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

EXPERT OPINION OF PROFESSOR PETER O. MÜLBERT AS TO MATTERS OF GERMAN LAW

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I, **Professor Peter Otto Mülbert**, of University of Mainz, Faculty of Law and Economics, 55099 Mainz Germany, **WILL SAY** as follows:

I. QUALIFICATIONS

1. I, Peter Mülbert, domiciled at Eisgrubweg 9, 55116 Mainz, Germany, have a doctorate in law and a Habilitation. I have authored or co-authored several books on banking law, with a special focus on credit transactions and banking guarantees, and I have written numerous articles in the field of banking law and commercial law, focusing among other topics on credit transactions and investor protection.

2. A copy of my *curriculum vitae* is attached to this opinion as Annex A.

II. INTRODUCTION AND BACKGROUND

3. I have been retained by Ropes & Gray International LLP, acting on behalf of CVI GVF (Lux) Master Sàrl, Hutchinson Investors LLC, Burlington Loan Management Limited, and their relevant affiliates (together the **Senior Creditor Group**), to prepare this opinion to assist the Court in its consideration of the Lehman Brothers International (Europe) Waterfall II application. A copy of the instruction letter is attached to this opinion as Annex D.

4. The purpose of this opinion is to explain the principles of German law relevant to the interpretation of the late interest rate provisions stipulated in the Master Agreement of Financial Derivative Transactions appended to this opinion as Annex C (the **German Master Agreement**).

5. In producing this opinion I understand that my duty is owed to the Court and I understand that this duty overrides any obligation to the parties who have engaged me. I have complied with this duty and will continue to comply with it.

6. I also confirm that I am aware of the requirements of Part 35 of the Civil Procedure Rules, the Practice Direction to Part 35 and the Guidance for the Instruction of Experts in Civil Claims 2014.

7. The facts and matters, upon which my expert opinion is based, including relevant provisions and details of English law, have been provided to me by Ropes & Gray International LLP.

8. Waterfall II involves an application to the English High Court by the Administrators of LBIE on a number of questions that impact on the nature and extent of creditors' entitlements to a share in the surplus assets in LBIE's estate now that creditors' provable debts have been paid in full (the **Waterfall II Application**).

9. The following entities were selected as the original respondents in the Waterfall II application:

   (i) the Administrators;

   (ii) Burlington Loan Management Limited, part of the DK group **(Burlington)**;

   (iii) CVI GVF (Lux) Masters Sàrl, part of the CarVal group **(CVI)**;

   (iv) Hutchinson Investors, LLC, part of the Baupost group **(Hutchinson)**;

(v) Wentworth Sons Sub-Debt SARL, a joint venture comprising the US parent company Lehman Brothers Holdings Inc. and the hedge funds King Street and Elliott (**Wentworth**); and

(vi) York Global Finance BDH LLC (**York**).

10. Burlington, CVI and Hutchinson hold between them large exposures under swaps with LBIE documented under:

(i) English law governed ISDA Master Agreements;

(ii) French law governed Master Agreements;

(iii) German law governed German Master Agreements.

11. The German law issues in the Waterfall II application are:

(i) whether, in calculating the amount of interest due under section 3(4) of the German Master Agreement, it is possible (and if so, in what circumstances and to what extent) to include an amount in respect of "further claims for damages" (**Damages Interest Claim**[1]) so that this would constitute part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) of the Insolvency Rules 1986 (**Issue 20**);

(ii) if the answer to Issue 20 is that a further claim for damages can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9), how in such circumstances is the relevant rate to be determined? In particular:

(a) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party, is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?

(b) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?

(c) where does the burden of proof lie in establishing a Damages Interest Claim and what is required to demonstrate that a relevant creditor has or has not met such requirement?

(**Issue 21**)

12. On 21 November 2014, the High Court made an order that the Senior Creditor Group and Wentworth may adduce and rely upon expert evidence for the purposes of assisting the court with determining Issues 20-21. Following this order, Wentworth and the Senior Creditor Group together with the Administrators agreed a list of questions to be addressed by experts in relation to issues 19 to 26 (the **Agreed Questions**). The Agreed Questions include questions on Issues 20 and 21 to be put to the parties' respective German law experts (the **German Law Questions**). This report expresses my expert opinion on the answers to the German Law Questions.

[1] NB Although this is the definition used in the Issues, I have found such definition confusing and so in my report, I refer to this particular claim as the Further Damages Interest Claim as defined in paragraphs [21] and [22].

13. For the convenience of the English court, I have produced this report in English, even though this is not my first language. I consider my knowledge and ability to speak English to be sufficient to enable me to do this, and believe this report to reflect accurately my expert opinion in this matter.

14. I have included at **Annex B** to this report a list of the materials that I have relied upon in making this report (in addition to the matters set out in my letter of instruction from Ropes & Gray International LLP). I have reviewed all such materials in their original German language version but I understand that translations will be made available to the English court to the extent that there is any disagreement between the respective experts in German law on the matters set out in this report.

III. REPORT

Issue 20 - In calculating the amount of interest due under section 3(4) of the German Master Agreement, is it possible (and if so, in what circumstances and to what extent) to include an amount in respect of "further claims for damages" ("Damages Interest Claim") so that this would constitute part of "the rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9)?

Executive Summary

15. Section 3(4) of the German Master Agreement provides as follows:

> *"in the event of non-payment by a party on the due date, interest shall accrue on the amount outstanding, until such amount is received, at a rate which shall be equal to the interbank interest rate charged by prime banks to each other for call deposits at the place of payment and in the currency of the amount outstanding for each day on which interest is to be charged, plus the interest surcharge referred to in Clause 12 sub-Clause (3). This does not exclude the right to make further claims for damages".*[2]

16. In my view, the effect of the first sentence of section 3(4) of the German Master Agreement is to modify the statutory entitlement to damages for late payment of a debt provided under Section 280 para. 1, in conjunction with Sections 280 para. 2, 286 and 288 para. 1 German Civil Code (**BGB**). As a consequence, the relevant entity is entitled to claim compensation for late payment of an overdue debt under section 288 para. 1 BGB in the form of interest at the fixed rate referred to in the first sentence of section 3(4) of the German Master Agreement, regardless of any actual loss (see paragraphs [29] – [32] below).

17. As regards "further claims for damages" as used in the second sentence of Section 3(4), and as a matter of German law, the provision reflects and preserves a creditor's entitlement to claim further damages in respect of delayed payment of an overdue debt under sections 280 paras. 1 and 2, section 286 and 288 para. 4 BGB. If the loss as a result of a delay in payment is greater than the amount of interest at the fixed rate, the relevant entity is therefore able to claim in respect of the additional loss exceeding such fixed rate by way of a claim for further damages.

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[2] This is an unofficial English translation. The German language version would be the operative document.

18. Such damages are, as a matter of German law, calculated in accordance with section 249 para. 1 and section 252 BGB. In order to claim such further damages in respect of delayed payment of an overdue debt, it is ordinarily necessary for the creditor to assert and prove the existence of loss and damage caused by the late payment (see paragraph [28] below).

19. Depending on the type of loss and damage suffered, such an award of further damages in respect of actual loss and damage arising from delayed payment of an overdue debt is capable of being expressed as a percentage rate (see paragraphs [35] – [37] below) which accrues on the principal amount of the unpaid debt (see paragraph [40] below). The applicable rate in such cases is determined in accordance with the principles set out paragraphs [43] – [50] below.

20. I understand that the question of whether a damages claim under Section 280 para 1 and 2 BGB and Section 286 BGB (and, by extension, under section 3(4) of the German Master Agreement) can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) is a matter of English law and, hence outside the scope of this expert evidence.

Definitions:

21. For the purpose of this report, the terms (i) to (v) are to be understood as follows:

    (i) **Damages Claim**: any claim pursuant to Section 280 para. 1, in conjunction with Sections 280 para. 2, 286 (and 288) BGB for damages in the case of late payment. As an umbrella term, it includes definitions (ii) to (iv) below, each of which is capable of being expressed as a rate, but also includes the definition in (v) below in respect of damages incurred which are not capable of being expressed as a rate.

    (ii) **Damages Interest Claim**: any claim pursuant to Section 280 para. 1, in conjunction with Sections 280 para. 2, 286 and 288 German Civil Code for damages incurred which are capable of being expressed as a rate. This expression includes each of the types of claim referred to in (iii) and (iv) below.

    (iii) **Minimum Damages Interest Claim**: any claim pursuant to Section 280 para. 1, in conjunction with Sections 280 para. 2, 286 and 288 para. 1 or 2 BGB for damages in the case of a payment default regardless of whether the creditor actually incurred a loss or not.

    (iv) **Further Damages Interest Claim**: any claim pursuant to Section 280 para. 1, in conjunction with Sections 280 para. 2 and 286 German Civil Code for (additional) damages within the meaning of Section 288 para. 4 BGB which are capable of being expressed as a rate, i.e. for damages incurred which are capable of being expressed as a rate and which are in excess of the losses compensated by the Minimum Damages Interest Claim(s) pursuant to Section 288 para. 1 or 2 BGB.

(v) **Other Damages Claim**: any claim pursuant to Section 280 para. 1, in conjunction with Sections 280 para 2 and 286 BGB for damages incurred which are not capable of being expressed as a rate.

22. The way these definitions fit together can be shown in the flow-chart in the Schedule to this report.

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 section 3(4) of the German Master Agreement?

23. The interpretation of contracts is governed by the general principles set forth in Sections 133 and 157 of the German Civil Code (**BGB**). Contracts have to be interpreted according to the parties' intention and according to the requirements of good faith, considering common usage and the objective meaning of the terms of contract and the circumstances in which the contract was entered into (subjective and objective approach).[3] Regarding the interpretation of commercial contracts, in addition, the commercial practice has to be taken into account.[4]

24. The wording of the contract serves as the starting point of interpretation. If the wording of the document is ambiguous it is to be assumed that the parties intended a reasonable, adequate contractual arrangement under the circumstances given. Thus, the appropriate interpretation has to ensure adequacy of the contractual arrangement, consistency of the contract as a whole and compatibility with the principles of the BGB.[5]

25. With regard to specific terms in a contract that qualify as general terms and conditions (**GTC**) within the meaning of Section 305 para. 1 BGB the interpretation is governed by more stringent rules. GTCs shall be interpreted according to their objective meaning, i.e. independently of the will of the contracting parties.[6] This objective meaning derived by reference to a hypothetical "average" other party to the contract in question and his understanding of the contractual terms in question. If doubts as to the interpretation remain, the clause will be interpreted to the advantage of the (other) party who did not introduce the GTC. These rules do not apply in relation to provisions that do not qualify as GTCs where, as outlined above, the subjective intention of the parties is key. Section 3(4) of the German Master Agreement is most likely a GTC but this would depend on the specific facts, i.e. whether the section was subject to individual negotiation.

26. If subsequently to the formation of the contract a specific situation arises which the contracting parties did not, either expressly or by implication, take into account, statutory default rules (*dispositives Recht*) will take effect unless the contract stipulates otherwise. If the application of the default rules does not suffice to fill the gap in the contractual arrangement, a supplementary or completive contract interpretation (*ergänzende Vertragsauslegung*) will be undertaken. The hypothetical motivation of

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[3] BGH, BGHZ 91, 324.

[4] BGH, NJW 1985, 550 sub I 2 b bb (with further references).

[5] BGH, NJW 1997, 1003, 1004 sub III 2 a.

[6] Settled case law; see, eg, BGH, decision of 29 April 2015 – VIII ZR 104/14 (juris) sub II 2 c aa (with further references); *Ellenberger* in Palandt, BGB, Section 133 n. 26a.

the parties forms the basis of the completive contract interpretation,[7] i.e. the basis for supplementing additional provisions to a contract which, in hindsight, is incomplete in the sense that the parties failed to take a future event into account when agreeing on the terms of the contract. Hence, the contract has to be completed by inserting a contractual clause which, in the opinion of the Court, the parties would have agreed on if they had taken the subsequent situation into account at the time of entering into the contract.

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 a debt and what form or forms can the award of damages take? In particular:

(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?

Damages Claims

27. The statutory basis for awarding damages in cases of delayed performance in general derives from Section 280 para. 1 BGB, in conjunction with Section 280 para. 2 and 286 BGB (**Damages Claims**).

28. A Damages Claim requires the following facts to be established:

(i) a (legal) relationship between the parties based on contract or statute;

(ii) a failure of the debtor to perform, including a failure to pay a debt when it falls due;

(iii) a warning notice (*Mahnung*) by the creditor made after performance is due, unless a calendar date or a period of time has been specified for the performance (Section 286 para. 1 and 2(1) BGB)[8];

(iv) fault for which the debtor is responsible for the purpose of Section 276 para. 1 BGB which is to be presumed according to Section 286 para. 4 BGB; and

(v) a damage actually suffered by the creditor regardless of whether the loss is capable of being expressed as a rate or not.[9]

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[7] See, eg, BGH, BGHZ 40, 91, 103 et seq.

