

## decision

### AMSTERDAM DISTRICT COURT

Private law division

Case number / application number 534587 / FT RK 13-136

### Decision of 24 January 2013

on the appeal against the decision of 6 December 2012 of the supervisory judge in the bankruptcy of Lehman Brothers Treasury Co. B.V.,

brought by **LEHMAN BROTHERS FINANCE SA (in liquidation)**, with registered office, or principal place of business in Zürich (Switzerland), lawyer R.J. van Galen in Amsterdam.

#### 1. Proceedings

1.1. The appeal from Lehman Brothers Finance SA (in liquidation) (hereinafter: LBF) was received at the registry on 21 January 2013. It was heard on 24 January 2013. Appearing besides LBF were Lehman Brothers Treasury Co. B.V. (hereinafter: LBT), the trustees in the bankruptcy of LBT, and the stakeholders listed in the report of the hearing.

1.2. The decision has been scheduled for today.

#### 2. Facts

2.1. LBT has issued a number of financial instruments, including so-called *Notes* under the *Euro Medium Term Note Program*, the *German Note Issuance Program*, the *Swiss Certificates Program* and the *Italian Inflation Linked Notes Program*. These instruments - in any case to the extent that LBF participated in them - were issued to Lehman Brothers International (Europe) (in administration) (LBIE). LBIE is an English company belonging to the Lehman group, which holds the Notes for, among others, LBF as beneficial owner. LBIE is therefore the so-called "Direct Participant", while LBF as "Noteholder" is a so-called "Ultimate Beneficial Owner" (UBO).

2.2. The total amount of the claim LBF allegedly has against LBT is approximately USD 4.6 billion, of which approximately USD 1 billion consists of claims under the Notes. LBF's 'ordinary' claim has been disputed by the trustees of LBT.

2.3. On 30 November 2012, the website of LBT ([www.lehmanbrotherstreasury.com](http://www.lehmanbrotherstreasury.com)), on which always all relevant information on (the progress of) the bankruptcy is published, contained a *draft Composition Plan* (draft agreement regarding the bankruptcy). Attached as an annex to the Composition Plan was a Consent Solicitation Memorandum (CSM), in which the procedure is described that Direct Participants should follow in order to enable the UBOs to vote on the proposed composition plan.

2.4. By the above-mentioned decision, the supervisory judge ruled, to the extent relevant in this context:

- claims must be filed with the bankruptcy trustees on or before 25 January 2013;
- the CSM and its provisions with regard to, among other things, the filing of claims, the submission of voting instructions with regard to the composition plan and the manner of representation at the claims admission meeting, apply to creditors that wish to file a claim arising out of financial instruments issued by LBT in accordance with the *Euro Medium Term Note Program*, the *German*

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*Note Issuance Program, the Swiss Certificates Program and the Italian Inflation Linked Notes Program* (as defined in the CSM), jointly: 'Noteholders';

- the claims admission meeting will be held on 7 March 2013;
- in view of, among other things, the complexity and large number of financial instruments issued by LBT and as traded on a global scale, the large number of institutions involved in directly or indirectly holding (interests in) those instruments, and the differences in the laws that are applicable to and the legal structures in which those instruments are held, the determination whether the consent, required for the acceptance of the composition plan has been obtained from Noteholders, shall start from the information obtained on the basis of the procedures provided for in the CSM;
- for the application of Article 109 and Article 115 of the Dutch Bankruptcy Act in respect of the Noteholders, it is sufficient for the Bankruptcy Trustees to send a single (electronic) notification through the clearing systems.

2.5. A notice sent by the trustees on 6 December 2012 by electronic means through the clearing systems to the Noteholders, including LBF, the *Notice from Lehman Brothers Treasury Co. B.V.* ("LBT") in bankruptcy of the same date, reads:

*"Explicit reference is made to the public reports and other information available on the website [www.lehmanbrotherstreasury.com](http://www.lehmanbrotherstreasury.com) (the "LBT Website").*

*The Bankruptcy Trustees hereby advise that the Supervisory Judge has set the Claims Filing Date for 25 January 2013 and the date for the Claims Admission Meeting for 7 March 2013.*

*LBT will offer a composition plan ("**Composition Plan**") to its ordinary non-preferred creditors ("**Ordinary Creditors**"). A draft Composition Plan dated 30 November 2012 is available on the LBT Website as an annex to the fourteenth interim report of the same date. The Composition Plan will be formally offered to Ordinary Creditors on 10 December 2012 and will be deposited with the Amsterdam District Court registry and made available on the LBT Website. The consent period, in which LBT will be soliciting voting instructions from Ordinary Creditors, will commence on 10 December 2012 and expire on 25 January 2013 at 6pm CET.*

*With respect to claims arising from Notes issued by LBT, only persons or entities that are shown in the records of a clearing system as holders of particular nominal amounts of Notes ("**Direct Participants**") can file claims and vote on the Composition Plan. Reference is made to the procedures and requirements related to the filing of claims and submission of voting instructions set out in the Consent Solicitation Memorandum, attached as annex II to the Composition Plan.*

*The Bankruptcy Trustees will deposit lists of provisionally admitted and provisionally disputed claims with the Amsterdam District Court registry no later than seven days before the Claims Admission Meeting.*

*Noteholders that do not qualify as a Direct Participant are recommended to contact the relevant Direct Participant or intermediary institution through which their Notes are held and to consult the "UBO Information Memorandum" available on the LBT Website."*

LBF has received this notice and has submitted it in the proceedings as exhibit IV.

