19 U 285/10

2/23 0 385/09 Regional Court (*Landgericht*) of Frankfurt am Main

As per transcript, pronounced on
8 June 2011

Schäfer, court clerk
Registrar of the court registry (*Urkundsbeamtin der Geschäftsstelle*)

HIGHER REGIONAL COURT (*OBERLANDESGERICHT*) OF FRANKFURT MAIN

IN THE NAME OF THE PEOPLE

JUDGMENT

In the case of

Lehman Brothers International (Europe) (in administration), represented by the Joint Administrators, acting as agents without personal liability, Anthony Victor Lomas, Steven Anthony Pearson, Dan Yoram Schwarzmann, Michael John Andrew Jervis and Derek Anthony Howell, 25 Bank Street, London, E14 5LE, UK,

Claimant and Appellant

Counsel:
Linklaters LLP, Mainzer Landstraße 16, 60325 Frankfurt am Main,

1. Zoo Zürich AG, represented by the Board of Directors (*Verwaltungsrat*) which, in turn, is represented by executive director Kurt Plattner, Zürichbergstraße 221, A 8044 Zurich, Switzerland,

Intervener 1,

2. Mr Simon Tindall and Ms Caroline Tindall, 31 Lonsdale Road, Barnes, London, SW13 9JP, England

Intervener 2,

3. Origen Trustee Services Limited, represented by Hannah Davies, 40-43 Chancery Lane, London, WC2A 1 JA, England,

Intervener 3,

4. GLG Investments IV Public Limited Company, represented by Matsack Trust Limited which, in turn, is represented by the directors Gerald O'Mahony, Michael Jackson, Alun John Davies and Aniello Bianco, 70 Sir John Rogerson's Quay, Dublin 2, Ireland

Intervener 4,

Counsel for Interveners 1 to 4:
Schultze & Braun GmbH Rechtsanwaltsgesellschaft, Eisenbahnstraße 19 - 23, 77855 Achern,

versus

Dr Michael C. Frege as insolvency administrator (*Insolvenzverwalter*) of Lehman Brothers Bankhaus AG, CMS Hasche Sigle Rechtsanwälte, Barckhausstraße 12 - 16, 60325 Frankfurt am Main,

Defendant and Respondent,

Counsel:
Hengeler Müller, Bockenheimer Landstraße 24, 60325 Frankfurt am Main,

the 19th Division for Civil Matters (*Zivilsenat*) of the Higher Regional Court of Frankfurt am Main – through the Presiding Judge (*Vorsitzender Richter*) at the Higher Regional Court, Mr Martenstein, the Judge at the Higher Regional Court, Dr von Storch, and the Judge at the Higher Regional Court, Ms Müller – following the oral hearings on 18 May 2011 –
adjudicate as follows:

The Claimant's appeal against the judgment of the 23rd Civil Division (*Zivilkammer*) of the Regional Court of Frankfurt am Main dated 7 October 2010 is dismissed, as far as it relates to the dismissal of claims no. 1.1 and 1.2.

As for the remainder, the judgment is reversed and the case is remitted to the court of first instance which will also have to decide on the costs of the appellate proceedings.

The judgment is provisionally enforceable (*vorläufig vollstreckbar*).

A second appeal (*Revision*) is not allowed.

Basis for the judgment:

I.

In an action by stages (*Stufenklage*), the parties are in dispute over the question as to whether a trust agreement (trust chain) existed between the parties in relation to the client monies in the amount of U.S.$1 billion held on trust by the Claimant and transferred by the Claimant on 12 September 2008 at 5:49:58 p.m. into the account of the debtor (Bankhaus AG) with JP Morgan Chase, New York, entitling the Claimant, according to its main claim, to request the repayment of these amounts from Bankhaus AG's insolvency administrator, the Defendant, by way of segregation. Essentially, the question is whether the letters submitted as Exhibits L10 and L11 to the statement of claim evidence that a trust arrangement also existed between the Claimant and Bankhaus AG.