[8] Moreover, a warning notice is not required if
(i) performance must be preceded by an event and a reasonable period of time for performance has been specified in such a way that it can be calculated, starting from the event, according to the calendar,
(ii) the obligor seriously and definitively refuses performance or
(ii) for special reasons, weighing the interests of both parties, the immediate commencement of default is justified (Section 286 para. 2(2)-(4) BGB).

[9] While the amount of damages is to be calculated pursuant to the general provisions stipulated under Sections 249 para. 1 and 252 BGB.

Minimum Damages Interest Claims

29. In the event of a payment default, Section 288 para. 1 and 2[10] BGB deviates from the requirement of actual damages outlined at point (v) above by providing that the creditor may claim default interest regardless of whether he actually incurred a damage or not (**Minimum Damages Interest Claim**). The purpose of this derogation from general principles (i.e. the waiver of the need to demonstrate a damage actually incurred by the creditor) is to incentivize the debtor to pay in time. Consequently, where Section 288 para. 1 and 2 BGB is relied upon, the creditor does not need to show that he incurred a loss as a result of the late payment nor is the debtor entitled to object that the creditor did not suffer any concrete loss[11].

30. A Minimum Damages Interest Claim is calculated as a percentage of the outstanding principal debt owed by the debtor. Section 288 para. 1 and 2 BGB sets out the applicate rates. Pursuant to para. 1, the default rate of interest per year is 5 percentage points above the basic rate of interest. In turn, pursuant to Section 247 BGB, the basic rate of interest is determined twice a year for a six-month period each, beginning on January 1 and on July 1, by reference to the most recent refinancing operation of the European Central Bank, and is made public by the Deutsche Bundesbank.

31. In substance, the Minimum Damages Interest Claim is a sub-set of the Damages Interest Claim within the meaning of Sections 280 and 286 BGB. This follows from the clarification in Section 288 para. 4 BGB to the effect: "The assertion of further damage is not excluded" and, in particular, the reference to "further" damage as discussed below. Default interest awarded by Section 288 para. 1 BGB serves as compensation for a (hypothetical) minimum loss suffered by the creditor, the existence of which cannot be refuted by the debtor for the reasons given in paragraph [29] above.[12]

32. The relationship outlined above between the Damages Interest Claim and the Minimum Damages Interest Claim also determines which elements have to be established in law and in fact: the Minimum Damages Interest Claim is subject to the same requirements as described above for the Damages Claim except that it does not require a concrete loss incurred by the creditor, i.e. the requirement outlined in paragraph [28 (v)] above does not apply. Instead, the statutory default interest rate(s) during the default period apply.

Further Damages Interest Claim

33. If the creditor suffers a loss that exceeds his compensation pursuant to Section 288 para. 1 to 3 BGB, he may claim **further** damages; where such damages are capable of being expressed as a rate (as outlined below), these are referred to as a **Further Damages Interest Claim**. Section 288 para. 4 BGB, operating as a savings clause, clarifies as much by stipulating that, although Section 288 paras. 1 and 2 BGB provides for the possibility of claiming default interest in case of a payment default, the creditor is not

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[10] Para. 2 of Section 288 BGB stipulates a higher default interest rate than para. 1 but does not apply to a contract of the type of the German Master Agreement. Hence, in the following, the provision will not be dealt with any further.

[11] See, eg, BGH, NJW 2011, 3648, 3649 n. 16 (with further references) and Grüneberg in Palandt, BGB, Section 288 n. 4.

[12] BGH, NJW 1953, 337; KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 55.

barred from bringing a claim for any additional loss including a Further Damages Interest Claim with respect to further damages incurred by him.[13] Hence, the claim for further damages within the meaning of Section 288 para. 4 BGB is a form of the Damages Interest Claim and, thus, subject to the requirements set out above at paragraph [28].

(b) How would such an award be expressed? In particular, is such 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?

34. A Minimum Damages Interest Claim under Section 288 para. 1 BGB is only capable of expression as a percentage rate, unless the debtor is no longer in default. In the latter situation, a court could calculate the total amount of default interest that accrued for the period of time the debtor was in default. However, in such a case, a court can also express the default interest as a rate applied to the principal claim for the period of default.[14]

35. As regards a Damages Claim, two different types of damages have to be distinguished at the outset:

    (a) the first type of damage is in relation to a one-off loss rather than a continuing loss suffered over time in respect of the time value of money, for example the costs of enforcing a claim including the costs of bringing a law suit (**Other Damages Claim**);

    (b) the second type of damage is a continuing loss, suffered by the creditor as a result of the delay in receiving its money including in particular:

        (i) the costs of necessary interim financing, resulting from the delay in receiving the funds due at an earlier time (*Kosten der Zwischenfinanzierung*); and

        (ii) the loss of investment return that results from not being able to (re)invest the funds due (*entgangene Anlagezinsen*), i.e. opportunity costs in a broad sense.

36. For the first type of damage, compensation cannot be expressed as a rate.

37. For the second type of damage, the compensation is in principle capable of expression both as an amount or as a percentage rate. However, to award a Damages Interest Claim in respect of the second type of damage as an amount requires that the final amount of such damage be known at the time of the judgment being rendered. In the case of an award for damages incurred because of delayed payment, this will only be the case if the debtor has already paid the amount due and the default has therefore ended prior to the court's decision. Otherwise, the court cannot determine the exact amount of the damages since it will be unable to calculate the amount of additional future damages pending payment of the defaulted amount by the debtor. Likewise, if

[13] See KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 63.

[14] See, eg, BGH, NJW 2006, 3271.

the creditor has to raise money (interim financing) in order to cover the shortfall resulting from the funds being withheld by the debtor, the court will only be able to determine the exact amount of damages to be awarded if the debtor is no longer in default. In addition, although in such circumstances, the damages could be expressed as an amount, that amount would simply reflect the application of the rate over a defined period (and so the damages could also be expressed as a rate).

38. If the debtor has not already paid the defaulted amount by the time final judgment has been rendered, the court will assess the Damages Interest Claim in relation to the second type of damage as a percentage rate in accordance with the answer to 20.2(c) below.

39. It should be noted that I understand that the question of whether a Damages Interest Claim pursuant to Sections 280, 286 and 288 para. 4 BGB, when expressed as a rate, can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) is a matter of English law and, hence, outside the scope of this expert evidence.

(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?

Principal sum on which the award accrues

40. Where a Minimum Damages Interest Claim or a Further Damages Interest Claim is expressed as a rate[15], it applies to the amount of the principal claim not timely paid by the debtor. Hence, the principal sum on which such an interest rate accrues is the amount withheld or unpaid by the debtor when the debt fell due.

Determination of applicable rate

41. As described above, the applicable rate in the case of a Minimum Damages Interest Claim pursuant to Section 288 para. 1 BGB is 5 percentage points above the basic interest rate (Section 247 BGB) during the time the debtor is in delay in paying the amount due.

42. Where a Further Damages Interest Claim is expressed as a rate, the determination of the applicable rate varies depending on whether the creditor has to calculate the concrete losses suffered (*konkrete Schadensberechnung*) or whether he is entitled to apply a simplified method of calculation.

43. The generally applicable method for calculating damages which is available to **all** creditors is to determine the concrete losses suffered (*konkrete Schadensberechnung*). The creditor has to demonstrate and ultimately prove the intended use of the amount withheld, the effect on his assets from the non-availability of the funds due to him, and the damage he suffered from not being able to use the funds in a specific way.[16]

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[15] It should be noted that, given the definition of these two expressions, they could only be expressed as a rate.

[16] See, eg, BGH, WM 1974, 128 sub II; BGH, NJW 2012, 2427 n. 64.

44. Regarding a loss of return that a creditor suffers because funds due are withheld by the debtor and, thus, are not available for carrying out a profitable investment (*entgangene Anlagezinsen*), the creditor can apply the method just described in paragraph [43] if he is able to prove that those profits would have accrued.

45. Since it will not always be easy or possible to prove the rate of return that would have been generated by the creditor had the funds been paid on time, the German Federal High Court (**BGH**) allows for a somewhat simplified method of calculation based on sentence 2 of Section 252 BGB. Sentence 2 provides for a relaxation of the standard of proof to the effect that profits which the specific creditor in question could not realize as a consequence of a delayed payment by the debtor are to be considered as a damage (i.e. a Damages Interest Claim) if the profits could probably have been expected to accrue in the normal course of events or in the special circumstances applicable to the particular creditor. Since, according to generally accepted insight into human behavior (*allgemeine Lebenserfahrung*), a substantial amount of money will not be wasted but rather will be invested at a current market investment rate, a creditor who is owed a substantial amount of money is entitled to claim damages for the loss of such profit,[17] unless the debtor is able to rebut the presumption of profits made by the creditor.[18]

46. In considering the recent approach of the courts to the assessment of lost profits, the starting point is Section 287 of the German Civil Procedure Code whereby the court, in determining the damages incurred, is empowered to make an estimate where the actual loss of return is not clear. In doing so with respect to damages that are capable of being expressed as a rate, the court has to take into account the prevailing market conditions. Hence, the creditor has to demonstrate (and potentially prove) the actual basis on which the court should base its estimate.[19] If, for example, the creditor claims damages for having missed an alternative investment in bonds, the court will base its estimate on the publicly available statistics published by the Bundesbank.[20]

47. The case law is inconsistent, however, regarding the standard of proof that applies in relation to the claimant's obligation to demonstrate the basis for his claim for damages (*Darlegungslast*). According to some decisions, the creditor is not subject to stringent requirements with regard to demonstrating the profit he would have made in the ordinary course of business; a non-negligible probability suffices.[21] Other decisions, however, stipulate far stricter requirements. For example, it has been held that the creditor has to detail the specific investment he would have undertaken if he had received the funds on the due date.[22] Moreover, the court has refuted the view that a significant sum will always carry interest equal to the statutory interest rate of 4 %[23] at least where no evidence was presented to substantiate this, and has even doubted with respect to long-term sovereign bonds and bank bonds whether one can expect any minimum gain at all.[24]

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[17] See, eg, BGH, NJW 2012, 2427 n. 64 (with further references).
[18] BGH, decision of 8 November 1973 – III ZR 161/71 = WM 1974, 128 sub II.
[19] BGH NJW 2012, 2266 n. 13
[20] See, eg, BGHZ 161, 196, 201 et seq..for the calculation of a prepayment fee (*Vorfälligkeitsentschädigung*) for which the same principles of calculation apply.
[21] See, eg, BGH, NJW 2012, 2427 n. 64 (with further references).
[22] BGH, NJW 2012, 2266 n. 13.
[23] See Section 246 BGB.
[24] BGH, NJW 2012, 2266 n. 13, 18.

48. Finally, *banks*[25] are entitled to an even more simplified method of calculating losses from foregone investment opportunities, allowing them to employ abstract hypotheticals based on assumptions regarding their behavior and the nature of their business (*abstrakte Schadensberechnung*).[26] The starting point is the idea that a bank will typically suffer a loss as a result of a delayed payment since it could have (re)invested the amount withheld from it. Hence, for the purpose of expressing a Damages Interest Claim as a rate, the average interest rate charged by the bank serves to determine the applicable rate.

49. Decisions dealing with that issue typically refer to the average rate regarding a bank's lending business.[27] However, the BGH, in a landmark decision in 1974, referred to the average rate of a particular bank's full range of business activities (e.g. in case of a universal bank: mortgage credit, short-term credit, investment in fixed-income securities) not only to a bank's lending business.[28] Hence, if the bank operates only one type of business, the average interest rate charged by the bank applies; if a bank operates different types of business lines, the average interest rate across its several lines of business applies so for example in the case of a credit bank (*Kreditbank*), the weighted average interest rate across its different types of loans (e.g. consumer credit; mortgage credit).[29] Saved costs, e.g. saved costs of refinancing or saved administrative costs, need not be deducted. However, the bank has to demonstrate and ultimately prove the factual basis of its abstract calculation of damages.[30] This requires, inter alia, a credit bank to demonstrate the types of loans it makes as well as the lending rates for each of these types of loans.[31] In turn, the debtor is entitled to demonstrate that this method of calculating the Damages Interest Claim lacks a factual basis because, even if the bank had received the outstanding amount of money on the due date, it would have lacked the opportunity to make a profitable investment in its line(s) of business.[32]

50. *Other* types of *investors*, e.g. non-bank financial institutions and hedge funds, according to many commentators, are entitled to calculate Damages Interest Claims in the same way as banks.[33] It is without doubt that other professional investors may apply the method of calculation based on sentence 2 of Section 252 BGB. Whether they are also entitled to rely on an abstract calculation (as outlined in paragraph [48]) is marginally less settled. The BGH, in a landmark decision in 1988, pointed out in passing that, like any other merchants, banks are entitled to an abstract calculation. Before that, lower courts disagreed as to whether insurance companies are entitled to an abstract calculation.[34] Moreover, judge *Grüneberg*, a member of the eleventh chamber of the BGH, states that only banks are entitled to calculate "further damages

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[25] The cases referred to below concern a commercial bank or universal bank rather than an investment firm or other financial institution.

[26] BGH, BGHZ 104, 337, 344 et seq. sub III.

[27] See, eg, BGHZ 104, 337, 345, BGH NJW 1992, 109 and BGH NJW 1992, 1620.

[28] BGHZ 62, 103, 107: .