2.6. The final *Composition Plan* and the accompanying *Consent Solicitation Memorandum* were posted on the LBT Website on 10 December 2012. The pages 4-5 of the *Composition Plan* state (both in the draft version of 30 November 2012 and in the final version of 10 December 2012):

**"NOTEHOLDERS ARE REQUESTED TO READ CAREFULLY THE CONSENT SOLICITATION MEMORANDUM"**

*The Supervisory Judge has approved the filing and voting procedures as described and laid down in the Consent Solicitation Memorandum".*

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Also in the heading of the CSM (both in the draft version of 30 November 2012 and in the final version of 10 December 2012) it is stated that the CSM has been approved by the supervisory judge.

2.7. The decision of the supervisory judge was posted on the LBT Website on 17 December 2012.

### 3. The request

3.1. LBF requests the district court to declare its motion inadmissible, because the decision is non-existent, or in any case void, or reverse the decision of the supervisory judge and provide that the Noteholders - where the submission of claims, the giving of instructions regarding the vote on the composition plan and the representation method at the first creditors' meeting are concerned - are not subject to the CSM, but to the provisions of the Bankruptcy Act.

3.2. Briefly stated, LBF substantiates this as follows. The decision of the supervisory judge was not based on any statutory provision. The decision was not sent to the relevant parties, the Noteholders. In his decision, the supervisory judge bound the Noteholders to the CSM without there being any legal basis for this. The decision is unclear and unacceptably affects the rights of Noteholders.

### 4. The assessment

4.1. The trustees and LBT have in the first place put forward that LBF has exceeded the period of five days stipulated in Article 67 paragraph 1 Dutch Bankruptcy Act and that its appeal should therefore be disallowed. The district court will assess this defence first.

4.2. It is an established fact that the supervisory judge has given the decision contested by LBF on 6 December 2012 and that the appeal against it was not brought by LBF until on 21 January 2013. It is therefore also an established fact that the period of five days for appeal as stipulated by Article 67 paragraph 1 Dutch Bankruptcy Act has been significantly exceeded. LBF's appeal should therefore be disallowed, unless it did not know and could not reasonably know, due to an error of the district court, that the supervisory judge had given a decision, and the decision was not sent to it until after the period for bringing an appeal. Contrary to what LBF asserts, this is not the case here. In the opinion of the district court, LBF knew or should have known on 6 December 2012 that the supervisory judge had approved the CSM, based on the following facts and circumstances.

4.3. It has not been disputed by LBF that it received on 6 December 2012 the *notice* of the same date, quoted in 2.3 above.

In the first paragraph of that *notice*, reference is made to the public reports and other information on the website [www.lehmanbrotherstreasury.com](http://www.lehmanbrotherstreasury.com) (the "LBT Website"). In the second paragraph of that *notice*, it is stated that the supervisory judge has set the claims filing date and the date for the claims admission meeting (25 January 2013 and 7 March 2013, respectively).

It is then stated that LBT will offer a composition plan and that this composition plan will be filed with the Amsterdam district court on 10 December 2012 and will be published on the LBT website. It is also stated that a draft composition plan can already be consulted on the website.

It is also stated in the *notice* that LBT "*will be soliciting voting instructions*" in the period from 10 December 2012 to 25 January 2013 (18:00). It is stated at the bottom of page 4 of the *Composition Plan*, in large bold letters "*Noteholders are requested to read carefully the Consent Solicitation Memorandum*" and immediately thereafter (at the top of page 5) that the supervisory judge has consented to the submission of the claims and voting procedure referred to in the CSM. The CSM is an annex to this *Composition Plan*. It is stated on the first page of this CSM in large letters that the supervisory judge has approved the CSM.

LBF knew or could have known all this on 6 December 2012. It is true that it is not explicitly stated in the *notice* that the supervisory judge had decided that voting at the claims admission meeting will take place in compliance with the CSM, but based on all the aforementioned data, this could certainly be clear to a reasonably attentive creditor. Also relevant in this context is that creditors

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may be expected to be alert in view of the brief periods for appeal (prompted by the striving for liquidation of bankruptcies in an expeditious manner). If it would be assumed that a creditor may not rely on the draft composition plan with the accompanying CSM, but only on the final version - whose posting on the website was announced for 10 December 2012 in the *notice* quoted in 2.3 above (and which was actually posted on that date) - it means that LBF could in any case have known at that time that the supervisory judge had approved the CSM, so that the five-day period for appeal in any case started running at that moment. In short, LBF knew or could reasonably have known on 6 December 2012 (or in any case on 10 December 2012), that the supervisory judge had approved the CSM. That approval is the decision it contests, meaning that the appeal period started running on 6 December 2012, or in any case on 10 December 2012.

4.4. That LBF did not have the exact text of the decision on 6 December 2012 or 10 December 2012, does not make this different, since it could (and should) have inquired after this with the trustees or the supervisory judge, as can be expected from a creditor that knows that a decision has been taken against which it wishes to bring an appeal, without knowing how the text of that decision reads. In addition, LBF did not need the text of the decision of the supervisory judge to bring an appeal; the appeal would also have been allowed if LBF had declared (within the appeal period) to appeal against the decision of the supervisory judge, by which the CSM was approved, that had become known to it on 6 December 2012 or 10 December 2012.

4.5. Based on the above, it is concluded that LBF's appeal must be disallowed.

**5. The decision**

The district court:

- declares that LBF's appeal is disallowed.

Given by *mr* J.A.J. Peeters, *mr* R.H.C. Jongeneel and *mr* A.P. Schoonbrood-Wessels and pronounced in public on 24 January 2013.

[In the absence of *mr* Peeters signed by *mr* Jongeneel]