At the first stage, the Claimant requested to be informed on the whereabouts of the aforementioned payment, including via submission of the corresponding original documents, and as to whether there is any consideration received for such payment distinguishably present in the estate.

Due to the statements submitted by the parties at the first instance, we refer to the facts of the case presented in the challenged judgment. These facts are supplemented as follows:

The parties are not in dispute over the fact that documents on the whereabouts of the monies were exchanged in the context of a working group (Client Money Working Group) formed by employees of Bankhaus AG and lawyers of the Claimant after the filing for the claim at issue in the amount of €806,491,398 to be entered into the insolvency table and after the reporting date (17 March 2009), which – amongst other things – was intended to clarify the facts until then unclear and to carry out a legal assessment of the Claimant's claim on this basis.

The parties are also not in dispute over the fact that the Defendant's representatives at the working group meeting of 13 August 2009 answered any questions put by the Claimant's lawyer, Dr Vorwerk, submitted in an e-mail dated 29 July 2009 (Exhibit B31). Amongst other things, it was explained to the Claimant's representatives in detail that the monies had been paid to Bankhaus in its capacity as an account bank, and not as a trustee, and, accordingly, had not been placed with third parties. In addition, it was explained and evidenced that the JPMorgan account was Bankhaus's general U.S.$ nostro account, to which all U.S.$ payments to Bankhaus were credited, and not a separate trust account. Furthermore, not only the alleged client monies, but also any other U.S.$ payments to Bankhaus AG were credited and debited to the JPMorgan account into which the Claimant made the transfer at issue. Accordingly, the Claimant's alleged client monies became commingled with own funds of Bankhaus, which is why the trust monies – if there was a trust arrangement – can no longer be unambiguously determined.

The exchanged documents also included the letter of KPMG AG Wirtschaftsprüfungsgesellschaft dated 05 June 2009 (Exhibit B25). This letter included as an enclosure an overview of the move-

ments in the JPMorgan account on 12 September 2008. This overview shows that, immediately after the transfer at issue was received at 5:49:58 p.m., an amount of U.S.$1,000,065,347.22 (5:49:59 p.m.) and an amount of U.S.$634,775,284.72 (5:53:00 p.m.) were debited, resulting in a remaining total balance of U.S.$4,011,668.30.

Evidence of the aforementioned payment transactions was submitted to the Claimant's counsel in electronic form on 08 May 2009 by way of a copy of the relevant account statements in an attachment to an e-mail sent by Felix Schaefer to Dr Sven Schelo of Linklaters on 08 May 2009, 9:00 a.m. (Exhibit B33). It is true that some of the payment transactions had been blacked out for data protection purposes, but this does not concern the relevant debit orders. – As an exhibit to his statement of defence, the Defendant submitted an uncensored copy of the account statement relating to the JPMorgan account (Exhibit B24).

The amount of U.S.$1,000,065,347.22 was transferred to the Claimant. With respect to the debit order of U.S.$634,885,284.72, the explanation in the e-mail showed that this was the balance of various transactions which could only be paid once there was sufficient credit in the account.

After the last working group meeting, the Claimant's counsel, the lawyers (*Rechtsanwälte*) Dr Schelo and Dr Steck, both of Linklaters LLP, confirmed to the Defendant's counsel that the documents exchanged had been sufficient and the facts had been conclusively explained and disclosed.

The Claimant held the view that the documents exchanged in the client money working group did not provide conclusive information, especially because no original documents had been provided which did not contain blackened passages and which evidenced what had happened to the client money. According to the Claimant, the account vouchers meanwhile provided do not evidence what happened to the client money.

In contrast, the Defendant held the view that the request for information had expired as a result of the performance owed having been effected in accordance with section 362 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*). Because according to the Defendant full information had been provided even before the proceedings were initiated.

