No 7942 of 2008

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 INSOLVENCY ACT 1986

(1) ANTHONY VICTOR LOMAS

(2) STEVEN ANTHONY PEARSON

(3) PAUL DAVID COPLEY

(4) RUSSELL DOWNS

(5) JULIAN GUY PARR

(as the joint administrators of the above named company)

Applicants

- AND -

(1) BURLINGTON LOAN MANAGEMENT LIMITED

(2) CVI GVF (LUX) MASTER S.À R.L

(3) HUTCHINSON INVESTORS LLC

(4) WENTWORTH SONS SUB-DEBT S.À R.L

(5) YORK GLOBAL FINANCE BDH, LLC

(6) GOLDMAN SACHS INTERNATIONAL

Respondents

JOINT STATEMENT OF JUDGE GERO FISCHER AND PROFESSOR PETER O. MÜLBERT OF AGREED AND NON-AGREED ISSUES AS TO MATTERS OF GERMAN LAW

I. Prefatory Remark

Dr Gero Fischer (a retired justice of the Federal Court of Justice, Senate for Bankruptcy Law) and Professor Peter O. Mülbert (a professor of law at the Faculty of Law and Economics, University of Mainz), experts instructed by the attorneys for Wentworth Sons Sub-Debt S.à r.l. and by the Senior Creditor Group (*i.e.*, CVI GVF (Lux) Master Sarl, Hutchinson Investors, LLC, Burlington Loan Management Limited, and their relevant affiliates), respectively, have prepared this Joint Statement to assist the High Court of Justice (the "High Court") in its consideration of the Lehman Brothers International (Europe) Waterfall II application on certain questions of German law arising in the context of the German Master Agreement.

The experts refer at various points to their previous Expert Opinions. The abbreviations used here for these are as follows:

"GF EO"	Judge Fischer Expert Opinion submitted on 10 July 2015
"GF RP"	Judge Fischer Reply Opinion submitted on 31 July 2015
"GF SEO"	Judge Fischer Supplemental Expert Opinion submitted on 2 October 2015
"PM EO"	Professor Mülbert Expert Opinion submitted on 10 July 2015
"PM RP"	Professor Mülbert Reply Opinion submitted on 31 July 2015
"PM CEO"	Professor Mülbert Consolidated Expert Opinion submitted on 2 October 2015

II. Joint Statement

No.	Summarisation of points of agreement	Opinion of Peter Mülbert as far as no agreement exists	Opinion of Gero Fischer as far as no agreement exists
	Issue 20		
	20.1 What rules or principles of construction govern and apply, as a matter of German law, to the interpretation of commercial contracts such as clause 3(4) of the German Master Agreement? (20.1 PM EO, 20.1 GF EO)		
1.	The experts agree that clause 3(4) of the German Master Agreement ("**GMA**") is not relevant for Issue 20 and Issue 21. Clause 3(4) GMA is not applicable to the close-out amount arising under clauses 7 to 9 of the GMA.	No statement.	No statement.
2.	The experts agree that there is no provision in the GMA which confers a contractual entitlement to interest on an unpaid close-out amount arising under clauses 7 to 9 of the GMA.	No statement.	No statement.
3.	The experts agree on the interpretation of contracts [PM EO 23 – 26]: - The interpretation of contracts is governed by the general principles set forth in sections 133 and 157 of the German Civil Code (BGB). - The starting point of interpretation is the wording of the contract. Contracts have to be interpreted according to the requirements of good faith, considering	No statement.	No statement.