[29] BGH, BGHZ 104, 337, 344 et seq. sub III. It should be noted that, in that context, the court expressly referred to a "Kreditbank". By inference, for banks that operate other lines of business as well, the average interest rate must be the weighted average interest rate across all its business lines.

[30] BGH, NJW 1992, 109, 110 sub II 3.

[31] BGH, NJW 1992, 109, 110 sub II 4.

[32] BGH, BGHZ 104, 337, 348 sub IV 1.

[33] *Löwisch* and *Feldmann* in Staudinger, BGB, Section 288 n. 47; *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, Section 286 n. 134.

[34] LG Verden, VersR 1967, 869 (yes); OLG Köln, NJW 1969, 1388()no).

of default" by resorting to that method.[35] In my view, the more lenient approach is the correct one.

20.3 As a matter of German law and specifically pursuant to section 3(4) of the German Master Agreement, in your opinion:

(a) Is the relevant entity entitled to the fixed rate of interest (as a minimum) pursuant to the first sentence of that section regardless of any loss?

51. Yes – in my view, as a matter of German law and specifically pursuant to section 3(4) of the German Master Agreement, the relevant entity is entitled to the fixed rate of interest (as a minimum) pursuant to the first sentence of that section regardless of any loss. I explain why this is the case in the following paragraphs.

52. The wording of the first sentence of section 3(4) of the German Master Agreement, even though following the wording and the structure of Section 288 BGB, is inconclusive as to whether the relevant entity is entitled to a fixed rate of interest (as a minimum) regardless of any loss. Hence, the sentence needs to be construed in the light of the principles of interpretation of commercial contracts described in paragraphs [23] to [26] above.

53. Against the background of Section 288 BGB, there are three possible meanings as to the first sentence of section 3(4) of the German Master Agreement:

    (a) the first is that it provides a contractual claim for default interest, replacing in its entirety the statutory provision in Section 288 para. 1 BGB.[36] In my view, this interpretation has nothing to commend it for the reasons given in paragraph [60(c)];

    (b) the second is that the source of the Minimum Damages Interest Claim is still based in statute (i.e. under Section 288 para 1. BGB) but the first sentence of section 3(4) has the effect of varying the rate set out in Section 288 para. 1 BGB. This is my preferred interpretation for the reasons given below; and

    (c) the third is that it provides a "different legal basis" (in the sense of a separate cause of action, in addition to the claim under Section 288 para 1 BGB) for claiming default interest within the meaning of Section 288 para. 3 BGB. I do not think this is the correct interpretation for the reasons given below.

54. In order to consider the alternatives set out above, it is necessary to consider the questions of whether:

    (a) Section 288 para. 1 BGB is a mandatory provision or whether the parties can agree on downward or upward adjustments of the interest rate or even waive Section 288 para. 1 BGB; and

    (b) what the words "different legal basis" mean in Section 288 para. 3 BGB.

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[35] *Grüneberg* in Palandt, BGB, Section 288 n. 13.

[36] The parties may waive Section 288 para. 1 BGB for the reason given in paragraph [55].

55. In my own opinion, and according to the prevailing opinion among commentators, the statutory rules governing the amount of default interest are not mandatory,[37] i.e. the parties may depart from the rate specified in Section 288 para. 1 and 2 BGB by agreeing on a higher or a lower rate and may even waive Section 288 para. 1 and 2 BGB.[38]

56. The basis for accepting a contractually agreed rate for delayed payments (departing from the statutory interest rate) is neither found in para. 3 nor para. 4 of Section 288 BGB, but follows from the general principle of freedom of contract. Para. 4 only deals with additional damages suffered by the creditor and so is not relevant in this context. Furthermore, para. 3 entitles the creditor to claim a higher interest rate "on a different legal basis" (*Rechtsgrund*), i.e. on the basis of a statutory provision[39] that is different from Sections 280 and 286 BGB or on the basis of a guarantee or collateral contract[40] which gives rise to a separate cause of action and which awards damages at a particular rate[41] or which stipulates a contractual obligation to pay a particular rate.[42]

57. In support of this view, the BGH, in a landmark decision of 1984, held that the parties are free to agree on a departure from the rate stipulated in Section 288 para. 1 BGB even though a higher rate would amount to some sort of penalty.[43] In this context, the court did not refer to Section 288 para. 3 BGB in support of the parties' freedom to agree on a different rate but instead referred to the limits of the principle of freedom of contract set out in Section 138 BGB under the heading "Legal transaction contrary to public policy; usury". Moreover, the Court held that if the agreement were to qualify as a GTC, it would be subject to the more stringent limits on admissible clauses stipulated by Section 309 BGB with respect to lump-sum claims for damages (no. 5) and contractual penalties (no. 6) respectively.

58. In further support of the view expressed above, it should be noted that Section 288 BGB was amended in July 2014[44] by adding a new para. 6. The latter stipulates limits for any agreement between contracting parties which, in advance, excludes default interest or provides for a lower interest rate than the rate provided in Section 288 para. 1 and 2. From this it follows that, before July 2014, the parties could contractually

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[37] *Löwisch* and *Feldmann* in Staudinger, BGB, Section 288 n. 5; *Ernst* in Münchener Kommentar zum BGB, Vol. 2, 6th ed. 2012, Section 288 n. 28, 30; different opinion *Thode* in Münchener Kommentar zum BGB, Vol. 2, 4th ed. 2001, Section 288 n. 8.

[38] *Löwisch* and *Feldmann* in Staudinger, BGB, Section 288 n. 5.

[39] Currently, statutory provisions that entitle the creditor to claim a higher interest rate than the rates stipulated in paras. 1 and 2 do not exist. See *Grüneberg* in Palandt, BGB, Section 288 n. 11.

[40] But see *Grüneberg* in Palandt, BGB, Section 288 n. 4; KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 58 (not taking a stand).

[41] For example, if, for the purpose of doing away with the fault-requirement on the part of the debtor, the debtor additionally guarantees to pay a certain rate in case of delayed performance.

[42] For example, if the parties to a loan contract agree on a contractual obligation that, in the case of a delayed payment of the principal, the debtor has to pay a rate (e.g. the loan rate) regardless of whether the requirements of a statutory Minimum Damages Interest Claim are met or not and where the cause of action arises under the contract and not under Section 288; see BGH, BGHZ 104, 337, 340 sub II 2.

[43] As to the following, see BGH, BGHZ 104, 337, 339 sub II 2.

[44] By the Act against late payments in commercial transactions as of 22 July 2014 (*Gesetz zur Bekämpfung des Zahlungsverzugs im Geschäftsverkehr und zur Änderung des Erneuerbare-Energien-Gesetzes vom 22.07.2014).*

agree to a downward adjustment of the statutory default interest rate and, as a corollary, that the principle of freedom of contract supplied the basis for that adjustment, since, because of the wording of Section 288 para. 3 BGB, downward adjustments are *per se* outside the scope of para. 3 BGB.

59. Given that Section 288 para. 1 BGB qualifies as a default rule, there is no objection, in principle, to the first sentence of section 3(4) of the German Master Agreement containing a contractual downward modification of the statutory default interest rate and, in my view, that is the effect of the first sentence of section 3(4) of the German Master Agreement. Hence the relevant creditor, regardless of any losses incurred, is entitled to the fixed rate of interest as a minimum pursuant to Sections 280 and 286 BGB, in conjunction with Section 288 para. 1 BGB, as contractually amended by the first sentence of section 3(4) of the German Master Agreement.

60. My reasons for this view are as follows:

(a) Although it is not appropriate, as a matter of German law, to construe section 3(4) exclusively by reference to Section 288 BGB simply because, in the German language version, the same wording is used, one cannot find any indications in the German Master Agreement that suggest that the first sentence of section 3(4) should be construed in a different way to Section 288 para. 1 BGB. Quite to the contrary, the second sentence "This does not exclude the right to make further claims for damages" clearly mirrors not only the wording of Section 288 para. 4 BGB, but also the structure of Section 288 para. 1 and 4 BGB.

(b) Even more importantly, to construe the first sentence as a separate contractual basis for claiming default interest within the meaning of Section 288 para. 3 BGB, rather than a downward modification of the rate specified in Section 288 para. 1 BGB, would disregard the wording of the first sentence which only deals with the interest rate as such, but not with the legal basis for being entitled to claim the rate as default interest (which in my view is statutory and not contractual).

(c) Moreover, the reading of the first sentence as a contractual default interest claim would only make sense if, by implication, the right to statutory interest under Section 288 para. 1 BGB was also waived by the first sentence. Nothing in the German Master Agreement indicates that the first sentence of section 3(4) should substitute Section 288 para. 1 BGB, and, more to the point, there is no good reason why the parties would replace the statutory claim with a contractual claim which does not offer any advantages over the statutory claim to the creditor.

(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?

61. In my view, 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, the relevant party is entitled to recover its entire loss as a Damages Claim which would include any Damages Interest

Claim. The latter claim would comprise of two elements: (a) a Minimum Damages Interest Claim at the rate specified in the first sentence of section 3(4) of the German Master Agreement; and (b) a Further Damages Interest Claim for the loss exceeding such fixed rate pursuant to the second sentence of section 3(4). Hence alternative (b)(ii) is the correct one.

62. The answer to this question hinges on the meaning of the second sentence of section 3(4) of the German Master Agreement which therefore first needs to be discussed in some more detail in paragraphs [63] and [64].

63. Neither the first nor the second sentence of section 3(4) of the German Master Agreement provides a contractual basis for Further Damages Interest Claims, i.e. claims for compensation of (further) losses actually suffered by the creditor. Instead, such a claim under the German Master Agreement is a statutory claim based on Sections 280, 286 and 288 para. 4 BGB and the second sentence of section 3(4) merely clarifies that a relevant party is not barred from claiming damages for such (further) losses actually incurred that exceed the default interest awarded pursuant to Sections 280 and 286 BGB, in conjunction with Section 288 para. 1 BGB as amended by the first sentence of section 3(4). Put differently, the second sentence reiterates Section 288 para. 4 BGB and, thus, removes any doubts as to whether the parties, by agreeing to a downward modification of the statutory rate of default interest set out in Section 288 para. 1 BGB, intended to waive or restrict the relevant party's statutory claim for damages for losses actually suffered. The second sentence of section 3(4) clearly implies that such a departure from the statute is not intended, i.e. that Section 288 para. 4 BGB applies.[45]

64. The flipside of the implicit reference in the second sentence of section 3(4) of the German Master Agreement to Section 288 para. 4 BGB is that the second sentence also refrains from expanding a relevant party's right to claim damages for losses actually incurred beyond its statutory claims.

65. Hence, whether, under the German Master Agreement, a relevant party may only claim damages for its losses actually incurred or whether the party is entitled to claim both default interest (Section 288 para. 1 BGB as amended by the first sentence of section 3(4) (Minimum Damages Interest Claim)) and damages for the losses actually incurred (Further Damages Interest Claim), is governed by the relationship between para. 1 and para. 4 of Section 288 BGB. The reasons for this are straightforward:

(a) First, Minimum Damages Interest Claims and Further Damages Interest Claims are of a statutory nature, i.e. based on Sections 280, 286 and 288 BGB;

(b) Secondly, section 3(4) of the German Master Agreement only amends Section 288 para. 1 BGB but does not provide a (additional) contractual claim to this effect, and, in addition, clarifies that this amendment does not modify the relationship described above between para. 1 (as amended) and para. 4 of Section 288.

66. In turn, the relationship between para. 1 and para. 4 of Section 288 BGB needs to be understood in the light of the fundamental principle underlying the German law of

[45] Similarly *Jahn* in Bankrechts-Handbuch, Vol. II, § 114 n. 39.

damages which is to make the creditor whole. The flipside of that principle is the prohibition on creditor enrichment (Bereicherungsverbot) which aims at preventing overcompensation of creditors. Applying these principles to paras. 1 and 4 of Section 288 BGB and taking into account that default interest pursuant to para. 1, in essence, qualifies as a irrefutable minimum damage (*supra* issue 20.2(a)), the creditor is entitled to recover the entire loss that it actually suffered, but not compensation for its entire loss actually suffered as well as default interest pursuant to para 1.[46]

67. Technically, a creditor seeking damages for its entire loss has two options:

(a) the creditor can claim default interest pursuant to Section 288 para. 1 BGB (5 %) and, in addition, claim compensation for further default damages expressed as a rate (e.g. 3 %) within the meaning of Section 288 para. 4 BGB, i.e. by way of a Further Damages Interest Claim: 5% (under Section 288(1) + 3 % (under Section 288(4)); or

(b) alternatively, the creditor can seek to recover his entire loss by way of a Damages Interest Claim, for losses actually incurred that are capable of being expressed as a rate (e.g. 8%). If he chooses the second option, in order to avoid overcompensation, default interest awarded pursuant to Section 288 para. 1 BGB (5 %) will be offset *ex lege*[47] thereby "reducing" the Damages Interest Claim expressed as a rate: 8% (280 para. 1, 2, 286) - 5% (288(1)).