In its judgment of 07 October 2010 (file, pp. 354 et seq.), the Regional Court dismissed the claim for not being meritorious (*unbegründet*) and explained in this context that the claims asserted by way of the main claim were all based on the assumption that a trust arrangement existed between the Claimant and Bankhaus AG. According to such Court, it cannot be assumed that such an arrangement existed because the letter dated 12/14 February 2003 contradicted the letter dated 03 or 10 February 2003, so that the act of sending it constituted a rejection in conjunction with a new claim. Such claim was accepted by Bankhaus AG by signing on 14 February 2003. Therefore, the letters cannot be interpreted as arrangements between Claimant and Bankhaus AG complementing each other, especially since the letter dated 12 February 2003 corresponded to the wording of COB 9.3.82 R (Exhibit L12). The term "firm" contained therein corresponds to the Claimant mentioned in the second letter. The transfer at issue of 1 billion U.S.$ was not accompanied by any additional information, either, which would have revealed the identity of the trustor or the amount of the relevant trust monies. Furthermore, the TWS system, the Lehman Group's booking system, classified the Claimant's transfer as a "loan". In addition, the economic purpose of the transaction does not indicate a trust arrangement because such an arrangement is usually characterised by a trustee to whom more rights are transferred in relation to third parties than it may exercise in accordance with the arrangement under the law of obligations. Furthermore, the Claimant has not disputed that the only economic reason for investing the client monies with Bankhaus AG was the favourable refinancing. In the absence of a trust arrangement, the Claimant is not entitled

to request the desired information. Undisputedly, it is entitled to a repayment regarding the transfer made as a deposit. For the purposes of such repayment claim, it is irrelevant which dispositions the bank made with respect to the initial amount. In any case, there is no entitlement to request information. In the absence of a trust arrangement, there is also no segregation right under section 47 of the German Insolvency Code (*Insolvenzordnung – InsO*). Deposits with a bank, being claims *in personam* only, become part of the insolvency estate in the event of the bank's insolvency and only entitle their holders to simply file insolvency claims, which had been done in this case. Therefore, any claim for substitute segregation (section 48 of the German Insolvency Code) also fails to apply. If no duty is breached, i.e. if no trust arrangement is violated, the Claimant is not entitled to any damage claim under section 280 of the German Civil Code. Finally, the ancillary claim is also not meritorious. Such claim was filed to be entered into the insolvency table (Exhibit L19). However, the Defendant objected to this. To the extent that the Claimant now desires that the difference between €806,491,390 and the amount adjudicated under claim 3 be entered into the insolvency table, it must be pointed out that in the absence of any trust arrangement and thus in the absence of any main claim there is no difference that can be filed to be entered into the insolvency table.

In the appeal (*Berufung*), the Claimant moved that the legal dispute be remitted to the Regional Court; in the alternative, it repeated its motions of the first instance in slightly modified form. The main reasons underlying such motions were, according to the Claimant:

1.

The Regional Court anticipated the outcome of the taking of evidence with regard to the main issue 'existence of a trust arrangement', thus violating section 286 of the German Code of Civil Procedure (*Zivilprozessordnung – ZPO*) in conjunction with Art. 103 para. 1 of the German Constitution (*Grundgesetz – GG*). It inadmissibly ignored an offer to produce evidence with respect to such main issue by evaluating circumstantial evidence. Since it is undisputed that Christian Fischer and Frank Zeitz signed a trust agreement (submitted as Exhibit L10) on behalf of Bankhaus AG in February 2003 and sent it to the Claimant, it is of decisive importance to know whether the Claimant actually accepted the trust agreement offered by Bankhaus AG and whether the signing of the ancillary agreement implies a rejection of the trust agreement – as alleged by the Defendant. Therefore, evidence would have had to be taken with respect to the intention of the parties. Such evidence was offered in the Defendant's pleadings dated 06 April 2010, p. 13 (file, p. 77). The judgment is based on a violation of law because if the law had been applied correctly, the Regional Court would have decided in favour of the Claimant, i.e. it would have decided that a trust agreement existed and would have adjudicated the claims for restitution.