	common usage, the purpose of the contract and the circumstances in which the contract was entered into. - General terms and conditions shall be interpreted according to their objective meaning, i.e. independently of the will of the contracting parties.		
20.2 What basis is there, as a matter of German law and specifically pursuant to the German Master Agreement, to award damages in respect of the late payment of debt and what form or forms can the award of damages take? In particular: (20.1 PM CEO, 20.2 GF EO) **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?** (20.1.a) PM CEO, 20.2.(1) GF EO)			
4.	(i) BGB sec. 288(1) The prerequisites are a money debt resulting from a legal relationship between the parties, and default of the obligor within the meaning of BGB sec. 286. [PM CEO 29, 32] The party is entitled to the rate irrespective of whether damage was incurred. [PM CEO 547, 58]	No Statement.	No Statement.
5.	The experts agree that although there is disagreement on how subsections 288(1) and 288(4) are categorised (cf. the columns to the right), this categorisation has no implications for the prerequisites of a claim pursuant to sec. 288(1) BGB under German law. [PM CEO 34]	Relationship between BGB sec. 288(1) and (4): BGB sec. 288(1) is a sub-case of the general damages provision under BGB sec. 280. [PM CEO 33, 34, 79-83]	Relationship between BGB sec. 288(1) and (4): BGB sec. 288(1) does not confer damages, but instead constitutes a separate claim not founded on the general rules of BGB sec. 280. Reference to GF EO para. 38; RP para. 5.

6.	(ii) BGB sec. 288(2) and (3) are irrelevant to Issues 20 and 21. [PM CEO 30]	No Statement.	No Statement.
7.	(iii) BGB sec. 288(4) The provision provides for a claim only to compensation for default damage that has actually been incurred [PM CEO 36, 49]. If the obligee claims interest under subsection 1, there is a claim only to compensation for any damage incurred in excess of the interest claim. [PM CEO 59 – 63]	No Statement.	No Statement.
8.	(iv) Calculation of damage The obligee must establish both the causal connection for the damage and its amount.	No Statement.	No Statement.
9.	BGB sec. 252 sentence 2 includes a facilitation concerning the demonstration and amount of damage in cases where lost profits are being claimed. Banks may calculate damage in the abstract on the basis of transactions typically conducted. [PM CEO 54, 55]	Standard of proof for lost profits: The experts disagree on whether the facilitated standard of proof that applies for banks is also applicable to investors and other entities dealing commercially in money. [PM CEO 55, 56] The case law is inconsistent regarding the standard of proof that applies in relation to the claimant's obligation to demonstrate the basis for his claim in damages. Some decisions refer to a "non-negligible probability"; others stipulate far stricter requirements [PM CEO 53]	Standard of proof for lost profits: The experts disagree on whether the facilitated standard of proof that applies for banks is also applicable to investors and other entities dealing commercially in money. Reference to GF CEO para. 70; GF RP para. 25 – 27.

(b) How would such an award be expressed? In particular, is 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? (20.1.b) PM CEO; 20.2.(2) GF EO)			
10.	The experts are in agreement on the following points: [PM CEO 37 – 44] (i) One-time (not ongoing) losses can be asserted only as an amount. (ii) Lost profits from a forgone investment opportunity are usually asserted as an amount. (iii) Compensation for damage in the form of lost or additionally incurred interest can be demanded as an amount or as a rate, but it is customary to assert it as a rate.	Continuing loss could include a loss of profit, for example on an investment in shares to generate a return by way of share dividends [PM CEO 42-43]	No Statement.
11.	The experts are in agreement that in a dispute over losses that extend beyond the date of the hearing, an application for a declaratory judgment on these future losses comes under consideration.	No Statement.	No Statement.

(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? (20.2.(3) GF EO, 20.1.c) PM CEO]			
12.	The experts are in agreement that for claims under BGB sec. 288(1), the rate refers to the amount for which the obligor is in default. [PM CEO 85]	No Statement.	No Statement.
13.	The experts are in agreement that for damages claims under BGB sec. 288(4), the rate in a specific case may refer to a smaller amount than the one for which the obligor is in default.	No Statement.	No Statement.
20.3 As a matter of German law and specifically pursuant to clause 3(4) of the German Master Agreement, in your opinion: (20.3. GF EO; 20.2. PM CEO) **(a) Is the relevant entity entitled to the fixed rate of interest (as a minimum) pursuant to the first sentence of that clause regardless of any loss?** (20.3.(1) GF EO, 20.2.a) PM CEO)			
14.	The experts are in agreement that these issues are no longer relevant insofar as they concern clause 3(4) of the German Master Agreement.	No statement.	No statement.
15.	They are in agreement that the relevant entity is entitled to the fixed rate of interest (as a minimum) under BGB sec. 288(1), regardless of any loss.	No statement.	No statement.