68. The upshot, then, with respect to claims for default interest and damages under the German Master Agreement is that the relevant entity is entitled to recover its entire loss in respect of the late payment by way of:

(a) a claim for default interest pursuant to sentence 1 of section 3(4) of the German Master Agreement (the Minimum Damages Interest Claim); and

(b) a claim for the loss exceeding such fixed rate by way of a claim for (further) damages (the Further Damages Interest Claim).

Issue 21 - If the answer to question 20 is that a further claim for damages can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9), how in such circumstances, is the relevant rate to be determined? In particular:

(i) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?

69. Provided that the Damages Interest Claim[48] has been included in the transfer to the third party, it will be calculated by reference to the assignor's losses for the period

[46] KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 55; see also BGH, NJW 1953, 337 ("... Teil der Zinsforderung, der über 5 % hinaus geht").

[47] KG Berlin, decision of 18 February 2014 – 26a U 60/13 (juris) n. 55.

[48] As Issue 21 assumes that the further claim for damages can be included as part of the "rate" applicable to the debt apart from the administration, I have focused on the Damages Interest Claim and not the part of the Damages Claim that cannot be expressed as a rate. I have also considered

prior to the transfer and by reference to the assignee's losses for the period following the transfer for the reasons given below. That is the case even if the effect is that the debtor may have to pay more as a consequence of the assignment.[49]

70. As a starting point it should be noted that the transfer of a relevant claim by way of an assignment agreement pursuant to Section 398 BGB does not have the effect of *ex lege*[50] also transferring a Minimum Damages Interest Claim or a Further Damages Interest Claim.

71. However, a creditor may transfer the interest claims separately pursuant to Section 398 BGB. Such a transfer can be effected under German law either by a separate assignment agreement or by a specific sub-clause in the same assignment agreement. Such an agreement can take the form of an implied agreement accompanying the express assignment agreement transferring the principal claim. Whether such an implied agreement exists regarding Minimum Damages Interest Claims and Further Damages Interest Claims depends on the parties' intentions and their behavior. If the parties' actions and other given circumstances do not suffice in determining whether the parties transferred the claims or not, the following distinction becomes crucial: whether such claims have already come into existence before the transfer or whether, at that time, it is only possible that such claims will come into existence in the future. In cases of doubt, existing claims will not be transferred by an implied agreement while potential future claims will be transferred.[51]

72. For these purposes, a Damages Interest Claim (including both Minimum Damages Interest Claims and Further Damages Interest Claims) will be treated as having already come into existence if, at the time the transfer becomes effective, the debtor is already in default[52] and, in addition, the assignor has already suffered an actual loss. If, at the time the transfer becomes effective, the assignor/former creditor has not suffered any loss, only a claim for Default Interest (pursuant to Sections 280, 286 and 288 para. 1 BGB) will be treated as having come into existence (thus requiring express language to transfer such a claim).

73. From the foregoing, it follows that Damages Interest Claims that arose prior to the assignment of the principal claim are calculated by way of an award of damages to the transferor/assignor for losses incurred by him.[53] The assignor can only claim damages for those losses he actually incurred until the transfer became effective. If that Damages Interest Claim is assigned, the assessment of damages for the pre-transfer

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both the Minimum Damages Interest Claim and the Further Damages Interest Claim (together the Damages Interest Claim) as it makes sense to deal with both together although the definition of Damages Interest Claim in Issue 20 suggests that this question is only really concerned with what I have defined as the Further Damages Interest Claim.

[49] *Busche* in Staudinger, BGB, Section 398 n. 82 with further references; *Grüneberg* in Palandt, BGB, Section 398 n. 19; cf BGH NVwZ-RR 2008, 674 n. 19, 22 et seq; BGH, NJW-RR 1992, 219 sub II (not taking a stand).

[50] Section 401 BGB, which provides for a transfer ex lege in certain situations, does not apply. See *Grüneberg* in Palandt, BGB, Section 401 n. 6 with further references.

[51] BGH, NJW-RR 1992, 219 sub II; *Grüneberg* in Palandt, BGB, Section 401 n. 6 (with further references); cf, BGH, BGHZ 35, 172, 173 sub 2; BGH, NJW 2006, 1662 n 9-10.

[52] Pursuant to Section 286 BGB, see above 20.2(a).

[53] *Grüneberg* in Palandt, BGB, Section 401 n. 6 with further references.

period will relate to the assignor even though the assignee will be entitled to receive those damages by virtue of the assignment.

74. Conversely, if future (potential) Damages Interest Claims are transferred by way of an (express or implied) assignment agreement, the assignee is entitled to assert any Damages Interest Claims arising from that time onwards. For the purposes of determining whether the relevant person suffered any loss, the assignee is the relevant person, not the assignor. In other words, since, pursuant to sentence 2 of Section 398 BGB, the assignment has the effect that the new creditor steps into the shoes of the previous creditor, the assignee is the only person who can claim damages and he is only able to claim compensation for those losses that he incurred himself.[54]

75. Finally, it should be noted that the Minimum Damages Interest Claim, awarding a rate determined by statute or by contract, does not depend on the situation of the assignor or of the assignee.

(ii) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?

76. A third party will be precluded from asserting a Damages Interest Claim if such a claim arose prior to the assignment and was not transferred to the third party by an (express or implied) assignment agreement. In addition, a third party will be precluded from asserting a Damages Interest Claim in respect of its own losses incurred after the date of the assignment if, as an exception to the general rule referred to in paragraphs [71] and [74] above, the parties did not transfer the future (potential) Damages Interest Claim.

(iii) where does the burden of proof lie in establishing a Damages Interest Claim, and what is required to demonstrate, that a relevant creditor has or has not met such requirement?

77. The burden of proof in establishing a Damages Interest Claim lies with the claimant. As a general principle of German civil law the creditor has to carry forward and to prove the facts necessary to establish a claim.

78. Whether a relevant creditor has or has not met such requirement, as a matter of German law, is not determined by German civil law but by the rules of German civil procedure on the standard of proof, in particular by Section 286 ZPO.

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 Section 3(4) or a Damages Interest Claim[55] as a matter of German law?

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[54] BGH, NJW 2006, 1662 n. 9; BGH, NJW-RR 1992, 219 sub I; BGH, BGHZ 128, 371, 376 sub II 3 a and *Grüneberg* in Palandt, BGB, Section 288 n. 6. By way of exception, if the parties transfer the relevant (principal) claim as an assignment by way of security, the assignor will be the relevant person to determine the losses suffered for the purpose of determining the default damages: See BGH, NJW 2006, 1662 n. 10 et seq.

[55] I use the expression Further Damages Interest Claim

79. The transferee of the relevant claim can assert both a claim for default interest under the first sentence of section 3(4) of the German Master Agreement (a Minimum Damages Interest Claim) and a Further Damages Interest Claim for losses he actually incurred after the date of transfer (Sections 280, 286, 288 para. 4 BGB) if the parties expressly or impliedly (see paragraphs [71] to [74] transferred future claims (i.e. claims arising after the transfer becoming legally effective) for default interest as well as Further Damages Interest Claims.

80. Moreover, the transferee will be entitled to assert Minimum Damages Interest Claims and Further Damages Interest Claims for the period before the transfer becoming effective if the parties transferred these claims, as well. Such pre-existing Damages Interest Claims will be assessed by reference to the losses actually incurred by the transferor.

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?

81. The transferee is entitled to assert a claim for damages with respect to those losses he suffered after the transfer became legally effective. Whether, in place of LBIE's original counterparty, he is also entitled to assert a claim for damages with respect to losses suffered by LBIE's original counterparty depends on whether the parties transferred that claim, as well. See paragraphs [71] to [74] above in this respect.

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?

82. For Damages Interest Claims to be asserted by the transferee as a matter of German law, the requirements set out in paragraph [28] above must be established.

83. As regards the calculation of damages, what has to be established depends on whether:

(a) the transferee asserts a claim for damages in respect of losses suffered by himself after the date of transfer or losses suffered by the transferor prior to the date of transfer (see paragraphs [71] to [74] above); and

(b) whether the creditor is a bank or another investor entitled to use the simplified method of calculating damages or another creditor which is only entitled to use a somewhat simplified method of calculating losses from foregone investment opportunities (see paragraphs [45] to [50] above).

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?

84. The calculation of the Damages Interest Claims has to take into account both the damages of LBIE's original counterparty and of the transferee on a *pro rata temporis* basis, i.e.

(a) the damages of LBIE's original counterparty from the time when LBIE was in default until the time of the assignment becoming legally effective, and

(b) the damages of the transferee from the time of the assignment becoming legally effective until damages have been awarded.

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?

85. The mere fact that a transferee asserting a Minimum Damages Interest Claim and/or Further Damages Interest Claim was aware of the debtor's default prior to the assignment does not preclude the transferee from asserting the claim.

21.6 Where does the burden of proof lie in relation to such issues, as a matter of German law?

86. In general, as a matter of German civil law, the burden of proof lies with the party which benefits from the specific aspect that needs to be proven.

IV. Statement regarding the expert's duty to the court

87. 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.

V Statement of truth

88. 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 what are within my knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matter to which they refer.

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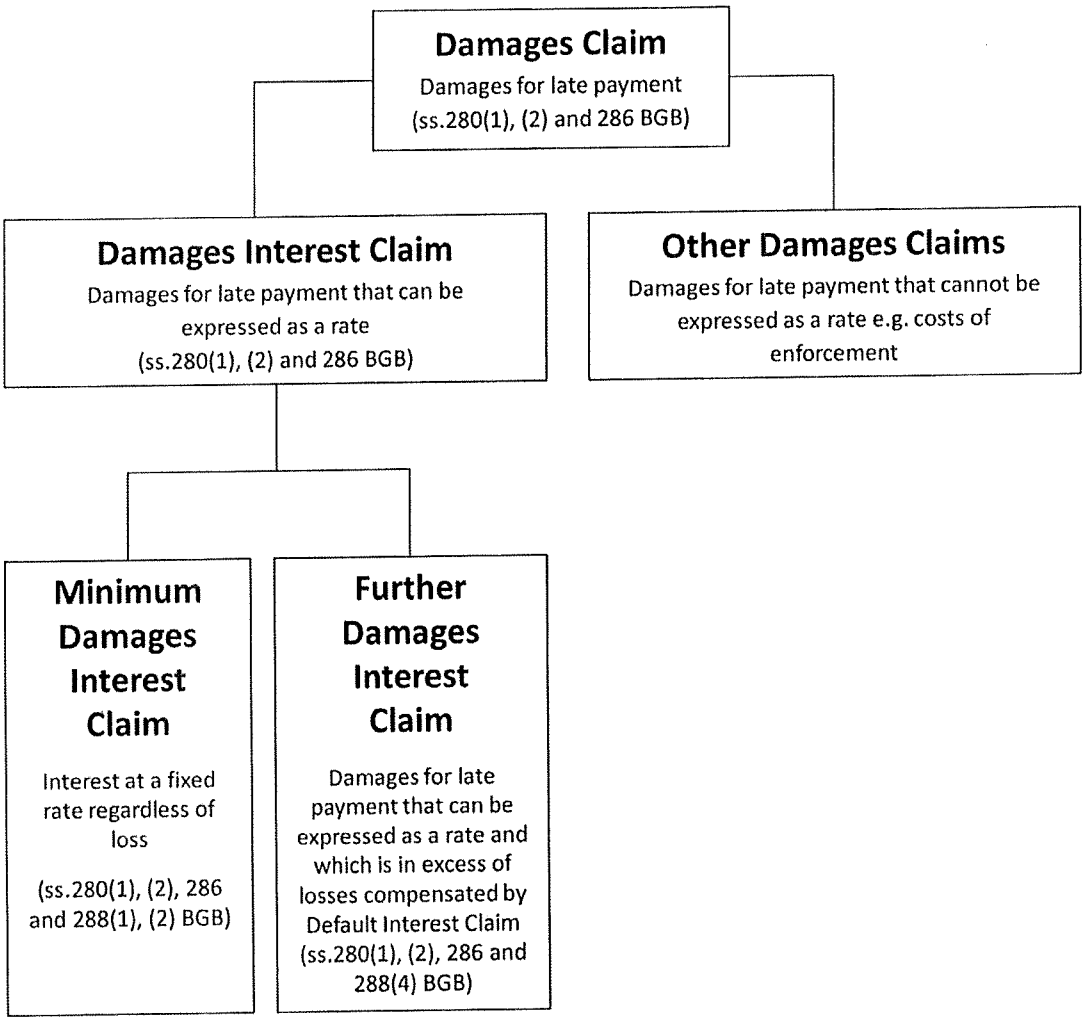
Professor Peter O. Mülbert

Dated: 9 July 2015

SCHEDULE

DEFINITIONS USED IN GERMAN LAW REPORT



ANNEX A

BIOGRAPHY

CURRICULUM VITAE

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Position:

Professor of Law, Faculty of Law and Economics, Fellow, Gutenberg Research College, and Director of the Center for German and International Law of Financial Services, University of Mainz

Occupational History:

Fellowship, Gutenberg Research College, University of Mainz (2010 -); Visiting Professor, Harvard Law School (2011, 2007); University of Tokyo (2013, 2009); Seoul National University (2012); Professor, University of Mainz (1999 -); University of Trier (1995 – 1999); University of Heidelberg (1994 – 1995)