Furthermore, the Regional Court surprisingly based its judgment on the assumption that there was no difference that might be entered into the insolvency table without previously advising the party/parties accordingly as legally required by section 139 of the German Code of Civil Procedure. It interpreted claim 4 as if it were meant to apply exclusively in the event that claims 1 and 3 had been partially successful. To the extent that the Regional Court holds the view that the Claimant is not entitled to any claim for segregation, any claim for substitute segregation or any claim for damages under claim 3, the amounts awarded thereunder must be considered as amounting to "zero" so that the difference amounts to €806,491,398. Therefore, the Regional Court's interpretation is out of touch with reality. The judgment is also based on this violation of law. Taking into account the violations of law explained the action must be reversed in accordance with section 538 para. 2 no. 1 and no. 4 of the German Code of Civil Procedure and remitted to the Regional Court.

Furthermore, the Claimant points out that with respect to claim 4 the claim was disputed both on the merits and in terms of amount. In its pleadings dated 06 April 2010, p. 3 (file, p. 68), the Defendant denied that the claim for inclusion of the claim for repayment of the client monies plus interest was an insolvency claim in the rank of section 38 of the German Insolvency Code and that this claim can be filed for inclusion into the insolvency table. According to the Defendant, the amount of the claim was also disputed.

Finally, as a result of the defects of the first instance proceedings, an extensive and complex taking of evidence would be required. Both parties offered the testimony of 11 witnesses as evidence for the statement of facts in dispute between the parties (see list in the file, p. 665 for details). Furthermore, the Claimant offered expert opinions with regard to several complex issues of European law, Luxembourg law and English banking supervision law.

2.

In the event that the Division itself decides in accordance with section 538 para. 1 of the German Code of Civil Procedure the Claimant primarily claims that the Regional Court unrightfully stated that there was no trust arrangement between the Claimant and Bankhaus AG. It repeats that the ancillary agreement provided additional content to the trust agreement and did not contradict it. The purpose of the additional letter was to disclose the regulatory requirements imposed on the Claimant, i.e. its trust relationship with its clients. It is beside the point to argue that the additional information provided therein was a denial of the trust agreement because there is not the least contradiction in terms of content between the two letters. Such clarification by the Claimant contained in the ancillary agreement in relation to its clients is compulsorily required by the CASS rules (section 7.7.) and the COB rules. This is to be distinguished from the trust relationship additionally existing between the Claimant and Bankhaus AG under the trust agreement. The spirit and purpose of the COB/CASS rules is to protect client monies against a potential insolvency of the MiFID investment firms. A trust structure can also secure such protection when placing client monies with a group company. When preparing the ancillary agreement, the wording “deposit” was used without changing the legal nature of the placement of client monies, which qualified as trust monies. Labelling the client money placement as a “loan” in the TWS system in Frankfurt is not in accordance with the legal character of the placement but is based on a technical insufficiency of the system. Furthermore, the genesis and the actual conduct of the parties speak in favour of the conclusion of the trust agreement. The trust agreement is the result of a consultation process between executive employees of the Lehman Group. The consultation process is evidenced by the e-mails provided and shows that the wording selected was deliberately established.

Another argument against a replacement of the trust agreement by the ancillary agreement is that the latter does not fulfil all regulatory requirements for the documentation with respect to the placement of client monies. The ancillary agreement only contains those parts of the documentation which were not yet part of the trust agreement. If, from the Claimant’s perspective, the ancillary agreement had indeed been intended to replace the trust agreement, it would have been the obvious thing to do to use a standard agreement.

The Claimant therefore holds the view that only the trust agreement and the ancillary agreement together contained all information required by CASS and COB, so that it must be concluded that the two agreements complemented one another.

With respect to the reasons for the appeal of Interveners 1 to 4, reference is made to their pleadings dated 11 January 2011 (file, pp. 732 et seq.).

The Claimant and the Interveners move that

I. The judgment pronounced by the Regional Court of Frankfurt am Main (case no. 2/23 O 385/09) on 7 October 2010 be reversed as a result of the Claimant's appeal and the case be remitted to the Regional Court.

