Friday, 28 October 2011

No. 300/2011.

Arrowgrass Distressed Opportunities Fund Limited

Arrowgrass Master Fund Ltd.

CIG & Co Conseq Invest plc

Conseq Investment Management AS

CVI GVF (Lux) Master S. à r. l.

Fondo Latinoamericano de Reservas (F.L.A.R)

GLG European Distressed Fund

GLG Market Neutral Fund

ING Life Insurance and Annuity

ING USA Annuity and Life Insurance Co.

LMN Finance Ltd.

Lyxor/Third Point Fund Limited

Monumental Life Insurance Company

National Bank of Egypt (UK) Limited

Ohio National Life Assurance Corporation

PHL Variable Insurance Company

Phoenix Life Insurance Company

Reliastar Life Insurance Company

Security Life of Denver Insurance

Sun Life Assurance Company of Canada

Third Point Partners LP (US)

Third Point Offshore Master Fund LP

Third Point Partners Qualified LP

Third Point Ultra Master Fund LP (Cayman)

Värde Fund LP

Värde Fund V-B LP

Värde Fund VI-A LP

Värde Fund VII-B LP

The Värde Fund VIII LP

The Värde Fund IX LP/The Värde Fund IX-A LP

Värde Investment Partners LP

Värde Investment Partners (Offshore) Master LP

(Ragnar Aðalsteinsson, Supreme Court attorney)

Bayerische Landesbank

Bremer Landesbank

Commerzbank AG

Commerzbank International SSA

Erste Europäische Pfandbrief- und

Kommunalkreditbank AG

Eurohypo AG

DekaBank Deutsche Girozentrale

DekaBank Deutsche Girozentrale Luxembourg SA

Deutsche Postbank International SA

Düsseldorfer Hypothekenbank AG

DZ BANK AG Deutsche Zentral

Genossenschaftsbank

Landesbank Baden-Württemberg

LBBW Luxembourg SA

Deutsche Hypothekenbank AG

Raiffeisenbank International AG

Österreichische Volksbanken AG

Sparkasse Oberhessen

Taunus-Sparkasse

Sparkasse Pforzheim Calw

Sparkasse-Jena-Saale-Holzland

Sparkasse Hannover

Nassauische Sparkasse

Anstalt des öffentlichen Rechts

Kreissparkasse Peine Die Sparkasse Bremen AG

Sparkasse Oder-Spree

(Arnar Þór Jónsson, Supreme Court Attorney)

Deutsche Bank Trust Company Americas and

(Eyvindur Sólnes, Supreme Court Attorney)

Landsbanki Guernsey Ltd.

(Gunnar Jónsson, Supreme Court attorney)

v

Landsbanki Íslands hf. and

(Herdís Hallmarsdóttir, Supreme Court attorney)

Gemeente Alphen aan den Rijn

(Andri Arnason, Supreme Court attorney)

and

Landsbanki Íslands hf. and

(Herdís Hallmarsdóttir, Supreme Court attorney)

Gemeente Alphen aan den Rijn

(Andri Arnason, Supreme Court attorney)

v

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Nassauische Sparkasse

Anstalt des öffentlichen Rechts

Kreissparkasse Peine

Die Sparkasse Bremen AG

Sparkasse Oder-Spree

(Arnar Þór Jónsson, Supreme Court Attorney)

WGZ Bank Luxembourg SA

Landesbank Berlin AG

Deutsche Postbank AG

Caixa Geral de Depositos

The Royal Bank of Scotland plc.

ABN AMRO Bank NV, London Branch

Sparkasse zu Lübeck AG

Vereinigte Sparkassen im Landkreis Weilheim

KfW Bankengruppe

Arrowgrass Special Situations S. à r. l.

Skiki ehf.

Blómstri ehf.

Íslenska útflutningsmiðstöðin hf.

Óttar Yngvason Rakel Óttarsdóttir

(no one)

Deutsche Bank Trust Company Americas and

(Eyvindur Sólnes, Supreme Court Attorney)

Landsbanki Guernsey Ltd.

(Gunnar Jónsson, Supreme Court attorney)

Appeal. Financial undertakings. Winding-up. Priority of claim. Priority claim. Deposit. Loan contract. Constitution. Property rights. Retroactivity. Non-discrimination. Proportionality. European Convention on Human Rights. Limits of legal applicability. Contractual interest. Penalty interest. Dissenting opinion.