Other Current and Recent Affiliations:

Panel of Financial Services Experts of the Committee on Economic and Monetary Affairs of the European Parliament (2006 - 2014)
Administrative Appeal Committee („Widerspruchsausschuss") at the Federal Financial Supervisory Authority („BaFin") (2002 -)
Advisory Council („Übernahmebeirat") at the Federal Financial Supervisory Authority (2002 -)
Research Associate, European Corporate Governance Institute (2003 -)
Executive Board, Bankrechtliche Vereinigung – wissenschaftliche Gesellschaft für Bankrecht e.V. (German association of lawyers for banking law and capital market law)
Advisory Board, Frankfurt Institute for Risk Management and Regulation (2015 -)
Editorial Board, *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (2007 -) (journal for commercial law, corporate law, capital market law, competition law)

Editorial Advisory Board, *Wertpapiermitteilungen* (2002 -) (journal for banking law, capital market law, corporation law)
Editorial Board, *Neue Zeitschrift für Gesellschaftsrecht* (2007 -) (journal for corporation law)
Foreign Contributing Editor, *Banking & Finance Law Review* (2009 -)

Other Activities:

Expert Witness, Finance Committee of the German Parliament; Federal Ministry of Finance; Federal Financial Supervisory Authority; Hessian Ministry of Economy, Transport, Urban and Regional Development; The German Council of Economic Experts; Gesellschaft für Anlagen- und Reaktorsicherheit (GRS) mbH; Landgericht München I (court of first instance for the district Munich I)
Speaker, 67th German Jurists Forum („Deutscher Juristentag") (2008)
Reporter, 61st German Jurists Forum („Deutscher Juristentag") (1996)
Scientific Advisory Board at the Max-Planck-Institute for Comparative and International Private Law, Hamburg (2009 - 2014)
Editorial Advisory Board, *CORPORATE FINANCE law* (2010 - 2013)
Supervisory Board, DEURAG AG (2003-2005)
Chairman, Supervisory Board, mc munich capital AG (2000-2002)

Education:

University of Munich, „Habilitation" (1994)
Baden-Württemberg, Bar Exam („2. Staatsexamen"), 1985
University of Tübingen, Doctorate in Law (1984)
University of Tübingen, J.D. („1. Staatsexamen") (1981)

Principal Areas of Interest:

German and European company law, capital markets law, banking and financial services law

ANNEX B

MATERIALS RELIED UPON IN MAKING THE REPORT

1. Court decisions

1.1 Federal High Court (Bundesgerichtshof – BGH)

BGH, decision of 29 October 1952 – II ZR 47/52 = NJW 1953, 337
BGH, decision of 18 May 1961 – VII ZR 39/60 = BGHZ 35, 172
BGH, decision of 10 July 1963 – VIII ZR 204/61 = BGHZ 40, 91
BGH, decision of 08 November 1973 – III ZR 161/71 = WM 1974, 128
BGH, decision of 01 February 1974 – IV ZR 2/72 = BGHZ 62, 103
BGH, decision of 02 March 1982 – VI ZR 245/79 = NJW 1982, 1761
BGH, decision of 07 June 1984 – IX ZR 66/83 = BGHZ 91, 324
BGH, decision of 19 September 1984 – VIII ZR 108/83 = NJW 1985, 550
BGH, decision of 28 April 1988 – III ZR 57/87 = BGHZ 104, 337
BGH, decision of 25 September 1991 – VIII ZR 264/90 = NJW-RR 1992, 219
BGH, decision of 08 October 1991 – XI ZR 259/90 = NJW 1992, 109
BGH, decision of 18 February 1992 – XI ZR 134/91 = NJW 1992, 1620
BGH, decision of 09 February 1995 – III ZR 174/93 = BGHZ 128, 371
BGH, decision of 17 October 1995 – VI ZR 246/94 = NJW 1996, 117
BGH, decision of 23 January 1997 – IX ZR 69/96 = NJW 1997, 1003, 1004
BGH, decision of 30 November 2004 – XI ZR 285/03 = BGHZ 161, 196
BGH, decision of 09 February 2006 – I ZR 70/03 = NJW 2006, 1662
BGH, decision of 12 July 2006 – X ZR 157/05 = NJW 2006, 3271
BGH, decision of 10 April 2008 – VII ZR 58/07 = BGHZ 176, 128
BGH, decision of 12 June 2008 – III ZR 38/07 = NVwZ-RR 2008, 674
BGH, decision of 20 July 2011 – IV ZR 75/09 = NJW 2011, 3648
BGH, decision of 24 April 2012 – XI ZR 360/11 = NJW 2012, 2266
BGH, decision of 08 May 2012 – XI ZR 262/10 = NJW 2012, 2427
BGH, decision of 01 July 2014 – VI ZR 391/13 = RuS 2014, 525
BGH, decision of 29 April 2015 – VIII ZR 104/14 (juris)

1.2 Higher Regional Courts and Regional Courts

Higher Regional Court of Köln (Oberlandesgericht – OLG), decision of 09 January 1969 – 12 U 149/68 = NJW 1969, 1388
Higher Regional Court of Berlin (Kammergericht – KG), decision of 18 February 2014 – 26a U 60/13 (juris)
Higher Regional Court of Düsseldorf (Oberlandesgericht – OLG), decision of 13 April 1989 – 6 U 170/88 = NJW 1990, 640
Higher Regional Court of Karlsruhe (Oberlandesgericht – OLG), decision of 10 July 2012 – 8 U 66/11 = NJW 2013, 473
Regional Court of Verden (Landgericht – LG), decision of 23 May 1967 – 2 S 53/67 = VersR 1967, 869

1.3 Supreme Court of the (German) Reich (Reichsgericht – RG)

Supreme Court of the (German) Reich, decision of 08 April 1929 – VI 635/28 = RGZ 124, 111

2. Books and Articles

Palandt, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), 74rd ed., 2015
Staudinger, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), §§ 255-304, revised ed. 2014
Staudinger, Bürgerliches Gesetzbuch (Commentary on the German Civil Code), §§ 397-432, revised ed. 2012
Münchener Kommentar zum BGB (Commentary on the German Civil Code), Vol. 1, 6th ed. 2012
Münchener Kommentar zum BGB (Commentary on the German Civil Code), Vol. 2, 6th ed. 2012
Münchener Kommentar zum BGB (Commentary on the German Civil Code), Vol. 2, 4th ed. 2001
Schimansky/Bunte/Lwowski (eds.), Bankrechts-Handbuch (Handbook of banking law), Vol. II, 4th ed. 2011

3. Statutory materials

3.1 The German Civil Code (Bürgerliches Gesetzbuch - BGB)

Section 133 Interpretation of a declaration of intent (Auslegung einer Willenserklärung)
Section 138 Legal transaction contrary to public policy; usury (Sittenwidriges Rechtsgeschäft; Wucher)
Section 157 Interpretation of contracts (Auslegung von Verträgen)
Section 194 Subject-matter of limitation (Gegenstand der Verjährung)
Section 195 Standard limitation period (Regelmäßige Verjährungsfrist)
Section 199 Commencement of the standard limitation period and maximum limitation periods (Beginn der regelmäßigen Verjährungsfrist und Verjährungshöchstfristen)
Sections 203 Suspension of limitation in the case of negotiations (Hemmung der Verjährung bei Verhandlungen)
Section 204 Suspension of limitation as a result of prosecution of rights (Hemmung der Verjährung durch Rechtsverfolgung)
Section 205 Suspension of limitation in the case of a right to refuse performance (Hemmung der Verjährung bei Leistungsverweigerungsrecht)
Section 206 Suspension of limitation in case of force majeure (Hemmung der Verjährung bei höherer Gewalt)
Section 207 Suspension of limitation for family and other reasons (Hemmung der Verjährung aus familiären und ähnlichen Gründen)
Section 208 Suspension of limitation in the case of claims for infringement of the right to sexual self-determination (Hemmung der Verjährung bei Ansprüchen wegen Verletzung der sexuellen Selbstbestimmung)
Section 209 Effect of suspension (Wirkung der Hemmung)

Section 210	Suspension of expiry of the limitation period in the case of persons without full capacity to contract (Ablaufhemmung bei nicht voll Geschäftsfähigen)
Section 211	Suspension of expiry in matters relating to estates (Ablaufhemmung in Nachlassfällen)
Section 212	Recommencement of the limitation period (Neubeginn der Verjährung)
Section 213	Suspension, suspension of expiry and recommencement of limitation in the case of other claims, Hemmung (Ablaufhemmung und erneuter Beginn der Verjährung bei anderen Ansprüchen)
Section 214	Effect of limitation (Wirkung der Verjährung)
Section 217	Limitation of collateral performance (Verjährung von Nebenleistungen)
Section 246	Statutory interest rate (Gesetzlicher Zinssatz)
Section 247	Basic rate of interest, (Basiszinssatz)
Section 249	Nature and extent of damages (Art und Umfang des Schadensersatzes)
Section 250	Damages in money after the specification of a period of time (Schadensersatz in Geldnach Fristsetzung)
Section 251	Damages in money without the specification of a period of time (Schadensersatz in Geldohne Fristsetzung)
Section 252	Lost profits (Entgangener Gewinn)
Section 253	Intangible damage (Immaterieller Schaden)
Section 276	Responsibility of the obligor (Verantwortlichkeit des Schuldners)
Section 280	Damages for breach of duty (Schadensersatz wegen Pflichtverletzung)
Section 286	Default of the obligor (Verzug des Schuldners)
Section 288	Default interest and other damage due to default (Verzugszinsen und sonstiger Verzugsschaden)
Section 305	Incorporation of standard business terms in the contract (Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag)
Section 398	Assignment (Abtretung)
Section 401	Passing of accessory rights and preferential rights (Übergang der Neben- und Vorzugsrechte)
Section 404	Objections of the obligor (Einwendungen des Schuldners)

3.2 The German Civil Procedure (Zivilprozessordnung - ZPO)

Section 286	Evaluation of evidence at the court's discretion and conviction (Freie Beweiswürdigung)
Section 287	Investigation and determination of damages; amount of the claim (*Schadensermittlung; Höhe der Forderung*)

ANNEX C

GERMAN MASTER AGREEMENT

	Rahmenvertrag vom

Rahmenvertrag für Finanztermingeschäfte

Zwischen

Name und Anschrift des Vertragspartners

(nachstehend „Vertragspartner" genannt)

und

Name und Anschrift der Bank

(nachstehend „Bank" genannt)

wird Folgendes vereinbart:

1. Zweck und Gegenstand des Vertrages

(1) Die Parteien beabsichtigen, zur Gestaltung von Zinsänderungs-, Währungskurs- und sonstigen Kursrisiken im Rahmen ihrer Geschäftstätigkeit Finanztermingeschäfte abzuschließen, die

a) den Austausch von Geldbeträgen in verschiedenen Währungen oder von Geldbeträgen, die auf der Grundlage von variablen oder festen Zinssätzen, Kursen, Preisen oder sonstigen Wertmessern, einschließlich diesbezüglicher Durchschnittswerte (indices), ermittelt werden, oder
b) die Lieferung oder Übertragung von Wertpapieren, anderen Finanzinstrumenten oder Edelmetallen oder ähnliche Leistungen

zum Gegenstand haben. Zu den Finanztermingeschäften gehören auch Options-, Zinsbegrenzungs- und ähnliche Geschäfte, die vorsehen, dass eine Partei ihre Leistung nur dann erbringt oder dass Leistungen von einer Bedingung abhängig sind.

(2) Für jedes Geschäft, das unter Zugrundelegung dieses Rahmenvertrages abgeschlossen wird (nachstehend „Einzelabschluss" genannt), gelten die nachfolgenden Bestimmungen. Alle Einzelabschlüsse bilden untereinander und zusammen mit diesem Rahmenvertrag einen einheitlichen Vertrag (nachstehend der „Vertrag" genannt); sie werden im Sinne einer einheitlichen Risikobetrachtung auf dieser Grundlage und im Vertrauen darauf getätigt.

2. Einzelabschlüsse

(1) Haben sich die Parteien über einen Einzelabschluss geeinigt, so wird die Bank dem Vertragspartner schriftlich, fernschriftlich, telegraphisch, durch Telefax oder in ähnlicher Weise dessen Inhalt bestätigen.

(2) Jede Partei ist berechtigt, eine unterzeichnete Ausfertigung des Einzelabschlusses zu verlangen, die jedoch keine Voraussetzung für dessen Rechtswirksamkeit ist.

(3) Die Bestimmungen des Einzelabschlusses gehen den Bestimmungen dieses Rahmenvertrages vor.

3. Zahlungen und sonstige Leistungen

(1) Jede Partei wird die von ihr geschuldeten Zahlungen und sonstigen Leistungen spätestens an den im Einzelabschluss genannten Fälligkeitstagen an die andere Partei erbringen.

(2) Sämtliche Zahlungen sind in der aufgrund des Einzelabschlusses geschuldeten Vertragswährung kostenfrei und in der für Zahlungen in dieser Währung handelsüblichen Weise auf das im Einzelabschluss genannte Konto des Zahlungsempfängers in am Fälligkeitstag frei verfügbaren Mitteln zu leisten.