II. In the alternative, in the event that motion I is unsuccessful:

The judgment pronounced by the Regional Court of Frankfurt am Main (case no. 2/23 O 385/09) on 7 October 2010 be changed as follows as a result of the Claimant's appeal:

a. The Defendant is ordered

(i) to provide the Claimant with information on the whereabouts of the client monies transferred by the Claimant to Lehman Brothers Bankhaus AG on 12 September 2008 at 5:49:58 p.m. into the account of Lehman Brothers Bankhaus AG with JPM Chase New York, account number 066639557, amounting to U.S.$1 billion, and/or partial amounts thereof. In this respect, the (partial) amount, the accounts, the date and the time of the transfer are to be indicated via submission of the original documents;

(ii) to inform the Claimant, by submitting the original documents, if Lehman Brothers Bankhaus AG and/or the Defendant received a consideration for those client monies and, if so, what consideration Lehman Brothers Bankhaus AG and/or the Defendant received for those client monies, and in what form such consideration is still distinguishably present in the estate.

b. The Defendant is ordered to confirm the accuracy and completeness of the information provided by him according to the above claim under (a) by way of an affidavit, if necessary.

c. The Defendant is ordered, depending on the information provided according to the above claim under (a),

(i) to return to the Claimant the amount resulting from the information provided under claim a (i) plus contractually owed interest of 2.3475% from 12 September 2008 to 15 September 2008 resulting therefrom, plus default interest on that amount in the amount of 8 percentage points above the base interest rate as of 16 September 2008;

(ii) to return to the Claimant the individually distinguishable items resulting from the information provided under claim a (ii), received as a consideration for the trust monies originally subject to a right of segregation;

(iii) to include a claim for damages in the amount of the difference between €802,316,923.00 and the amounts resulting from paragraphs c (i) and c (ii) above, which has been filed to be entered into the insolvency table under serial no. 226 of the table within the scope of the insolvency proceedings over the assets of Lehman Brothers Bankhaus AG, plus default interest of 8 percentage points above the base interest rate since 16 September 2008, into the insolvency table.

d. In the further alternative, in the event that the action by stages were not meritorious in whole or in part, the Defendant is ordered to include the Claimant's claim for

payment of €806,491,398.00, which has been filed to be entered into the insolvency table under serial no. 226 of the table within the scope of the insolvency proceedings on the assets of Lehman Brothers Bankhaus AG, into the insolvency table.

The Defendant moves that

the appeal be dismissed.

The Defendant defends the decision challenged. He holds the view that the Regional Court did not (as alleged by the appeal) anticipate the outcome of the taking of evidence. In his view, it is not necessary to take evidence because it is of decisive importance to interpret the letters dated 03 February 2003 and 12/14 February 2003 and thus to legally assess the case by interpreting declarations of intent.

II.

The appeal is admissible. It is not meritorious as far as it relates to the dismissal of the requests for information (claims no. 1.1 and 1.2.); as for the remainder, it leads to the reversal of the challenged judgment and to the remittal of the case to the Regional Court.

1.

The claim is not meritorious as far as the Claimant requests at the first stage to be informed about the whereabouts of the payment in the amount of U.S.$1bn at issue and, furthermore, as to whether there is any consideration possibly received for such payment still distinguishably present in the estate. It can be left open whether the Defendant was under any legal obligation to provide the requested information. This is because any potential claim of the Claimant to be informed under the trust agreement alleged by it has extinguished by performance pursuant to section 362 para. 1 of the German Civil Code. By submitting the relevant documents and, furthermore, by issuing certain statements, the Defendant has provided the requested information.

The receipt and the whereabouts of the amount transferred into the U.S.$ nostro account of Bankhaus AG, account number 066639557, can be verified based on the record of the account movements in the JPMorgan account on 12 September 2008, which has been submitted as Exhibit B25. This overview, which, according to the Defendant's undisputed statement, was enclosed with KPMG AG Wirtschaftsprüfungsgesellschaft's letter of 05 June 2009 and has been delivered to the Claimant's joint administrators and the Claimant's counsel, does not only show the receipt of the transfer at issue at 5.49.58 p.m., but also the debit orders for further amounts on the same day. The first debit order relates to the transfer of an amount of U.S.$1,000,065,347.22 (5.50.59 p.m.) to the Claimant itself, so that any further information in this respect is unnecessary. The second debit order relates to an amount of U.S.$634,775,284.72 (5.53.00 p.m.). As regards this debit order, lawyer (*Rechtsanwalt*) Felix Schaefer explained in an e-mail sent to the Claimant's counsel on 08 May 2009 that it related to the balance of various transactions which had already been advised during the day and before the transfer at issue was received, but was not paid out until sufficient credit was received. The aforementioned payment transactions are also evidenced by the account