	(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? (20.3.(2) GF EO, 20.2.b) PM CEO)		
16.	The experts are in agreement that these issues are no longer relevant insofar as they concern clause 3(4) of the German Master Agreement.	No statement.	No statement.
17.	The experts concur in the opinion that if the relevant party's loss as a result of a delay in payments is greater than the amount of the interest at the agreed fixed rate, the relevant entity is entitled to recover either (i) the entire loss without a fixed interest rate, or (ii) the fixed interest rate plus the loss that exceeds that rate, as damages for default of payment. [PM CEO 59 – 64]	No statement.	No statement.
20.4	**On the true construction of clauses 7 to 9 of the GMA** (1. GF SEO, 20.3. PM CEO) **(a) When does a close-out amount arising under clauses 7 to 9 of the GMA become due and payable?** (1.a) GF SEO, 20.3.a) PM CEO)		
18.	The experts are in agreement that in accordance with clause 7(2) GMA, the contract was terminated upon LBIE's application for Administration. [PM CEO 68, 69]	The experts differ as to when the close-out amount became due and payable: According to Mülbert, it became due on termination of the GMA. Pursuant to BGB section 271(1), a debt becomes due and payable immediately if no other time has been agreed by the parties or is	The experts differ as to when the close-out amount became due and payable: According to Fischer it did not become due until the netting provided under clauses 8 and 9 GMA had been carried out. Reference to GF EO para. 60, 77, 78; GF SEO 27 – 30

		evident from the circumstances. The GMA itself does not specify a due date for the payment of the Single Compensation Claim under clauses 7 to 9. Clause 9(2) GMA only deals with certain exceptions, none of which applies to the Single Compensation Claim owed by LBIE. As a result, section 271(1) applies and the Single Compensation Claim becomes due immediately upon the termination of the GMA triggered by LBIE's administration application [PM CEO 74].	
(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? (1.b) GF SEO, 20.3.b) PM CEO)			
19.	The experts are in agreement that default within the meaning of BGB sec. 286 must have occurred in order for a damages claim for late payment to exist. [PM CEO 29, 75]	No statement.	No statement.

(c) Is section 271 of the BGB relevant to the question in 1(a) above? (1.c) GF SEO; 20.3.c) PM CEO[1])			
20.	Both experts affirm this. [PM CEO 74]	However, Mülbert holds that performance is due immediately, because nothing else is specified or evident from the circumstances. Section 271(1) BGB is relevant and the requirements of section 27(1) BGB for the Single Compensation Claim becoming due immediately with the termination are met. As a result – the Single Compensation Claim becomes due immediately upon the termination of the GMA [PM CEO 74].	Fischer, by contrast, holds that it follows from the procedure under clauses 8 and 9 that performance does not become due until that procedure has been carried out. That procedure constitutes the circumstances from which becoming due can be derived pursuant to BGB section 271(1). Reference to GF SEO para. 36
20.5 What is the true construction of section 286? In particular: (2. GF SEO. 20.4. PM CEO) **(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?** (2.a) GF SEO, 20.4.a) PM CEO)			
21.	The experts are in agreement that no default can occur by serving a warning notice after the institution of a German insolvency proceeding.	Mülbert holds that this may be different in the case of an Administration. [PM CEO 79] I am not aware of any provision of German law that would have the effect that no default could occur (or no warning notice could be given) following the	Fischer holds that even after Administration is ordered, default cannot be established by serving a warning notice. Reference to GF SEO para. 38 - 40

[1]) Incorrectly identified as 20.3.(e) in the Consolidated Report.

		commencement of an English administration proceeding [PM CEO 79].	
(b) What are the formal and substantive requirements for a "warning notice" (as the phrase is used in section 286 of the BGB)? (2.b) GF SEO; 20.4.b) PM CEO)			
22.	Both experts are in agreement: The obligor must receive a clear, definite demand from the obligee for payment of an amount that is due.	No statement.	No statement.