(3) Haben beide Parteien an demselben Tag aufgrund des Vertrages Zahlungen in der gleichen Währung zu leisten, zahlt die Partei, die den höheren Betrag schuldet, die Differenz zwischen den geschuldeten Beträgen. Die Bank wird dem Vertragspartner den zu zahlenden Differenzbetrag rechtzeitig vor dessen Fälligkeit mitteilen.

(4) Zahlt eine Partei nicht rechtzeitig, so werden bis zum Zeitpunkt des Eingangs der Zahlung des fälligen Betrages Zinsen hierauf zu dem Satz berechnet, der um den in Nr. 12 Abs. 3 festgelegten Zinszuschlag über dem Zinssatz liegt, den erstklassige Banken für jeden Tag, für den diese Zinsen zu berechnen sind, untereinander für täglich fällige Einlagen am Zahlungsort in der Währung des fälligen Betrages berechnen. Die Geltendmachung eines weiteren Schadens ist nicht ausgeschlossen.

(5) Ist ein Fälligkeitstag kein Bankarbeitstag, so sind die Zahlungen und sonstigen Leistungen nach Maßgabe des Einzelabschlusses wie folgt zu erbringen:

a) am unmittelbar vorhergehenden Bankarbeitstag oder
b) am unmittelbar folgenden Bankarbeitstag oder
c) am unmittelbar folgenden Bankarbeitstag; sofern dieser jedoch in den nächsten Kalendermonat fällt, am unmittelbar vorhergehenden Bankarbeitstag.

4. Bankarbeitstag

„Bankarbeitstag" im Sinne dieses Vertrages ist jeder Tag, an dem die Banken an dem/den im Einzelabschluss genannten Finanzplatz/Finanzplätzen für Geschäfte, einschließlich des Handels in Fremdwährungen und der Entgegennahme von Fremdwährungseinlagen, geöffnet sind (mit Ausnahme des Samstags und des Sonntags).

5. Bezugsgröße

(1) Ist in einem Einzelabschluss ein variabler Zinssatz, Kurs, Preis oder sonstiger Wertmesser („variable Größe") vereinbart, so wird die Bank dem Vertragspartner an dem Tag, an dem diese variable Größe zu bestimmen ist („Feststellungstag"), oder unverzüglich danach die zugrunde liegende Bezugsgröße mitteilen.

(2) Sollte die im jeweiligen Einzelabschluss vereinbarte Bezugsgröße an einem Feststellungstag nicht ermittelt werden können, werden die Parteien diese unter Rückgriff auf Berechnungsgrundlagen festsetzen, die den im Einzelabschluss vereinbarten möglichst nahe kommen. Falls die Bezugsgröße ein Interbanken-Zinssatz ist und innerhalb von 20 Tagen nicht einvernehmlich festgelegt worden ist, gilt als Bezugsgröße das arithmetische Mittel der Zinssätze, zu denen zwei von der Bank zu benennende, international angesehene Banken auf dem Interbankenmarkt erstklassigen Banken Termingelder mit entsprechender Laufzeit in der Vertragswährung in ungefährer Höhe des Bezugsbetrages gegen 11:00 Uhr (Ortszeit am betreffenden Interbankenmarkt) am Feststellungstag angeboten haben.

(3) Ein als Bezugsgröße dienender Zinssatz („Basis-Satz") ist gegebenenfalls auf den nächsten 1/1000 Prozentpunkt aufzurunden.

6. Berechnungsweise bei zinssatzbezogenen Geschäften

(1) Der aufgrund eines Einzelabschlusses jeweils zu zahlende variable Betrag ist das Produkt aus (a) dem dafür vereinbarten Bezugsbetrag, (b) dem nach Nr. 5 und dem Einzelabschluss errechneten variablen Zinssatz („variabler Satz"), als Dezimalzahl ausgedrückt, sowie (c) dem Quotienten im Sinne des Abs. 5.

(2) Der aufgrund eines Einzelabschlusses jeweils zu zahlende Festbetrag ist, falls er im Einzelabschluss betragsmäßig festgelegt wird, der dort genannte Betrag. Anderenfalls ist er das Produkt aus (a) dem dafür vereinbarten Bezugsbetrag, (b) dem im Einzelabschluss vereinbarten festen Zinssatz („Festsatz"), als Dezimalzahl ausgedrückt, sowie (c) dem Quotienten im Sinne des Abs. 5.

(3) Im Fall von Zinsbegrenzungsgeschäften ist der variable Satz nach Maßgabe des Einzelabschlusses vorbehaltlich Absatz 4 jeweils

a) für Zahlungen durch die als Überschuss-Zahler (oder Cap- bzw. FRA-Verkäufer) bezeichnete Partei der vereinbarte Basis-Satz abzüglich des Satzes, der im Einzelabschluss als Höchstsatz (oder Cap-Rate) bzw. Terminsatz festgelegt wird, und

b) für Zahlungen durch die als Minderbetrags-Zahler (oder Floor-Verkäufer bzw. FRA-Käufer) bezeichnete Partei der Satz, der im Einzelabschluss als Mindestsatz (oder Floor-Rate) bzw. Terminsatz festgelegt wird, abzüglich des vereinbarten Basis-Satzes.

(4) Wird eine Zahlung nicht nach Ablauf, sondern zu Beginn des betreffenden Berechnungszeitraums geleistet, so wird der nach Abs. 1 oder 2 zu ermittelnde Betrag diskontiert, indem er durch einen Betrag dividiert wird, der sich bei einem Berechnungszeitraum von einem Jahr oder weniger nach der Formel

$$1 + \frac{L \times D}{B}$$

und bei einem Berechnungszeitraum von mehr als einem Jahr nach der Formel

$$(1 + L)^{\frac{D}{B}}$$

errechnet.

Dabei ist

L der für den betreffenden Berechnungszeitraum ermittelte Basis-Satz oder sonstige vereinbarte Diskontsatz, als Dezimalzahl ausgedrückt, also z. B. 0,07 im Fall eines Basis- oder Diskontsatzes von 7%;

D die Anzahl der Tage des Berechnungszeitraums;

B 360, es sei denn, die vereinbarte Vertragswährung ist eine Währung, für die der Basis- oder sonstige vereinbarte Diskontsatz nach Marktusance auf der Grundlage von 365 bzw. im Falle eines Schaltjahres 366 Tagen berechnet wird; in diesem Fall ist B = 365 bzw. 366.

Diese Regelung gilt, sofern nichts anderes vereinbart ist, stets für Terminsatzvereinbarungen (Forward Rate Agreements). Bei sonstigen Geschäften gilt sie nur dann, wenn im Einzelabschluss eine Diskontierung vereinbart ist.

(5) „Quotient" ist nach Maßgabe des Einzelabschlusses

a) die Anzahl der tatsächlich abgelaufenen Tage des Berechnungszeitraums, für den der Betrag zu berechnen ist, dividiert durch die Zahl 360 („365/360"), oder

b) die Anzahl der abgelaufenen Tage dieses Berechnungszeitraums, berechnet auf der Basis eines 360-Tage-Jahres mit 12 Monaten zu je 30 Tagen, dividiert durch die Zahl 360 („360/360"), oder

c) die Anzahl der tatsächlich abgelaufenen Tage dieses Berechnungszeitraums, dividiert durch die Zahl 365 bzw. im Fall von Schaltjahren 366 („365/365"), oder

d) die Anzahl der tatsächlich abgelaufenen Tage dieses Berechnungszeitraums, dividiert durch die Zahl 365 („366/365").

(6) „Berechnungszeitraum" ist der Zeitraum, der mit dem Anfangsdatum des Einzelabschlusses oder einem Zahlungstermin (einschließlich) beginnt und mit dem nächstfolgenden Zahlungstermin oder dem Enddatum (ausschließlich) endet, oder, sofern die Parteien im Einzelabschluss in Bezug auf variable Beträge „Fälligkeitstag/Fälligkeitstag" vereinbart haben, der Zeitraum, der mit dem Anfangsdatum des Einzelabschlusses oder einem Fälligkeitstag (einschließlich) beginnt und mit dem nächstfolgenden Fälligkeitstag oder dem Enddatum (ausschließlich) endet. „Zahlungstermin" ist im Sinne dieses Vertrages ist der Tag, an dem, gegebenenfalls aufgrund einer Anpassung gemäß Nr. 3 Abs. 5, die Zahlung tatsächlich zu leisten ist; „Fälligkeitstag" ist der vertraglich vorgesehene Zahlungstag ohne Berücksichtigung einer solchen Anpassung.

(7) Ist ein variabler Betrag oder ein nach Abs. 2 Satz 2 zu berechnender Festbetrag zu zahlen, so wird die Bank diesen, im ersten Fall zeitnah, mit der jeweils anwendbaren Bezugsgröße, dem Vertragspartner mitteilen.

7. Beendigung

(1) Sofern Einzelabschlüsse getätigt und noch nicht vollständig abgewickelt sind, ist der Vertrag nur aus wichtigem Grund kündbar. Ein solcher liegt auch dann vor, wenn eine fällige Zahlung oder sonstige Leistung – aus welchem Grund auch immer – nicht innerhalb von fünf Bankarbeitstagen nach Benachrichtigung des Zahlungs- oder Leistungspflichtigen vom Ausbleiben des Eingangs der Zahlung oder sonstigen Leistung beim Empfänger eingegangen ist. Die Benachrichtigung und die Kündigung müssen schriftlich, fernschriftlich, telegraphisch, durch Telefax oder in ähnlicher Weise erfolgen. Eine Teilkündigung, insbesondere die Kündigung einzelner und nicht aller Einzelabschlüsse, ist ausgeschlossen. Nr. 12 Abs. 5 (B) bleibt unberührt.

(2) Der Vertrag endet ohne Kündigung im Insolvenzfall. Dieser ist gegeben, wenn das Konkurs- oder ein sonstiges Insolvenzverfahren über das Vermögen einer Partei beantragt wird und diese Partei entweder den Antrag selbst gestellt hat oder zahlungsunfähig oder sonst in einer Lage ist, die die Eröffnung eines solchen Verfahrens rechtfertigt.

(3) Im Fall der Beendigung durch Kündigung oder Insolvenz (nachstehend „Beendigung" genannt) ist keine Partei mehr zu Zahlungen oder sonstigen Leistungen nach Nr. 3 Abs. 1 verpflichtet, die gleichtägig oder später fällig geworden wären; an die Stelle dieser Verpflichtungen treten Ausgleichsforderungen nach Nrn. 8 und 9.

8. Schadensersatz und Vorteilsausgleich

(1) Im Fall der Beendigung steht der kündigenden bzw. der solventen Partei (nachstehend „ersatzberechtigte Partei" genannt) ein Anspruch auf Schadensersatz zu. Der Schaden wird auf der Grundlage von unverzüglich abzuschließenden Ersatzgeschäften ermittelt, die dazu führen, dass die ersatzberechtigte Partei alle Zahlungen und sonstigen Leistungen erhält, die ihr bei ordnungsgemäßer Vertragsabwicklung zugestanden hätten. Sie ist berechtigt, nach ihrer Auffassung dazu geeignete Verträge abzuschließen. Wenn sie von dem Abschluss derartiger Ersatzgeschäfte absieht, kann sie denjenigen Betrag der Schädensberechnung zugrunde legen, den sie für solche Ersatzgeschäfte auf

der Grundlage von Zinssätzen, Terminsätzen, Kursen, Marktpreisen, Indices und sonstigen Wertmessern sowie Kosten und Auslagen zum Zeitpunkt der Kündigung bzw. der Kenntniserlangung von dem Insolvenzfall hätte aufwenden müssen. Der Schaden wird unter Berücksichtigung aller Einzelabschlüsse berechnet; ein finanzieller Vorteil, der sich aus der Beendigung von Einzelabschlüssen (einschließlich solcher, aus denen die ersatzberechtigte Partei bereits alle Zahlungen oder sonstigen Leistungen der anderen Partei erhalten hat) ergibt, wird als Minderung des im übrigen ermittelten Schadens berücksichtigt.

(2) Erlangt die ersatzberechtigte Partei aus der Beendigung von Einzelabschlüssen insgesamt einen finanziellen Vorteil, so schuldet sie vorbehaltlich Nr. 9 Abs. 2 und, falls vereinbart, Nr. 12 Abs. 4 der anderen Partei einen Betrag in Höhe dieses ihres Vorteils, höchstens jedoch in Höhe des Schadens der anderen Partei. Bei der Berechnung des finanziellen Vorteils finden die Grundsätze des Absatzes 1 über die Schadensberechnung entsprechende Anwendung.

9. Abschlusszahlung

(1) Rückständige Beträge und sonstige Leistungen und der zu leistende Schadensersatz werden von der ersatzberechtigten Partei zu einer einheitlichen Ausgleichsforderung in Euro zusammengefasst, wobei für rückständige sonstige Leistungen entsprechend Nr. 8 Abs. 1 Sätze 2 bis 4 ein Gegenwert in Euro ermittelt wird.