statements attached by Felix Schaefer to an e-mail of 08 May 2009, which was sent to the Claimant's current counsel (Exhibit B33).

The Claimant does not dispute the completeness of the account movements record submitted as Exhibit B25. The Claimant's general objection that the documents exchanged in the client money working group do not provide conclusive information does not indicate what other issues the Claimant considers still to be clarified. The Claimant's allegation that it has never been provided with uncensored original documents as to the whereabouts of the client monies is also incorrect. The allegation of blacked-out documents refers apparently to the account statements submitted as Exhibit B33, in which all entries of the "Description" column other than those relating to the three aforementioned account movements are blacked out. The Claimant, however, ignores the fact that the Defendant has submitted uncensored copies of the same account statements, as well as other account statements providing information about further account movements on 15, 16 and 19 August 2008, as Exhibit B24.

Moreover, the Claimant does not succeed with its objection that Bankhaus AG and/or the Defendant have not provided original documents. According to established case law, there is an obligation to inform based on the requirements of good faith (section 242 of the German Civil Code) where the legal relationships existing between the parties implicate that the obligee is excusably unaware of the existence and scope of his right, where he is not able to obtain the information required to prepare and assert his claim himself other than in a way that cannot be reasonably expected of him and where the obligor is easily able to provide such information without incurring unreasonable costs. In this context, it is required that a special legal relationship exists between the parties ([*case law reference*]). This would be the case here if a trust agreement in relation to the transfer at issue, as alleged by the Claimant, existed. An obligation to provide original documents, however, cannot be derived from the principle of good faith. Even more so as indications that could justify doubts as to the copies being true copies of the originals have neither been submitted by the Claimant nor are evident in any other way.

As regards the Claimant's requests to be informed as to whether Bankhaus AG received a consideration for the client monies and, if so, what consideration, and whether such consideration can still be distinguished in the estate, these questions have already been answered by the Defendant. According to the Claimant's undisputed statement, it was explained to the Claimant's representatives at the working group meeting of 13 August 2009 in detail that the monies had been paid to Bankhaus AG in its capacity as an account bank, and not as a trustee, and, accordingly, had not been placed with third parties. The question as to whether the payment at issue can still be distinguished in the estate has been addressed by the Defendant in his further submission to the effect that not only the alleged client monies were transferred into the debtor's general U.S.$ nostro account, but also any other U.S.$ payments to and by Bankhaus were credited and debited to this account, which is why the Claimant's client monies became "commingled" with own funds of Bankhaus and the trust monies can no longer be unambiguously determined.

The completeness of the information provided and thus the satisfaction of any possible claim to be informed are furthermore evident from the fact that the Claimant has not disputed the Defendant's statement according to which the Claimant's counsel, Dr Schelo and Dr Steck, confirmed after the last working group meeting to the Defendant's counsel that the documents exchanged had been sufficient and the facts had been conclusively explained and disclosed. It is therefore unnecessary to hear the witnesses named by the Defendant in this respect, the lawyers (*Rechtsanwälte*) Kühne and Schaefer.

2.

The decision that the claim to be informed is not meritorious was to be passed as a partial judgment, because the claims asserted at the individual stages are to be heard and judged separately and successively. Where a claim to be informed is dismissed for being satisfied, and thus not for reasons eliminating the basis for the other motions, the action is only to be dismissed at the first stage, but not the entire action by stages. As regards the further stages, the decision is to be passed by the Regional Court after the partial judgment has obtained the formal res judicata effect. An own decision on the merits by the appellate court pursuant to section 538 para. 1 of the German Code of Civil Procedure does not come into consideration because the case, as regards the further stages, is not ready to be decided. The case is therefore to be remitted in accordance with section 538 para. 2 no.4 of the German Code of Civil Procedure.

