

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT**

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

AND IN THE MATTER OF THE COMPANIES ACT 2006



**REPLY OF PROFESSOR HERVÉ SYNDET
TO THE EXPERT OPINION OF PROFESSOR THIERRY BONNEAU
AS TO MATTERS OF FRENCH LAW**

1. I, Professor Hervé Synvet, have examined the Expert Opinion of Professor Thierry Bonneau (the **Opinion**) as to matters of French law related to the Waterfall II application. The Opinion in its broad outlines gives an accurate picture of the state of French law. My comments will focus on certain points where I disagree or wish to introduce more precise details or slight differences. Where I do not address a point raised by Professor Bonneau, it does not indicate my agreement or disagreement with it.
2. As a preliminary matter, I understand that it has now been agreed by the parties that the AFTI and AFTB Master Agreements, and the single non-Euro denominated claim under the FBF Master Agreement (the **Excluded Agreements**), be excluded from the Agreed Questions. I have included, in Annex 1, the revised questions on which this reply is based and I have not dealt in this reply with any points raised in the Opinion in respect of the Excluded Agreements.
3. My first remark is in respect of the “*General Introduction*” which covers paragraphs 14 to 24 of the Opinion. In this introduction, Professor Bonneau sets out the sources of French law in the field of contracts, emphasizes the importance of the French Civil Code and explains the role of judicial decisions, particularly the decisions handed down by the French *Cour de cassation*. Although I do not disagree with the general principles stated by Professor Bonneau in these paragraphs, I do not think that these developments are really relevant in our case: what is necessary is a fair understanding of the methods of interpretation of contracts under French law, not of the law in general.
4. This being said, my comments will focus on four points:
 - (i) the interpretation of contracts under French law;
 - (ii) the transfer of receivables governed by Article L.211-37 of the French Monetary and Financial Code;
 - (iii) the meaning of the rule *nemo plus juris*; and
 - (iv) the characterization of a penalty clause under French law.

I. THE INTERPRETATION OF CONTRACTS UNDER FRENCH LAW

5. In paragraphs 27 and seq. of the Opinion, Professor Bonneau makes “*General remarks*” as to rules and principles of interpretation of contracts under French law. He becomes more specific when he discusses Article 1162 of the French Civil Code, which provides that, when in doubt, an agreement shall be interpreted against the party that has stipulated (i.e. the party that claims the benefit of the obligation) and in favour of the party that has undertaken the obligation. Even if Professor Bonneau is not explicit, the underlying idea appears to be that, if there is any doubt about the meaning of a late payment interest clause included in a Master Agreement, this clause must be interpreted in favour of the debtor, hence against the assignee of the receivable. Professor Bonneau concludes at paragraph 40: “*Accordingly, if the dispute concerns an interest rate, it is certain that it is the lowest interest rate – for being the most favourable to the debtor – which shall be applicable as a solution for the dispute between two creditors*”.

