Appendix

Content from Professor Mülbert's disputed issues column that was deleted from Joint Statement

In response to question 20.4(a) regarding when the close-out amount becomes due:

I disagree with Judge Fischer's statement that the Single Compensation Claim only "becomes due as soon as the creditor has calculated it in the manner provided in clause 8 and 9 and shows in an understandable and reproducible manner how the result was obtained" [GF SEO 2 (summary), see also 30]. German courts and legal literature very broadly agree that, upon an early termination of a contract for cause (*außerordentliche Kündigung*), a compensation claim in favour of the party exercising its termination right (e.g. clause 7(1) GMA) becomes due and payable immediately upon termination. For the claim to fall due immediately it is neither necessary for the creditor to exercise his right to choose between an abstract or concrete calculation of his damages nor for the creditor to calculate the exact amount of compensation due. As an illustration of this general principle I refer to the treatment of a claim for a prepayment fee as a consequence of the early termination of a loan contract. Such a claim becomes due immediately regardless of the fact that the creditor can choose between two methods to calculate his damages and regardless of the fact that it will take the creditor some time to determine the exact amount; see Staudinger/*Mülbert*, BGB, 2015, § 490 Rn. 164 with further references and OLG Frankfurt WM 2012, 2280, 2284.

I also disagree with Judge Fischer's statement that the Single Compensation Claim was not enforceable immediately at the time of the termination of the GMA [GF SEO 41]. I agree with the starting point of his argument, namely that the debtor can only enter into default if the claim in question is enforceable in law and that defences (*Einreden*) against a particular claim, e.g. the statutory limitation of a claim, make a claim unenforceable and, hence, will prevent the debtor from entering default. Given that the enforceability of a claim is a prerequisite for the maturity of the claim, this aspect is implicitly covered by my Consolidated Report [PM CEO 74]. However, Judge Fischer's argument *a fortiori*, namely that there cannot be a default if the creditor, as is the case in a German insolvency proceeding, is barred by law from enforcing the claim is flawed. His conclusion *a fortiori* mixes two separate and very different legal categories:

- As a matter of German law, defences (*Einreden*) are part of substantive law and relate to a particular claim.
- The reason for a creditor being barred from enforcing a claim post-commencement of a German insolvency proceeding, on the other hand, derives from German insolvency law and German civil procedure rules: pursuant to sections 80(1) and 81(1) InsO the debtor looses his power of disposition over his assets and, thus, cannot be subject to measures of forced execution (section 89 InsO), and, pursuant to section 80(1) InsO, he looses his standing to be sued (*passive Prozessführungsbefugnis*) with respect to insolvency claims.

The difference is crucial if a debtor is sued outside Germany. The applicable civil procedure rules (in this case, English law) will determine whether the creditor can sue the debtor whereas, if a defence exists under the applicable German substantive law, the debtor can raise that defence and, thus, can avoid being ordered by the court to perform. Given that fundamental difference, it is no wonder that, in the German debate on whether the debtor can enter default post-commencement of German insolvency proceedings, Judge Fischer's argument has not been raised.

In response to question 20.5(a) regarding whether a default can occur post an English administration:

The interpretation of section 286 BGB follows the general principles of interpretation developed by German courts and legal theory. Contrary to Judge Fischer's statement [GF SEO 40] the rationale and policy of English insolvency law does not impact on how to construe that provision. It is only when determining whether the particular facts satisfy the requirements of section 286 BGB that one has to examine whether specific facts or events in an English insolvency proceeding fit the requirements stipulated by section 286 BGB.