Contrary to the Regional Court, the Division holds that a trust agreement in relation to the payment at issue was entered into between the Claimant and the debtor.

The Claimant has submitted a letter signed by the head of Bankhaus AG's legal department, Frank Zeitz and addressed to the Claimant dated 03 or 10 February 2003 as Exhibit L10, in which it is confirmed that all money standing to the credit of an account of Lehman Brothers International (Europe), abbreviated as LBIE, that is the Claimant, is held by Bankhaus AG as trustee and the bank will keep these monies separate from other funds and will not combine the account of LBIE with any other account. The objective declaratory substance (*Erklärungsinhalt*) of this declaration cannot be denied. In addition to its unambiguous wording to the effect that Bankhaus AG acts as trustee, the declaration has essential characteristics of a trust agreement, which is not expressly regulated by law. Where a person keeps an asset originating from the assets of another party separate from his other assets, such person shows that he does not consider the asset to be a part of his assets, but that of another person, that is the trustee ([*reference to comments by legal scholars*]).

The fact that the account was kept as a trust account has been confirmed by Bankhaus AG. This is also in accordance with the e-mail exchange preceding the declaration. In an e-mail from Veerle Damen of 27 January 2003, 11.30 a.m., sent to Frank Zeitz and others, it was already stated that LBIE will be a client and Bankhaus trustee (agent bank) in the case at issue.

In an e-mail addressed to Monika Hebenbrock, Veerle Damen and Dave Rushton dated 28 January 2003, 8.01 p.m. (cc Christian Fischer, amongst others), Frank Zeitz, head of Bankhaus AG's legal department, subsequently suggested a wording, which, apart from minor linguistic changes, already paralleling what the Claimant calls the framework agreement submitted as Exhibit L10 and, in particular, also contained the information that Bankhaus AG holds all money standing to the credit as trustee and will keep these monies separate from other funds. The fact that Christian Fischer was asked whether "this" – referring to the aforementioned wording – "could be said with a clear conscience for the deposits of our London branch" shows that the head of Bankhaus AG's legal department was apparently aware of the fact that the intended declaration went beyond the scope of COB 9.3.82. The appeal rightly points out that Christian Fischer had obviously no difficulty with the suggested wording. In any case, there is no indication of a negative response and Monika Hebenbrock finally typed the wording of the declaration on stationery of Bankhaus AG, and Frank Zeitz signed it. The e-mail from Monika Hebenbrock dated 03 February 2003, 11.26 a.m., to Frank Zeitz, Veerle Damen and Dave Rushton indicates that she obviously sent the draft trust agreement to Frank Zeitz, amongst others, and expressly requested David Rushton to supplement the wording of the attachment at his option ("Please supplement the attachment at your option and return it to me. We will then send you a signed copy"). This has apparently happened, as Dave Rushton's e-mail response on the same day, 5.18.37 p.m., shows that

he obviously made certain changes – possibly the aforementioned linguistic changes – ("... could you please tell me whether you are happy with the attachment as it is and arrange for a signed copy of the document being returned?"). Based on this correspondence, it can be readily verified how the wording of the eventually signed declaration dated 03/10 February 2003 was established.

In addition, the plausibility of the Claimant's statements is also evidenced by the agreement dated 12/14 February 2003 (Exhibit L11), referred to by the Claimant as the ancillary agreement. Contrary to the letter dated 3 or 20 February 2003, this agreement sets forth that all monies standing to the credit of the Lehman Brothers International (Europe) client segregated account are held by the Claimant ("by us") as trustee. However, it has substantiated in detail why this declaration is the first link of the so-called trust chain – a trust relationship between the Claimant and its clients – and why this letter including any additional declarations, together with those already contained in the letter of 3/10 February 2003, served the purpose of complying with the COB standards, the predecessor rules of the CASS rules – apart from confirming the trust relationship between the Claimant and Bankhaus AG (second link of the trust chain) – which is why the second letter supplements the first letter without creating any contradictions.