6. This analysis fails to recognize that the contractual late payment interest is not necessarily higher than the legal rate, and that the refinancing rate of the assignor is not necessarily lower than the one of the assignee. The first point depends upon the result of the contractual formula as compared to the legal rate, which, under French law, is determined every year by a decree (and so varies every year, to an extent unpredictable by the parties when they reach an agreement). On the second point, the market may consider the assignee to be more credit-worthy (and less risky) than the assignor and so the overnight refinancing rate offered to the assignee may be lower than that offered to the assignor. Accordingly, it is impossible to know in advance whether one interpretation of a Master Agreement is more favourable than another to the debtor. As such, although the principle relied upon by Professor Bonneau exists as a matter of French law, it does not assist when interpreting a provision such as that in issue. Article 1162 of the French Civil Code is not the key to the interpretation of the clauses under examination.
7. Another comment relates to the determination of the common intention of the parties in the process of interpreting a contract. At paragraph 42 of the Opinion, Professor Bonneau writes: *“If, however, the provisions relating to the interest rate are unclear, the French judges must look for the common intention of the parties to determine the applicable rate. In the event the claim to which the interest rate applies has been transferred by a way of a cession de créance when looking to determine the applicable rates (if the provisions relating to it are unclear), the judge shall look at the common intention of the original parties to the original contract under which said claim arose, without taking into consideration the personality of the transferee. This is because the rate and/or the amount of interest due to the transferee cannot differ from the rate or the amount of interest that would have been due to the transferor and because such third party was not a party to the initial contract”*. It is true that, if any doubt were to arise as to the meaning of the contract, the judge would look at the common intention of the original parties, not of the transferee. But the original parties may have had the common intention of determining a rate of interest which takes into account the permitted assignment of the receivable and varies with the refinancing rate of the holder of the receivable. A French judge would pay attention to such common intention.
8. In the same line of thought, Professor Bonneau states, at paragraph 49 of the Opinion: *“The French court would also consider that the purpose of an interest rate clause is to compensate for the time value of money and was stipulated only as regards the initial parties. Accordingly this implies that only the initial parties must be considered when interpreting the scope of a claim for late payment interest despite the fact that the claim is advanced by a subsequent transferee of one of the parties”*. There is some inconsistency between the two assertions. It is true that the purpose of an interest rate clause is to compensate for the time value of money. But the statement *“was stipulated only as regards the initial parties”* begs the question and has little support. Indeed, when a receivable is assigned, the assignee is the one who suffers the loss caused by the default. It is the time value of money for the assignee that has to be compensated. Therefore, this factor must be considered when seeking to ascertain the common intention of parties who have anticipated a possible assignment of a claim.

II. THE TRANSFER OF RECEIVABLES PURSUANT TO ARTICLE L. 211-37 OF THE FRENCH MONETARY AND FINANCIAL CODE

9. It is necessary to consider the mechanism set out by Article L.211-37 of the French Monetary and Financial Code. At paragraph 55 of the Opinion, one reads: *“This legal regime resembles that of the Dailly assignment insofar as the assignment is enforceable against third parties without any formality”*. I disagree. In support of this statement, Professor Bonneau quotes Article L.211-37 of the said code: *“The assignment of receivables relating to the financial obligations referred to in Article L.211-36 may be enforced against third parties when the debtor is informed of the assignment”*. Actually, as is made clear by this provision, the perfection of the assignment is conditional upon the performance of a formality: informing the debtor of the assignment, by any means.
10. As a result, when a receivable is assigned by application of Article L.211-37 of the French Monetary and Financial Code (which will often be the case in the context of derivatives), the debtor is necessarily informed of the assignment. He is accordingly able to verify that the clauses relating to the assignment stipulated in the Master Agreements¹ have been duly complied with.

III. THE RULE *NEMO PLUS JURIS*

11. In the Opinion, Professor Bonneau brings up the rule *nemo plus juris* to assert that the parties might not refer to the rate applicable to the transferee in order to calculate the amount of interest. This idea first appears in his discussion of the provisions of the Master Agreements pertaining to the parties. At paragraph 48, he writes: *“The application of the overnight refinancing rate of the original contracting party, in the case of a claim by a transferee, is in accordance with the rule nemo plus juris, which implies that only the rate applicable to the transferor may be applied to calculate the amount of interest, even if the interest is to be paid to the transferee after the transfer of the claim”*.
12. This view becomes sharper in the developments answering Issue 23. At paragraph 71, one reads: *“The rule nemo plus juris covers the claim and its accessories, including the interests of the claim: the transferee can receive neither a higher amount for the principal of the claim, nor a higher amount of interest than the transferor. The rule nemo plus juris requires calculating the amount of interest in the same way, in all circumstances, whoever the creditor is, whether it is the transferor or the transferee. Consequently, only the rate applicable to the transferor may be applied to calculate the amount of interest, even if this interest is to be paid to the transferee following a cession de créance”*. And further, at paragraph 74: *“Indeed, as explained above, the assignee cannot have more rights than the assignor. Thus, the provision that refers to the rate to which the party has access refers to a rate necessarily known by the party which shall make the payment in question. A contrary solution would indeed encourage undesirable consequences to the obvious detriment of the debtor. As an example, if an assignee was permitted to recover more rights on a claim, such as a higher interest or a higher amount of late payment interest than the assignor this would put the assigned debtor in a detrimental position as it could have to pay a*

¹ See *infra*, para.16.

