

DR. IUR. H. C. GERHARD STRATE
KLAUS-ULRICH VENTZKE

RECHTSANWÄLTE

An die
Staatsanwaltschaft Hamburg
z. Hdn. Herrn Staatsanwalt **Gies**
Gorch-Fock-Wall 15
20355 Hamburg

Hamburg, am 24.11.2009/gs

Betr.: Ermittlungsverfahren gegen Verantwortliche der HSH Nordbank AG

Ihr Aktenzeichen: 5550 Js 4/09

Sehr geehrter Herr Staatsanwalt Gies,

beigefügt übersende ich Ihnen ein „Internal Memorandum“ sowie eine daran angehängte Email eines Partners der britischen Anwaltskanzlei Norton Rose vom 8.10.2008. Das „Internal Memorandum“ trägt kein Datum, muss aber – das ergibt sich aus dem Inhalt – nach der von der ISDA am 10.10.2008 durchgeführten „Auction“ erstellt worden sein. Möglicherweise findet sich das Datum auf einem Deckblatt oder auf der (mir ebenfalls nicht vorliegenden, aber in der Kopfzeile erwähnten) „Distribution List“.

Der Inhalt der Stellungnahme ist eindeutig: Unter keinem rechtlichen Gesichtspunkt wäre die HSH Nordbank verpflichtet gewesen, an Goldman Sachs irgendwelche Zahlungen zu leisten, nachdem der Zeitpunkt für die späteste Mitteilung der „Credit Event Notice“ im Hinblick auf die Insolvenz von Lehman Brothers verstrichen war.

Auch die beigelegte Email des Norton-Rose-Partners Laurence Garside vom 8.10.2008 ist unmissverständlich.

Nach den mir vorliegenden Informationen soll Norton Rose im Oktober 2008 noch auf eigenem „Letterhead“ eine kurze Stellungnahme abgegeben haben, welche im Ergebnis gleichen Inhalts ist wie die Email. Diese Stellungnahme liegt mir zur Zeit allerdings noch nicht vor.

Mit freundlichen Grüßen!



(Gerhard Strate)

HSH NORDBANK

INTERNAL MEMORANDUM

London Branch

To: See: Attached distribution list
From: Michael McNicholas – Legal Counsel - BU Legal
Subject: Goldmans Sachs USD 50m CDS Lehman Bros

Michael McNicholas
 michael.mcnicholas@hsh-nordbank.co.uk
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Summary:

HSH Nordbank, as of 4 October 2008, is under absolutely no obligation to pay any part of the USD 50m in Credit Protection in respect of the default/insolvency of Lehman Brothers under the Goldman Sachs Credit Default Swap ("CDS") dated 13/07/2009. The "Conditions to Settlement" have not been satisfied (and cannot be satisfied retrospectively).

The reasoning behind this conclusion is as follows. Goldmans has failed to deliver the Credit Event Notice within 14 calendar days of the Termination Date (being 20 September 2008) as required by the documentation (see: sections 1.9 and 3.2 of the 2003 ISDA Definitions). It is a requirement under Section 3.1 of the CDS terms that the "Conditions to Settlement" be satisfied for payment to be due – one of which conditions is the obligation for delivery of the Credit Event Notice during the "Notice Delivery Period" by the "Buyer" – Goldman Sachs. This condition has not been satisfied – therefore we do not have any legal requirement to pay the USD 50m in credit protection referenced in the CDS which would have otherwise been payable prior had the notice been delivered on or prior to 4 October 2008.

This advice has been verified with external legal counsel, Norton Rose, through their credit derivatives team. They concur with this analysis and consider our position to be 100% correct. If Goldmans were to commence legal action in the English courts (who would have jurisdiction under the terms of this contract) they would have no reasonable prospects of success.

Background/ Facts – the Goldmans CDS:

HSH Nordbank AG (London Branch) has entered into a CDS transaction with Goldman Sachs International (as credit protection buyer) for a notional USD 50m referencing Lehman Brothers Holding Inc. The DTCC terms apply which incorporate the ISDA 2003 Credit Derivative Definitions. The contract falls under the umbrella of the ISDA Master Agreement signed with Goldman Sachs International Inc.

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 VAT Reg No:GB 524 8958 23

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 Trade Register:
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 Kfz HRB 6127 Kfz

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The trade as placed via the DTCC platform and was confirmed by our back-office on the following terms:

PARTY A (Seller):	HSH Nordbank AG
PARTY B (Buyer):	Goldman Sachs International
Reference Entity:	Lehman Brothers Holding Inc.
Notional:	USD 50,000,000
Confirmation Date:	07/13/2007
Effective Date:	07/04/2007
Scheduled Termination Date:	09/20/2008

As of 15 September 2008 Lehman Brothers Holdings Inc. filed for insolvency protection in the US under Chapter 11 of the US Bankruptcy Code. This constitutes a "Credit Event" under the standard CDS terms applicable here. This is obviously bad news for HSH Nordbank – if the Credit Event had occurred 5 days later the Termination Date would have been reached and HSH Nordbank would no longer be required to pay the USD 50m in credit protection to Goldman Sachs.

Back-Office Action

In accordance with normal operating procedures the legal department has been asked to assist back-office and front-office departments in dealing with the effects of the insolvency of Lehman Brothers – including the settlement of trades where Lehman Brothers was either a counterparty or a Reference Entity. This included dealing with all the DTCC trades – including the Goldman trade referencing the USD 50m of Credit Protection written on Lehman Brothers.

Settlement of the CDS Positions

HSH Nordbank has received other "Credit Event Notices" as required under the various swaps it had entered into with other counterparties referencing Lehman Brothers as a Reference Obligation. However, it has been noticed that Goldmans had not provided the required Credit Event Notice as expected and internally a question was asked how this could be the case.