(2) Eine Ausgleichsforderung gegen die ersatzberechtigte Partei wird nur fällig, soweit diese keine Ansprüche aus irgendeinem rechtlichen Grund gegen die andere Partei („Gegenansprüche") hat. Bestehen Gegenansprüche, so ist deren Wert zur Ermittlung des fälligen Teils der Ausgleichsforderung vom Gesamtbetrag der Ausgleichsforderung abzuziehen. Zur Berechnung des Werts der Gegenansprüche hat die ersatzberechtigte Partei diese, (i) soweit sie sich nicht auf Euro beziehen, zu einem nach Möglichkeit auf der Grundlage des am Berechnungstag geltenden, amtlichen Devisenkurses zu bestimmenden Brief-Kurs in Euro umzurechnen, (ii) soweit sie sich nicht auf Geldzahlungen beziehen, in eine in Euro ausgedrückte Schadensersatzforderung umzuwandeln und (iii) soweit sie nicht fällig sind, mit ihrem Barwert (unter Berücksichtigung auch der Zinsansprüche) zu berücksichtigen. Die ersatzberechtigte Partei kann die Ausgleichsforderung der anderen Partei gegen die nach Satz 3 errechneten Gegenansprüche aufrechnen. Soweit sie dies unterlässt, wird die Ausgleichsforderung fällig, sobald und soweit ihr keine Gegenansprüche mehr gegenüberstehen.

10. Übertragung

Die Übertragung von Rechten oder Verpflichtungen aus dem Vertrag bedarf der vorherigen schriftlichen, fernschriftlichen, telegraphischen, durch Telefax oder auf vergleichbare Weise mitgeteilten Zustimmung der jeweils anderen Partei. Nr. 2 Abs. 2 gilt entsprechend.

11. Verschiedenes

(1) Sind Bestimmungen des Vertrages unwirksam oder undurchführbar, so bleiben die übrigen Vorschriften hiervon unberührt. Gegebenenfalls hierdurch entstehende Vertragslücken werden durch ergänzende Vertragsauslegung unter angemessener Berücksichtigung der Interessen der Parteien geschlossen.

(2) Der Vertrag unterliegt dem Recht der Bundesrepublik Deutschland.

(3) Nicht ausschließlicher Gerichtsstand ist der Ort der Niederlassung der Bank, durch die der Vertrag abgeschlossen wird.

(4) Der Rahmenvertrag in der hiermit vereinbarten Fassung gilt auch für alle etwaigen Einzelabschlüsse der Parteien unter dem Rahmenvertrag in einer früheren Fassung. Diese gelten als Einzelabschlüsse unter dem Rahmenvertrag in dieser neuen Fassung. Für diese Einzelabschlüsse bleibt die bisherige Fassung jedoch insoweit maßgeblich, als dies zum Verständnis der in ihnen getroffenen Regelungen erforderlich ist.

12. Besondere Vereinbarungen

(1) Die folgenden Absätze 2 bis 5 gelten nur, soweit die dazu bestimmten Felder angekreuzt oder ausgefüllt sind.

☐ (2) In Nr. 3 Abs. 3 werden die Worte „des Vertrages" durch „desselben Einzelabschlusses" ersetzt.

☐ (3) Der Zinszuschlag gemäß Nr. 3 Abs. 4 beträgt

[ ] % p. a.

(4) Nach Nr. 8 Abs. 2 Satz 1 wird folgender Satz eingefügt:

entweder

☐ Dies gilt vorbehaltlich Nr. 12 Abs. 5 (C) a) nur, falls die ersatzberechtigte Partei aus mindestens einem Einzelabschluss (i) alle von der anderen Partei geschuldeten Zahlungen oder sonstigen Leistungen endgültig und unanfechtbar erhalten hat und (ii) bei Fortführung des Vertrages selbst noch unbedingte oder bedingte Zahlungs- oder sonstige Leistungsverpflichtungen hätte.

oder

☐ Dies gilt vorbehaltlich Nr. 12 Abs. 5 (C) a) nur, falls die ersatzberechtigte Partei (i) aus sämtlichen Einzelabschlüssen alle von der anderen Partei geschuldeten Zahlungen oder sonstigen Leistungen endgültig und unanfechtbar erhalten hat und (ii) bei Fortführung des Vertrages selbst noch unbedingte oder bedingte Zahlungs- oder sonstige Leistungsverpflichtungen hätte.

☐ (5) Internationale Geschäfte

(A) Falls eine Partei verpflichtet ist oder verpflichtet sein wird, von einer durch sie zu leistenden Zahlung einen Steuer- oder Abgabenbetrag abzuziehen oder einzubehalten, wird sie die zusätzlichen Beträge an die andere Partei zahlen, die erforderlich sind, damit die andere Partei den vollen Betrag erhält, der ihr im Zeitpunkt einer solchen Zahlung zustehen würde, wenn kein Abzug oder Einbehalt erforderlich wäre. Dies gilt nicht, wenn die betreffende Steuer oder Abgabe vom Heimatstaat des Zahlungsempfängers oder einer in diesem Staat ansässigen Steuerbehörde auferlegt oder erhoben wird. Heimatstaat ist der Staat, in dem der Zahlungsempfänger seinen Sitz hat bzw. als ansässig angesehen wird oder in dem sich die Niederlassung des Zahlungsempfängers befindet, die unter dem betreffenden Einzelabschluss handelt.

(B) Falls aufgrund einer nach dem Abschlussdatum eines Einzelabschlusses erfolgenden Änderung von Rechtsvorschriften oder von deren Anwendung oder amtlichen Auslegung

a) zu erwarten ist, dass eine Partei am nächsten Fälligkeitstag in Bezug auf eine durch sie zu leistende Zahlung zusätzliche Beträge gemäß vorstehendem Unterabsatz (A) zu zahlen hat außer auf Zinsen gemäß Nr. 3 Abs. 4 oder

b) eine Partei den Vertrag nicht mehr erfüllen darf,

so kann diese Partei (nachstehend die „betroffene Partei" genannt) und im Falle b) auch die andere Partei (nachstehend die „Gegenpartei" genannt) den von der Änderung betroffenen Einzelabschluss unter Einhaltung einer Frist von zwei Wochen auf einen von ihr zu bestimmenden Termin kündigen; dieser Termin darf nicht mehr als einen Monat vor dem Zeitpunkt liegen, an dem die Änderung wirksam wird. Nr. 7 Abs. 3 bezieht sich im Fall einer solchen Kündigung nur auf den oder die betroffenen Einzelabschlüsse. Die Gegenpartei bzw. im Falle einer Kündigung durch die Gegenpartei die betroffene Partei kann jedoch innerhalb einer Woche nach Zugang der Kündigungserklärung durch Erklärung an die kündigende Partei bestimmen, dass die Kündigung für den Vertrag insgesamt gilt. Für die Form der Kündigung und der Erklärung nach Satz 3 gilt Nr. 7 Abs. 1 Satz 3.

(C) Im Falle einer Kündigung aufgrund eines der in Unterabsatz (B) genannten Kündigungsgründe gilt Nr. 8 mit folgender Maßgabe:

a) Ersatzberechtigte Partei ist die Gegenpartei. Nr. 12 Abs. 4, falls vereinbart, findet keine Anwendung.

b) Sind beide Parteien betroffene Parteien und erleidet eine von ihnen einen Schaden, so hat die Partei, die insgesamt einen Vorteil aus der Beendigung erlangt oder den kleineren Schaden erleidet, der anderen Partei einen Betrag in Höhe der Hälfte der Differenz zwischen Vorteil und Schaden bzw. zwischen dem größeren und kleineren Schaden zu zahlen. Diese Rechtsfolge tritt auch dann ein, wenn die Kündigung nach Unterabsatz (B) Satz 1 Buchstabe b) oder die Erklärung nach Unterabsatz (B) Satz 3 durch die Gegenpartei abgegeben wird.

c) Für Zwecke der Berechnung des eigenen Vorteils oder Schadens gilt in vorstehendem Fall b) jede Partei als ersatzberechtigte Partei.

(D) Für etwaige Rechtsstreitigkeiten oder sonstige Verfahren vor deutschen Gerichten bestellt der Vertragspartner hiermit die unter (F) oder gegebenenfalls in mindestens einem Einzelabschluss zu diesem Zweck benannte Person zum Zustellungsbevollmächtigten.

(E) Jede Partei verzichtet hiermit unwiderruflich darauf, in Verfahren betreffend sie selbst oder ihr Vermögen aufgrund etwaiger Souveränitäts- oder ähnlicher Rechte Immunität vor Klage, Urteil, Vollstreckung, Pfändung (sei es vor oder nach Urteilserlass) oder anderen Verfahren zu genießen oder geltend zu machen.

(F) Anschrift des Zustellungsbevollmächtigten in der Bundesrepublik Deutschland:

(6) Sonstige Vereinbarungen:

Unterschrift(en) der Bank	
Unterschrift(en) des Vertragspartners	

ANNEX D

INSTRUCTION LETTER

ROPES & GRAY
ROPES & GRAY
5 NEW STREET SQUARE
LONDON EC4A 3BF
UNITED KINGDOM
WWW.ROPESGRAY.COM

May 28, 2015

Professor Dr. Peter Mülbert
Fachbereich Rechts- und Wirtschaftswissenschaften
Johannes Gutenberg-Universitaet Mainz
55099 Mainz
Germany

Dear Professor

Re: Lehman Brothers Waterfall Application (Nos. 7942 of 2008) (Waterfall II)

We are sending this letter on behalf of CVI GVF (Lux) Master Sarl, Hutchinson Investors LLC, Burlington Loan Management Limited, and their relevant affiliates (together the **Senior Creditor Group**) and its contents have been approved by Freshfields Bruckhaus Deringer LLP and Schulte Roth & Zabel International LLP, their respective legal advisers. The Senior Creditor Group has authorised us to enter into this letter on their behalf, and we are authorised to bind the Senior Creditor Group to this letter.

The Senior Creditor Group would like to appoint you as an expert witness in this matter. This letter sets out the terms of your appointment (should you choose to accept them), contains your instructions and highlights your duties. Please read it carefully as it contains important information and then sign and return a copy to us indicating your agreement to its terms. Please be aware that we do not act as your legal representative, nor does any legal adviser to any member of the Senior Creditor Group.

1. TERMS OF APPOINTMENT

1.1 Although you are instructed by the Senior Creditor Group as an expert witness, your overriding duty as an expert is to help the court with matters within your expertise, and not to act as an advocate for the Senior Creditor Group. This means you must act with objectivity and independence in carrying out your instructions and are required to comply with the relevant provisions of the English Civil Procedure Rules (known as the **CPR**).

1.2 We enclose a copy of Part 35 of the CPR (**CPR 35**) and its Practice Direction (**PD 35**) together with a copy of the Guidance for the Instruction of Experts in Civil Claims 2014 produced by the Civil Justice Council (**Guidance**), which we hope you may find helpful in preparing your report. As much of this may be unfamiliar to you, please let us know if you do not understand any of these materials.

May 28, 2015

2. YOUR OBLIGATIONS AS AN EXPERT

2.1 By signing a copy of this letter you also agree that:

(a) you are representing that you have the relevant qualifications and experience to provide expert evidence in relation to this matter. If this is not the case please let us know immediately;

(b) you will use reasonable skill and care when carrying out your instructions;

(c) when instructed to report to the court, you will do so in compliance with the relevant requirements of the CPR and within any agreed time limit;

(d) when ordered to meet with an expert for an opposing party, you will conduct such meeting in accordance with the CPR;

(e) you will deal with written questions from an opposing party on any report you write within any time limit set by the court, any replies to such questions form part of your report or a supplemental report (as applicable);

(f) you will deal with all other matters promptly and, where appropriate, within any time limits agreed by us or set by the court;

(g) unless otherwise agreed, you will prepare a report at a cost proportionate to the sums in issue;

(h) you will make yourself available for court hearings, conferences and other meetings;

(i) you will preserve the confidentiality of all information supplied to you by us or by any member of the Senior Creditor Group or their legal advisers (including information supplied to you before the date of this letter) except to the extent that they are included in your final report(s);

(j) you have no conflict of interest in acting as an expert appointed by any member of the Senior Creditor Group in this matter. If and when further parties become involved in the dispute, we will inform you and you should confirm again (if applicable) that you do not have a conflict of interest.

(k) you will assist us in identifying the issues which need to be addressed;

(l) you will participate in a discussion between you and the expert for Wentworth (and if applicable, the expert for the Administrators) to identify and discuss the expert issues in the proceedings; and where possible, reach agreed opinion on those issues;

(m) you will contribute to an experts' joint statement; and

(n) if directed by the court you will give evidence in court concurrently with the expert for Wentworth (and if applicable, the expert for the Administrators) in accordance with CPR 35.11(1)-(4).

2.2 If you consider that you need further direction from the court to assist you with carrying out your functions as an expert, you may file a written request with the Court for directions. If you intend to file a request for directions, please discuss this with us immediately.

2.3 If you think that your obligations and duties as an expert under the CPR conflict with these instructions, you may consider withdrawing from your role as an expert in these proceedings. If you are considering withdrawing from your role as an expert, you must discuss this with us immediately.

2.4 If you do not comply with any of your obligations under the CPR, you could be faced with personal sanctions against you. These are described in the Guidance and we recommend you make yourself familiar with them.