- higher amount than it contractually agreed initially to a third party and this, without even knowing or having consented to the transfer”.*
13. In other words, according to Professor Bonneau, the rate applicable when calculating the amount of late payment interest does not depend upon an interpretation of the Master Agreements. It is a point of law: the rule *nemo plus juris* would prohibit the reference to the refinancing rate of a third party to the original contract, i.e. the assignee.
 14. I disagree with this analysis.
 15. First, I note that Professor Bonneau does not mention any case law to support his opinion on this point.
 16. Secondly, the rule *nemo plus juris* does not have such an extensive meaning. This rule is not set out in the French Civil Code. It is a judicial maxim that conveys common sense principles: the assignee can only claim rights that already exist under the original contract; the assignment is unable to create new rights in favour of the assignee; the debtor remains bound according to the terms and conditions of the original contract, neither more, nor less.
 17. In the present case, an assignee relies upon a clause that appears in the Master Agreement, as it has been agreed upon by both original parties. The assignee does not maintain that, regarding the late payment interests, it should have more rights than an assignor. The assignee only requests the application of the method of calculation of interest as set out in the relevant clause. If this clause takes into account the refinancing rate of the beneficiary of the late payment, it is the choice of the original parties, and the rule *nemo plus juris* is irrelevant here.
 18. I would like to add that the risk that the assigned debtor would have to pay to a third party a higher amount than it contractually agreed “*without even knowing or having consented to the transfer*” (Opinion, para. 74) is purely hypothetical. In the present case, each Master Agreements includes a clause relating to assignment to a third party. For example, Clause 11.4 of the FBF Master Agreement provides: “*This Agreement, each transaction and each of the rights and obligations thereunder shall not be transferred or assigned to any third party by neither Party without the prior written consent of the other Party*”.² Consequently, the debtor could consider the refinancing rate of a possible assignee before giving his written consent to the assignment. The risk pointed out by Professor Bonneau does not exist in fact.
 19. My conclusion is plain: no rule of French law prohibits a late payment interest clause which refers to the refinancing rate of the recipient of the payment – either the assignor or the assignee – to calculate the amount of interest due by the defaulting debtor. In the present case, the only actual issue is the interpretation of the relevant clauses of the Master Agreements. In my Expert Opinion, I discussed this interpretation. For the reasons given therein, I consider that the better interpretation is that the refinancing rate of the assignee must be taken into account because the

² Same clause at Article 11.4 of the AFB Master Agreement.

assignee is the one who suffers the payment default and is obliged to refinance itself in order to balance its treasury.