(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? (2.c) GF CEO; 20.4 c) PM CEO)			
23.	Filing proof of debt: Both experts are in agreement that filing a claim (proof of debt) in a German insolvency proceeding does not establish default. [PM CEO 88 – 91]	Mülbert holds that this may be different in an English Administration. [PM CEO 92] Based on the administration summary, there is no reason why a filing in an English administration would equally lack the power to put a debtor in default as is the case with a filing in a German insolvency proceeding [PM CEO 92]. Whether a termination notice would also incorporate a warning notice would depend upon the contents of the termination notice [PM CEO 93].	Fischer sees no grounds for such a distinction, having had regard to the Administration Summary. Reference to GF EO para. 64; GF SEO para. 38, 39, 43

24.	Notice of termination: **The experts are in agreement that this issue is irrelevant in view of the automatic termination of the contract under clause 7(2) GMA.[PM CEO 93]**	No statement.	No statement.
(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? (2.d) GF SEO, 20.4.d) PM CEO)			
25.	**The experts are in agreement that such a warning notice has no legal effect; in particular, there can be no question of a retroactive effect of a warning notice. [PM CEO 95]**	No statement.	No statement.
(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? (2.e) GF SEO; 20.4.e) PM CEO)			
26.	The experts' opinions differ in this regard.	Mülbert holds that an application or order for Administration can constitute a serious and definitive refusal of performance within the meaning of BGB sec. 286(2) no. 3 so that it is not necessary to deal with BGB, sec. 286(2) no. 4 at all. [PM CEO 72, 73, 96 – 124] **A refusal under section 286(2) no. 3 BGB can occur when, after or before the relevant claim falls due. [PM CEO 102, 122-124].**	Fischer holds that this is not possible. In his opinion, an application for Administration does not fulfil the conditions established under German law for a serious, definitive refusal of performance by the obligor, nor does it constitute a special reason within the meaning of BGB sec. 286(2) no. 4. The case is no different for the ordering of Administration. Sec. 286(2) no. 4 embraces only special circumstances of individual cases and is for this reason not applicable to

		A refusal under section 286(2) no. 3 BGB is neither a declaration of intent nor a quasi-declaration of intent but is instead a real act. Hence although LBIE's behaviour must be deliberate, there does not need to be a declaration by LBIE [PM CEO 119]. A refusal under section 286(2) no. 3 BGB can be explicit or implicit provided that the refusal constitutes the debtor's "final say" which is a question of fact. 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 pay some time in the future but not at the time performance is due or within a reasonable grace period [PM CEO 101]. The question of whether the filing of a German insolvency petition qualifies as a serious and definitive refusal of performance has not been discussed in substance by the German courts or in the legal literature [PM CEO]. In the case of a non-mandatory filing of an insolvency application (i.e. one where neither the debtor nor the directors are under a legal obligation to file for insolvency proceedings), the debtor exercises an option by choosing to file and this would be a serious and	applications to the court that are fundamentally required if the debtor is not able to pay. The same applies all the more for the opening of insolvency proceedings or an Administration, respectively, which is required in such cases. Furthermore, reference to GF SEO para. 48 – 54.

		definitive refusal of performance for the purposes of section 286(2) no. 3 BGB (by analogy with the treatment of such a filing for the purposes of section 323(4) BGB) [PM CEO 105-118].	

Issue 21 **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 the first sentence of clause 3(4) or a Damages Interest Claim as a matter of German law?** (21.A GF EO; 21.(i) and 21.1. PM CEO)			
27.	The experts are in agreement that the transferee cannot assert any additional claim or any claim taking the transferor's place, but can always assert only the transferred claim.	No statement.	No statement.
28.	The experts are also in agreement that the acquirer of the claim can assert the claim to compensation for default damage that has already accrued to the person of the transferor under BGB sec. 288(4), if the counterparty and the acquirer have so agreed. [PM CEO 125-131]	No statement.	No statement.