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Kiel HRB 8127 KI

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Legal Analysis

The ISDA 2003 Credit Derivatives Definitions are incorporated, via the DTCC terms, into all trades done via DTCC (including the Goldmans trade at issue). Therefore the analysis is straight-forward.

Article III – Conditions to Settlement, sets forth those conditions.

Section 3.1 stipulates that:

Upon the occurrence of a Credit Event applicable to a Credit Derivative Transaction and satisfaction of ALL of the Condition to Settlement with respect to such Credit Derivative Transaction, the parties shall perform the respective obligations in accordance with the applicable Settlement Method.

Section 3.2 states:

(a) "Conditions to Settlement" means . . . Credit Event Notice. . .

(b) The "Credit Event Notice Condition to Settlement" may be satisfied as follows:

- (i) If "Buyer" is specified in the related Confirmation as the Notifying Party, by the delivery of the Credit Event Notice by Buyer to Seller that is effective during the Notice Delivery Period.

Section 1.8

"notice Delivery Period" means the period from and including the Effective date to and including the date that is fourteen calendar days after (a) the Scheduled Termination Date. . .

Section 1.8 goes on to provide some later dates (i.e. Grace Period Extension Date, Repudiation/Moratorium Evaluation Date) however these have no application here.

There are no other provisions applicable under the CDS Terms.

Our internal analysis (Ed Pope and Michael McNicholas) has been verified by our external legal counsel, Norton Rose (see e-mail from Laurence Garside dated 08/10/2008) and we are absolutely confident of our analysis and the strength of HSH Nordbank's position. We have considered the likely arguments against our analysis – that being that if this matter were litigated a court may likely not, in relation to some types of contracts (e.g. a Loan Agreement) allow a party to rely on a term which would permit that party to avoid a payment obligation on a "technical point" – for example, relating to an arbitrary deadline which was missed because

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of a trivial and administrative error. However the market in which credit risk is traded between banks (as here under the DTCC platform) and the terms upon which a Credit Default Swap is documented (under the ISDA terms) are very specifically defined in very precise terms – and in relation to deadlines, to the minute. The requirement that the Credit Event Notice be given within the "notice Delivery Period" is a core or fundamental term and will be enforced as such by an English court.

Nevertheless, we can expect that Goldmans will make legal and commercial threats when they discover their error however Goldmans has no legal grounds upon which it could claim that a credit protection payment is due. Regardless, this contract has expired and HSH Nordbank has no obligation to make a Credit Default Payment.

ISDA Lehman's Auction Protocol (10 October 2008)

It should be noted that we cannot adhere to the Settlement Protocol for Lehman's as proposed by ISDA. If HSH Nordbank were to adhere to the terms of this protocol we would potentially be agreeing to pool our claims and the above analysis would not apply. As such it is important that we do not sign-up to the protocol. Further more if there are any inquiries why HSH is not adhering to the protocol no answers or comments should be given.

The reason why Goldmans has not delivered this notice defies explanation – the only possible explanation can be is that there has been a massive administrative error in Goldmans back office. Another factor may be that there is an expectation that we will adhere to the ISDA proposed Lehman Settlement Protocol which most market participants are signing-up to so to avoid the logistical and valuation problems associated with bi-lateral settlement. Nevertheless, whatever the reason for their failure to deliver the reasons for their failure to deliver notice is a moot point because the ISDA documentation is very clear – the notice must be delivered within the "Notice Delivery Period". If not delivered the deal is cancelled and all remaining obligations are terminated.

CONCLUSION

As of 4 October 2008 HSH Nordbank is under no obligation to pay the USD 50m in Credit Protection referenced on the Goldman Sachs Credit Default Swap. The "Conditions to Settlement" have not been satisfied and cannot be satisfied retrospectively.

Goldmans obligation to deliver the Credit Event Notice within 14 calendar days of the Termination Date is clear and unambiguous and if our decision is legally challenged in the English courts Goldmans has no prospect of success.

Michael McNicholas
Legal & Compliance – London Branch
HSH Nordbank AG

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"Garside, Laurence"
<Laurence.Garside@norton
rose.com>
08/10/2008 17:40

To <Michael.McNicholas@hsh-nordbank.co.uk>
cc <Edouard.Pope@hsh-nordbank.co.uk>,
<Julian.Fernandes@hsh-nordbank.co.uk>
bcc

Subject RE: CDS Termination



Mike/Ed,

Following my telcon earlier with Ed, I have had a fairly quick look through the documentation provided. As discussed with Ed, it is certainly the case that generally in order to claim under a CDS a Credit Event Notice must be served within 14 days of the Scheduled Termination Date (assuming none of the exceptions in the definition of Notice Delivery Period applies, which appears to be the case here) and that this 14 day period has expired here given that the Scheduled Termination Date was 20 September 2008.

Unless and until Goldmans do try to present a claim in respect of this trade, the above is probably sufficient for your present purposes but let me know if I can assist further.

Best regards

Laurence

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-----Original Message-----

From: Michael.McNicholas@hsh-nordbank.co.uk
[mailto:Michael.McNicholas@hsh-nordbank.co.uk]
Sent: 08 October 2008 12:12
To: Garside, Laurence
Cc: Edouard.Pope@hsh-nordbank.co.uk; Julian.Fernandes@hsh-nordbank.co.uk
Subject: CDS Termination

Laurence -- could we have a quick word urgently in relation to the attached trade.

If I am not here please call Ed on 0207 382 5052

(See attached file: Confirmation.pdf) (See attached file: Appendix B-1.pdf)

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