript as part of our</p> <p>12 oral closing. We could review that if that would assist</p> <p>13 my Lord more, but that's the way we were going to do it.</p> <p>14 MR JUSTICE HILDYARD: I leave you to do whatever you think</p> <p>15 will assist me most, but under the German law we have</p> <p>16 covered a great deal of ground, at least a rival to the</p> <p>17 other matters really in terms of complexities with the</p> <p>18 added complication that one is dealing with a language</p> <p>19 that in my case I don't understand until translated.</p> <p>20 Any assistance would be -- there is one thing in</p> <p>21 that context which I should have raised with -- with the</p> <p>22 judge which was at the beginning of 20 November, which</p> <p>23 I imagine was Friday, no, yes, Friday, on page 51, the</p> <p>24 answer between 17 and 22, which was then readdressed in</p> <p>25 somewhat different form at 53, 11 to 17, there was</p> <p style="text-align: center;">Page 61</p>	<p>1 cross-examination and Judge Fischer dealt with it in the</p> <p>2 transcript, page 81, lines 1 to 6.</p> <p>3 MR JUSTICE HILDYARD: Hold on, I would like to see that.</p> <p>4 I'm sorry. Sorry, Judge -- it helps me.</p> <p>5 MR DICKER: So page 81 between lines 1 and 6.</p> <p>6 MR JUSTICE HILDYARD: Yes.</p> <p>7 MR DICKER: I also dealt with the concept of, as I was</p> <p>8 putting it, no gap in interest running.</p> <p>9 MR JUSTICE HILDYARD: Yes.</p> <p>10 MR DICKER: At page 95 and 96.</p> <p>11 MR JUSTICE HILDYARD: Yes.</p> <p>12 MR DICKER: My Lord, so far as the initial passage my</p> <p>13 learned friend commented on, my Lord, we would say for</p> <p>14 better or worse, your Lordship has the translations</p> <p>15 provided by the agreed translator, interpreter, and it's</p> <p>16 really no more for my learned friend than it is for</p> <p>17 myself to say that some of those translations were</p> <p>18 inaccurate. I think your Lordship needs to do the best</p> <p>19 you can with the results of the transcript.</p> <p>20 MR JUSTICE HILDYARD: It was difficult because I don't think</p> <p>21 there was a simultaneous transcript of the German, and</p> <p>22 therefore you are right that I must muddle through on</p> <p>23 the footing of what is there.</p> <p>24 MR ALLISON: My Lord, of course, but that's why we thought</p> <p>25 from this side at least my Lord may be assisted with</p> <p style="text-align: center;">Page 63</p>
<p>1 an original objection to whether the interpretation had</p> <p>2 entirely captured the witness's answer. At 51, 17 to</p> <p>3 22.</p> <p>4 You did cover this I think in re-examination, but</p> <p>5 what should I do about that answer? Should I ignore the</p> <p>6 answer between 17 and 22 as having not quite captured</p> <p>7 what the witness intends to say or how do you propose</p> <p>8 that I should proceed?</p> <p>9 MR ALLISON: My Lord, without foreshadowing in advance what</p> <p>10 we'll say, that was the purpose for the question.</p> <p>11 MR JUSTICE HILDYARD: Of your re-examination.</p> <p>12 MR ALLISON: Exactly. Speaking -- it seemed that the thing</p> <p>13 that had gone missing is that was said in the context of</p> <p>14 a breach rather than an automatic termination, that's</p> <p>15 why the question was put again so the judge could</p> <p>16 explain to my Lord the view within an automatic</p> <p>17 termination for an application for insolvency. In other</p> <p>18 words, not the word "cause" that Mr Dicker used a lot</p> <p>19 during the course of cross-examination.</p> <p>20 MR JUSTICE HILDYARD: So it's the difference between a right</p> <p>21 and its enforcement, as explained in re-examination,</p> <p>22 would be your contention.</p> <p>23 MR ALLISON: My Lord, yes.</p> <p>24 MR DICKER: On our side your Lordship will no doubt have in</p> <p>25 mind this was an issue I covered during the course of my</p> <p style="text-align: center;">Page 62</p>	<p>1 hearing the answer in re-examination as analysed by</p> <p>2 Judge Fischer.</p> <p>3 MR JUSTICE HILDYARD: Yes. I mean, it all in a way</p> <p>4 illustrates that I don't find 9(1) and 9(2) entirely</p> <p>5 obvious as to how the timing works out, given that, as</p> <p>6 I understand it, a stay operates in respect of the other</p> <p>7 party's claim for an indefinite period. So it may be</p> <p>8 you can all clarify that for me, but I have not found it</p> <p>9 as easy as I would like.</p> <p>10 MR DICKER: It's on our list of things to cover tomorrow.</p> <p>11 MR JUSTICE HILDYARD: Thank you very much.</p> <p>12 Thank you both. 10.30? Thank you again. Thank</p> <p>13 you.</p> <p>14 (2.40 pm)</p> <p>15 (The court adjourned until</p> <p>16 Tuesday, 24 November 2015 at 10.30 am)</p> <p>17</p> <p>18 JUDGE GERO FISCHER (continued) .....1</p> <p>19 Cross-examination by MR DICKER .....1</p> <p>20 Re-examination by MR ALLISON. ....52</p> <p>21 Questions from THE BENCH .....55</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;">Page 64</p>



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