IV. THE PENALTY CLAUSE ISSUE

20. In the context of Issue 26, Professor Bonneau considers whether the late payment clauses could be characterized as penalty clauses. At paragraph 88 of the Opinion, he states that: "*The Clause, which provides for the payment of indemnities in case of late payment provides a penalty that sanctions the non-performance of the contract. Therefore, it constitutes a penalty clause (clause pénale), which allows the judge, in accordance with Article 1152 of the Civil Code, to reduce the amount of the indemnity if it is manifestly excessive*".
21. The consequences are clear: if the late payment clauses stipulated in the Master Agreements are characterized as penalty clauses, a French judge would have the power, by virtue of Article 1152 of the French Civil Code, to reduce the amount contractually due by the assigned debtor to the beneficiary of the payment, should this amount be considered manifestly excessive.
22. I think this proposed characterization cannot be accepted. In French law, a penalty clause is any contractual clause by which the parties assess by a fixed-rate sum the compensation that will result from the failure to perform the obligation. In other words, a lump sum replaces the judicial assessment of damages. Where that is the case then, as I said above, the Court has the power to reduce the amount payable if it is considered to be manifestly excessive.
23. But, as to late payment, under French law, there is no judicial assessment of the specific harm suffered by the creditor. The notion of penalties is therefore difficult to apply to interest clauses. Pursuant to Article 1153, para. 1, of the French Civil Code, for obligations consisting only of the payment of a certain sum of money, damages resulting from delay in the performance of such obligation shall only consist of a judgment for the payment of interest at the statutory rate. This statutory rate is determined every year by a decree, enacted on the basis of Law n° 75-619 dated 11 July 1975. As I explained in my Expert Opinion, para. 44, the provisions of Article 1153 of the French Civil Code are not mandatory, and the parties may agree to another rate. Accordingly, clauses such as those stipulated in the Master Agreements are not penalty clauses, but only contractual arrangements in the course of applying Article 1153 of the French Civil Code.
24. It is worth noting that the French *Cour de cassation* has stated that a supplement due in case of delay in the payment of social benefits ("*contributions sociales*") does not constitute a penalty clause³.
25. Consequently, a French judge would not in my opinion be allowed to reduce the amount of late payment interests due under the Master Agreements.
26. In any case, the contractual amount referable to the assignee does not look to me to be manifestly excessive. This is always a question of fact depending on the particular

³ Cass. Soc., 10 November 1981, n° 80-16.975, *Bull. civ. V*, n° 891, p. 662.

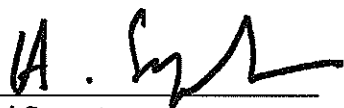
case, but the rates which would be applied in respect of the Master Agreements are not ones that I would consider could be described as manifestly excessive.

V. STATEMENT REGARDING THE EXPERT DUTY TO THE COURT

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

VI. STATEMENT OF TRUTH

28. 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.



Prof. Hervé Synvet

Dated: 31.07.2015

ANNEX 1

MATERIALS RELIED UPON IN MAKING THE REPLY

1. Court decision

Cass. Soc., 10 November 1981, n° 80-16.975, Bull. civ. V, n° 891, p. 662.

2. Statutory materials

2.1. French Civil Code (Code civil)

Article 1152

Article 1162

2.2 Other Statute

Law n° 75-619 dated 11 July 1975 relating to the statutory rate of interest

ANNEX 2

QUESTIONS FOR FRENCH LAW EXPERTS

Issue 23

1. What rules or principles of construction govern and apply to the interpretation of commercial contracts such as the FBF and AFB Master Agreements?
2. What modes of transfer of a contract or a claim exist under French law?
3. What is the effect of a *cession de créance* under French law? What is the position of a transferee of rights pursuant to a *cession de créance* as against the original non-transferor counterparty?
4. Can the transferee of a claim transferred pursuant to a *cession de créance* recover more from the original non-transferor counterparty than the transferor could have recovered (for instance, on the basis of the *nemo plus juris* principle)?
5. Is there a principle of French law that an assignee of a claim shall also benefit from the "ancillary rights" (*accessories*) attached to the claim? If so, what is the scope of the principle and what "ancillary rights" can the assignee of a claim claim?

Issue 24

6. What rules or principles of construction govern and apply to the interpretation of the interest rate provisions in commercial contracts such as the FBF and ABF Master Agreements?
7. To what extent, if at all, when the parties (a) have not specified a rate in the schedule negotiated between themselves in respect of a Euro denominated transaction under (i) the AFB 1994 Master Agreement or (ii) the FBF 2001 Master Agreement; or (b) have not modified the rates already provided in the standard provisions of the relevant Master Agreement (such as in the financial parameters section), would the French court, in construing interest rate provisions of the relevant Master Agreements, have regard either to EONIA or a rate charged by the European Central Bank for supplying liquidity, or to other rates such as refinancing rate of a party/payee?

Issue 26

8. What principles of French law and applicable standards, if any, constrain the right or power of a party to state or certify any of the rates mentioned in Issue 26?