3. COMPENSATION

3.1 You will provide us with an estimate of your fees and expenses if such an estimate is requested by the court. You should be aware that the court may limit the amount you are to be paid by reference to any estimate you give. It is important that you review your estimate regularly. If it seems likely that you may exceed your estimate, please let us know as soon as you become aware of this, and we will pass this information on to the Senior Creditor Group and, if necessary, the court.

3.2 You should be aware of the overriding objective of the CPR that courts deal with cases justly and that you are under an obligation to assist the court in this respect. This includes dealing with cases proportionately (keeping the work and costs in proportion to the value and importance of the case to the parties), expeditiously and fairly.

4. INSTRUCTIONS

(a) *Background to the matter*

4.1 We have set out below a brief summary of the procedural history, parties and German law issues involved in Waterfall II.

Procedural History

(a) Waterfall II involves an application to the English court by the administrators (**Administrators**) of Lehman Brothers International (Europe) (**LBIE**) on a number of questions that impact on the nature and extent of creditors' entitlements to a share in the surplus assets in LBIE's estate now that creditors' provable debts have been paid in full.

(b) LBIE was the English operating entity of the Lehman Brothers group. At the time of the global collapse of the Lehman Brothers group, LBIE was not balance sheet insolvent and the Administrators have found that there will be a large surplus of assets in the LBIE estate after repaying the provable claims of unsecured creditors. This surplus has led to the claims against LBIE trading well above par on the expectation that creditors will receive interest on their debts out of the surplus.

(c) The Waterfall I application (**Waterfall I**) concerned a number of questions on the ranking of various claims to the surplus assets in LBIE's estate (together with LBIE's shareholders' obligations to contribute to the debts of LBIE). The judgment in Waterfall I was handed down on 14 March 2014 (the **Waterfall I Judgment**). The Waterfall I Judgment was appealed by all parties, with the appeal recently heard by the Court of Appeal. Some of the parties have sought leave to appeal to the Supreme Court with respect to the decision of the Court of Appeal. It is too early to say whether that leave will be granted.

(d) The Waterfall II application was made in light of the failure of a proposal for the consensual resolution of claims to the surplus and to address issues not covered by Waterfall I on the nature and extent of creditors' entitlements to share in the distribution of the surplus. A copy of the Waterfall II application is included with these instructions as Annex I.

The Parties to Waterfall II

(e) The following entities were selected as respondents on the Waterfall II application:

(i) The Administrators (advised by Linklaters LLP);

(ii) Burlington Loan Management Limited, part of the DK group (**Burlington**);

(iii) CVI GVF (LUX) Masters SARL, part of the CarVal group (**CVI**);

(iv) Hutchinson Investors, LLC, part of the Baupost group (**Hutchinson**);

(v) Wentworth Sons Sub-Debt SARL, a joint venture comprising the US parent company Lehman Brothers Holdings Inc and the hedge funds King Street and Elliott (**Wentworth**); and

(vi) York Global Finance BDH LLC (**York**).

(f) As mentioned above, Burlington, CVI and Hutchinson are together referred to as the "Senior Creditor Group" although this title may be misleading because the funds hold ordinary unsecured (and not subordinated) claims rather than secured claims. They are arguing for a position that would maximise the returns to unsecured creditors (and so support arguments that would maximise the claims to post-administration interest). The members of the Senior Creditor Group hold between them exposures under swaps with LBIE documented under:

(i) English law governed and New York law governed ISDA Master Agreements;

(ii) French law governed FBF Master Agreements, AFB Master Agreements, AFTB Master Agreements and AFTI Master Agreements; and

(iii) German law governed German Master Agreements.

(g) Wentworth has purchased the subordinated debt owed by LBIE and also has an economic interest in the equity. It is therefore arguing for a position that would minimise claims to interest so that more of the surplus would flow to the subordinated debt and equity. It is advised by Kirkland & Ellis.

(h) York has a special interest because it bought a very large claim (referred to as the Liberty View claim) against LBIE that was only closed out and agreed last year. Broadly it supports the position of the Senior Creditor Group. It is advised by Michelmores LP.

The German Law Issues

(i) The key German law issues in the Waterfall II application (which deals with a number of issues in 39 detailed questions) are:

(i) whether, in calculating the amount of interest due under section 3(4) of the German Master Agreement, it is possible (and if so, in what circumstances and to what extent) to include an amount in respect of "further claims for damages" **(Damages Interest Claim)** so that this would constitute part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9) of the Insolvency Rules 1986 **(Issue 20)**; and

(ii) If the answer to Issue 20 is that a further claim for damages can be included as part of the "rate applicable to the debt apart from the administration" for the purposes of Rule 2.88(9), how in such circumstances is the relevant rate to be determined? In particular:

(A) in circumstances where the relevant claim under the German Master Agreement has been transferred (by assignment or otherwise) to a third party, is it the Damages Interest Claim which could be asserted by the assignor or the assignee which is relevant for the purposes of Rule 2.88(9)?

(B) where the relevant claim under the German Master Agreement has been acquired by a third party, in what circumstances (if any) is such a third party precluded from asserting a Damages Interest Claim under principles of German law?

(C) where does the burden of proof lie in establishing a Damages Interest Claim, and what is required to demonstrate, that a relevant creditor has or has not met such requirement?

(Issue 21)

(j) A summary of the other issues in the Waterfall II Application is enclosed, for reference only at Annex IX. We do not require you to consider these issues for the purpose of your report.

The requirement for German law expert evidence

(k) On 21 November 2014, the High Court made an order that the Senior Creditor Group and Wentworth may adduce and rely upon expert evidence for the purposes of assisting the court with determining (among other things) Issue 20 and Issue 21 (the **21 November Order**). Following the 21 November Order, Wentworth and the Senior Creditor Group together with the Administrators agreed a list of questions to be addressed by experts in relation to issues 19 to 26 (the **Agreed Questions**). The Agreed Questions include questions on Issue 20 and Issue 21 to be put to the parties' respective German law experts (the **German Law Questions**). The Senior Creditor Group would like you to provide your expert opinion on the answers to the German Law Questions. The Agreed Questions are included with these instructions in Annex II.

(l) On 7 May 2015 the High Court made orders that are applicable to the German law expert evidence (among others) (the **7 May Order**). Paragraphs 20-25 of the 7 May Order set out a timetable to which you must adhere. This timetable is described at paragraph 4.4 below. A copy of the 7 May Order is included in Annex VII to this letter.

(b) Documents provided

4.2 To assist you further in the preparation of your report, we enclose the following documents:

(a) the Waterfall II application, filed with the High Court of Justice on 12 June 2014 (provided in Annex I);

(b) the Agreed Questions (provided in Annex II);

(c) the ninth witness statement of Tony Lomas, one of the Administrators, which sets out the background to the Application as well as the issues regarding the construction of Rule 2.88 of the Insolvency Rules 1986 (see paragraph 40 ff) (provided in Annex III);

(d) the position papers of (i) the Administrators, (ii) the Senior Creditor Group, (iii) Wentworth and (iv) York (provided in Annex IV);

(e) the reply position papers of (i) the Senior Creditor Group, (ii) Wentworth and (iii) York (provided in Annex V);

(f) an extract from the skeleton argument of the Senior Creditor Group dealing with the construction of Rule 2.88 (provided in Annex VI);

(g) the 7 May Order (provided in Annex VII);

(h) a copy of the German Master Agreement and a standard form Confirmation (provided in Annex VIII); and

(i) a summary of the other issues in the Waterfall II application (provided in Annex IX).

(c) Outline of expert process and scope of work

4.3 The typical court process for expert witness evidence will involve some or all of the following events:

(a) drafting of expert reports;

(b) exchange of expert reports written by the Senior Creditor Group's, Wentworth's and (if applicable) the Administrators' respective expert witnesses;

(c) review of expert evidence served by Wentworth and (if applicable) the Administrators;

(d) drafting of expert reply reports which respond to issues raised by the other parties' expert witness in their first expert report;

(e) meeting of both parties' expert witnesses;

(f) joint statement by both parties' expert witnesses;

(g) drafting of a supplemental report by each party's expert witnesses if necessary; and

(h) attendance at court hearing.

4.4 In these proceedings, the following timetable has been set down by the Court:

(a) The trial will commence on **9 November 2015** and is expected to run for 7- 10 business days.

(b) Ahead of this trial date, the court has ordered that the parties and their German law experts comply with the timetable set out below. Each date specified is the deadline, that is the latest date on which the specified event may occur:

(i)	**10 July 2015**	Senior Creditor Group and Wentworth to file and serve reports of their respective German law experts
(ii)	**31 July 2015**	Senior Creditor Group's German law expert's reply report to Wentworth's German law expert report to be filed with the court
(iii)	**21 August 2015**	Administrators to file and serve on the Senior Creditor Group and on Wentworth a report of a German law expert (if they decide to appoint an expert)
(iv)	**21 September 2015**	Senior Creditor Group's, Wentworth's and (if applicable) the Administrators' respective German law experts to hold a discussion for the purpose of (i) identifying the issues (if any) in dispute between them; and (ii) reaching an agreement on those issues (where possible)

(v)	**12 October 2015**	A joint statement by the Senior Creditor Group's, Wentworth's and (if applicable) the Administrators' German law experts to be filed with the court. The joint statement must show (i) those issues on which the joint experts are agreed; and (ii) those issues on which the joint experts disagree and a summary of their reasons for disagreeing.
(vi)	**19 October 2015**	Senior Creditor Group, Wentworth and (if applicable) the Administrators to file any supplemental reports by their respective German law experts.

4.5 If the matter proceeds to trial, you may have to present oral evidence to the court, be cross-examined on your evidence and attend when the other party's expert witnesses give their evidence. In the unlikely event that you are called to give expert evidence orally in court, you could be required to attend court in London on any one or more of the trial days and we will not know which day until closer to the time

4.6 There is a mechanism for parties other than the Senior Creditor Group to pose questions to you. We will let you know when this is the case. The CPR includes an express requirement for written questions put to experts about their reports to be "proportionate".

(d) Your report

Duties in preparing the report

4.7 In addition to your overriding duty to the court, by signing a copy of this letter you agree to comply with PD 35 including the Guidance. In particular:

(i) your evidence will be an independent product uninfluenced by the pressures of litigation (for example you would express the same opinion if you were given the same instructions by another party);

(ii) you must aim to assist the court by providing an objective, unbiased opinion on matters within your expertise, and should not assume the role of an advocate;

(iii) you should consider all material facts, including those which might detract from your opinion (and your report should include reference to facts and materials which detract from your opinion as well as facts that support it);

(iv) when addressing questions of fact and opinion, you must be careful to keep the two separate. You must state clearly the facts (whether assumed or otherwise) upon which you base your opinions and you should have primary regard to these instructions. You must distinguish clearly between the facts that you know to be true and the facts that you assume;

(v) you should make it clear when a question or issue falls outside your expertise and when you are not able to reach a definite opinion, for example because you have insufficient information; and

(vi) if, after producing a report, you change your view on any material matter, this change of view should be communicated to all the parties without delay and, when appropriate to the court, so let us know immediately if this is the case.

Contents and timing of the report

4.8 We ask you to give your opinion on the basis of information provided to you on the German Law Questions. However as this matter proceeds, further instructions may be given to you. If so, these instructions will be in writing.

4.9 You are instructed to produce your report by **10 July 2015** in accordance with the timetable set out above. Any delay in producing your report may result in costs penalties or the court not admitting your evidence.

4.10 We remind you that your report should be addressed to the court and not to the Senior Creditor Group.

4.11 You agree that any expert report you produce will include the additional information or statements set out below:

(i) a statement that you understand your duty to the court and have complied and will continue to comply with this duty.

(ii) a statement that you are aware of the requirements of CPR 35, PD 35 and the Guidance.

(iii) the substance of all material instructions from us, whether written or oral, on the basis of which your report was written. We will assist you with this as it is essential that this statement is as complete and as accurate as possible.

(iv) your report must contain a statement of truth in the following form:

"*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.*"

4.12 In addition to the matters set out above, in order to comply with paragraph 3.2 of PD 35, your report should also contain the following:

(i) details of your qualifications;

(ii) details of any literature or other material on which you have relied in making the report;

(iii) a statement on who carried out any examination, measurement, test or experiment which you have used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under your supervision;

(iv) where there is a range of opinion on the matters dealt with in the report, a summary of the range of opinion, and reasons for your own opinion;

(v) an indication of which of the facts stated in the report are within your own knowledge;

(vi) a summary of the conclusions reached; and

(vii) if you are not able to give your opinion without qualification, state the qualification.

5. GENERAL

5.1 The terms of this letter and any non-contractual obligations arising out of or in connection with this letter shall be governed by English law. The English courts have exclusive jurisdiction to settle any dispute arising out of or in connection with the terms of this letter and the parties submit to the exclusive jurisdiction of the English courts.

5.2 Please inform us before accepting these instructions if you do not consent to any of the above. Please also let us know as soon as possible if any of your details set out above are incorrect or change.

We look forward to working with you.

Yours faithfully,

Ropes & Gray International LLP.

Ropes & Gray International LLP