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? (21.5 sentence 1 GF EO; 21.2 PM CEO)			
29.	The experts are in agreement that for the period before the transfer, the transferee can always assert only the transferor's claim. [PM CEO 141]	No statement.	No statement.
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? (21.5 sentence 2 GF EO; 21.3 PM CEO)			
30.	The experts are in agreement that for the period before the transfer, the transferee can always assert only the transferor's claim. [PM CEO 142. 143]	No statement.	No statement.
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? (21.5 sentence 3 GF EO; 21.4 PM CEO)			
31.	The experts are in agreement: After the claim has been transferred, the reason and amount for the damage are guided by the person of the transferee.	The experts' opinion differs as to whether this also applies if the damage incurred by the transferee is greater than that of the transferor if the claim had not been transferred. Mülbert holds that in this case the claim of the transferee alone is determinative.	The experts' opinion differs as to whether this also applies if the damage incurred by the transferee is greater than that of the transferor if the claim had not been transferred. Fischer holds that the transferee cannot assert any greater damage than the transferor would have incurred. Reference to GF EO para. 96 – 106

		The damages interest claim is calculated by reference to a "hybrid approach" even if the debtor has to pay more as a result. This is the prevailing view in the legal literature. The principles referred to by Judge Fischer embodied in sections 404, 406 and 407 BGB are merely rules that protect the debtor from legal disadvantages as a result of the assignment. They cannot be extended to factual disadvantages (i.e. disadvantages that result from the fact that a new creditor (transferee) is behaving differently from the former creditor (transferor) [PM CEO 137-140].	
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? (21.5 sentence 4 last half-sentence GF EO; 21.5 PM CEO)			
32.	The experts are in agreement that the assertion of assigned claims is not precluded because the assignee was aware of the obligor's default.	PM CEO 145	Fischer holds that there is no risk of abuse, because in his opinion the damage incurred by the transferor sets an upper limit anyway to the damage that can be claimed.

21.6 Where does the burden of proof lie in relation to such issues, as a matter of German law? (21.6. GF EO; 21.6. PM CEO)			
33.	The experts are in agreement that the burden of proof for the facts establishing the claim lies with whoever asserts the claim. [PM CEO 146]	No statement.	No statement.
21.7 In particular, under what circumstances are assigned claims time barred (verjährt) (including taking into account any extension, suspension or interruption of the statutory limitation period as a matter of German law on the two assumptions that (a) English limitation periods are stayed as a matter of English law by reason of the English administration and (b) English limitation periods are not stayed as a matter of English law by reason of the English administration) (21.5 sentence 4 first part (excluding last half-sentence); PM not included)			
34.	So far as the experts have been informed, the issue of the time bar no longer arises.	No statement.	No statement.

Duty to the High Court

1. Judge Fischer and Professor Mülbert understand that the duty of each of them is to help the High Court on matters within his expertise. This duty is paramount and overrides any obligation to the parties from whom they have received instructions and by whom they are being paid. Each has complied and will continue to comply with that duty.

2. Judge Fischer and Professor Mülbert are aware of the applicable requirements of Civil Procedure Rules Part 35, Practice Direction 35, the Civil Justice Council Guidance for the instruction of experts in civil claims 2014, and the Practice Direction – Pre-Action Conduct.

Statements of Truth

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.

handwritten signature

Dated: October 22, 2015

Dr. Gero Fischer

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.

Dated: October 22, 2015

Professor Peter. O. Mülbert

Statements of Truth

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.

Dated: October 22, 2015

Dr. Gero Fischer

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handwritten signature

Dated: October 22, 2015

Prof. Peter. O. Mülbert

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JOINT STATEMENT OF JUDGE GERO FISCHER AND PROFESSOR PETER O. MÜLBERT OF AGREED AND NON-AGREED ISSUES AS TO MATTERS OF GERMAN LAW

In my capacity as a public translator for the English language, duly commissioned and sworn by the President of the Regional Court II of Munich I hereby certify that the foregoing English translation of the German original submitted to me is correct and complete.
Given in Hornstein this 27th of October 2015.

Christopher Groß - Duly commissioned and sworn public translator for the English language.

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