The starting point is the Claimant's allegation made in the statement of claim according to which it requested Bankhaus AG to confirm in writing the requirements included in the rules of the FSA *Conduct of Business* sourcebook ("COB") at that time. This allegation corresponds to an e-mail from Veerle Damen to Frank Zeitz and Dave Rushton (27 January 2003; 2.06 p.m.) by which he requested the written confirmation of the relevant rule COB 9.3.82, the German translation of which is headed "*Trust-Anzeige und Bestätigung (Banken)* (Notification and confirmation of trust (banks))" and the wording of which was notified to Veerle Damen by Howard Pfabe in an e-mail sent shortly before (27 January 2003, 0.54 p.m.). When comparing the two letters, i. e. Exhibits L10 and L11, it is evident that the availability of the required written statements and confirmations under COB 9.3.82 to be given by the bank to the firm (Claimant) prior to opening a client bank account – confirmation that all monies standing to the credit of the account are held by the firm as trustee (no. 1); that the account is not combined with other accounts (no. 1); that the client money account is not subject to set-off (no. 1); ensuring a distinguishable account name (no. 2) – only becomes apparent when considering both letters together. The confirmation that the deposit bank has been informed that all monies standing to the credit of the account are (also) held by the firm as trustee is only evidenced by Exhibit L11. Also the confirmation that a distinguishable account name has been ensured, as required under COB 9.3.82, is for the first time stated in Exhibit L11 in a reasonably appropriate manner, even if the paid-in sum is referred to as "deposit" in the present case. A respective passage is not included in the letter dated 3 or 10 February 2003. The wording therein, according to which it is confirmed that the account name distinguishes the LBIE account sufficiently from other accounts where monies "of the bank" have been placed, may be intended to express that the trust monies should be kept separate also in the Claimant/Bankhaus AG relationship; however, such wording does not comply with the requirements of COB 9.3.82 regarding the Claimant's trust relationship with its clients.

As a result, it is only the overall consideration of both letters that leads to the compliance with COB 9.3.82 – plus the additional agreement on a trust arrangement in the Claimant's relationship with Bankhaus AG – which is why there are no reasons to assume that the second letter contains a refusal of the contract offer made in the first letter.

In contrast, the Defendant's statements – according to which the wording contained in the letter of 3 or 10 February 2003, "Bankhaus AG's position as a trustee", is based on an error on the part of Frank Zeitz – are not relevant in this respect, since a potential error does not affect the objective declaratory substance of the letter. However, the Defendant's statements are relevant as regards

the alleged consensus, at least during the time in question here, that the transfer of monies by the Claimant to the debtor would only serve the purpose of refinancing the debtor at favourable terms and that the parties have mutually agreed to waive the bank's acting as a trustee. In this case, the Claimant would not be permitted to derive any claims from the trust agreement in good faith (*nach Treu und Glauben*) (section 242 of the German Civil Code) due to contradictory behaviour.

By pleadings dated 18 June 2010, p. 21 (p. 134 of the court file), the Claimant denied the allegation that the client monies were used to refinance Bankhaus AG with the Claimant's knowledge and wilfulness. Hence, evidence must be taken with regard to such arrangement as alleged by the Defendant, by way of hearing the witnesses Fischer, Dr Scheffen, Glaser and Kirchbrücher who were offered as witnesses in the statement of defence dated 6 April 2010, p. 18.

The decision on the payment of the litigation costs will be subject to the final judgment ([*reference to comments by legal scholars*]). The decision on the provisional enforceability shall be based on section 708 no. 10 of the German Code of Civil Procedure.

A second appeal must not be allowed according to section 543 of the German Code of Civil Procedure, since the case is not of fundamental importance and a decision of the German Supreme Court is not required to further develop the law or secure a unified jurisprudence.

Martenstein Dr von Storch Müller