A and others appealed a Ruling by the Reykjavík District Court where a claim of the Dutch local authority GAR was deemed to be a deposit and recognised as a priority claim with reference to Art. 112 of Act No. 21/1991, on Bankruptcy etc., in the winding-up of the bank

LÍ hf. The claim was recognised with contractual interest from 28 August 2008 to 10 October the same year and with 6% penalty interest annually on EUR 3,017,630 from that date until 7 April 2009 and on EUR 2,996,743 from that date until 22 April the same year. For their part, GAR and LÍ hf. appealed the Ruling of the District Court due to disagreement on interest and costs. The plaintiffs based their case on various premises, among them that they had suffered losses resulting from the adoption of Act No. 125/2008, on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc., and that provisions in this Act were in violation of the Constitution of Iceland and specifically cited international conventions to which Iceland had acceded. On this aspect, the Supreme Court's verdict stated that this case and ten additional cases tested the constitutionality of Art. 6 of Act No. 125/2008. In one of these cases, Supreme Court Case no. 340/2011, the plaintiffs based their case on the same premises as was done in this case concerning the flaws in Act No. 125/2008, in which a verdict had been pronounced earlier that same day. Section II of the above-mentioned Supreme Court verdict gave an account of the substance of Act No. 125/2008, quoting Art. 6 thereof, which was disputed in particular by the parties and which had altered the order of ranking of claims upon the winding-up of financial undertakings, making deposit claims priority claims with reference to Art. 112 of Act No. 21/1991. This same section of the verdict described the takeover by the Financial Supervisory Authority of the country's three largest commercial banks directly following the adoption of the Act, including the defendant LÍ hf., and the establishment of new banks on the basis of the older ones. Finally, this section of the verdict explained the views of the plaintiffs regarding the constitutional flaws of Act No. 125/2008 which should result in its being disregarded in resolving this case, together with the opposing views of the defendants in the case, who were of the opinion that the Act complied both with the Icelandic Constitution and international agreements to which Iceland had acceded. Section III of the above-mentioned verdict gave an account of the interpretative sources for the Bill which had become Act No. 125/2008, to the extent this was relevant for resolution of the parties' dispute. It furthermore explained that at the end of 2008, Act No. 142/2008, on Investigation of the Causes of and Events Leading to the Collapse of the Icelandic Banks in 2008 and Related Events, had been adopted, and those conclusions of the parliamentary Special Investigation Commission which were of significance here. Section IV of the above-mentioned verdict then resolved the dispute on the constitutionality of Act No. 125/2008, rejecting the plaintiffs' contentions that the Act violated the Constitution and international agreements. The discussion in sections II and III of the Supreme Court's verdict in case no. 340/2011 applied equally in the case to be resolved here, as did furthermore the conclusions in section IV of the verdict. General considerations discussed there also applied in this case. Accordingly, the plaintiffs' contentions in this case, that the Act did not comply with the Constitution and international agreements, were rejected.

The Supreme Court next examined the question of whether the transaction of GAR and LÍ hf. could be regarded as a deposit in the sense of Act No. 98/1999, on Deposit Guarantees and an Investor-Compensation Scheme. According to the third paragraph of Article 102 of Act No. 161/2002, on Financial Undertakings, the same rules shall apply to the winding-up of a financial undertaking as apply to the priority of claims against an insolvent estate. However, claims for deposits, as provided for in Act No. 98/1999, enjoy priority with reference to the first and second paragraphs of Article 112 of Act No. 21/1991. A deposit as referred to in the first paragraph of Article 9 of Act No. 98/1999 was, according to the third paragraph of the provision [sic], any credit balance resulting from financial deposits or transfers in normal banking transactions, which a commercial bank or

savings bank is under obligation to refund under existing legal or contractual terms. The Supreme Court then described the legal relationship between the local authority and LÍ hf. in connection with those funds that the local authority had placed with the bank and the Court concluded that, in accordance with what was presented there and in other respects with reference to the appealed Ruling, the conclusion of the Ruling should be upheld, that the local authority had a deposit with the bank which should be regarded as a deposit in accordance with the third paragraph of Article 9 of Act No. 98/1999, and that this deposit should enjoy guarantee protection as provided for by that Act. As a result, the claim lodged by the local authority should enjoy priority with reference to Art. 112 of Act No. 21/1991 in the bank's winding-up. Also with reference to the premises of the Supreme Court's verdict in case no. 340/2011, as well as to the premises of the appealed Ruling, the conclusion was accepted in this case that the minimum deposit guarantee provided for in the first paragraph of Article 10 of Act No. 98/1999, made no difference to the fact that the insured deposit in its entirety enjoyed priority with reference to Art. 112 of Act No. 21/1991.

The Supreme Court next turned to the dispute between GAR and LÍ hf. on interest. The Supreme Court's verdict accepted that the law of that country should be applied with which the agreements on the deposits had the strongest connections, cf. the first paragraph of Article 4 of Act No. 43/2000 on the limits of legal applicability in the law of contracts; in the estimation of the Court the contract in this sense had the strongest connections with the Netherlands. The Amsterdam branch of LÍ hf. had published a notification on its website on 8 October 2008, or two days before the branch should have repaid the deposit to the local authority. It stated, inter alia, that it regretted having to announce that "Icesave" could no longer fulfil its obligations "as a savings bank" after its parent company, LÍ hf., had encountered serious difficulties. The notification by the Amsterdam branch of LÍ hf. was, in accordance with its address, definitely directed to those customers of the branch which had deposits in so-called Icesave accounts. The activities of the branch, however, had consisted of accepting both retail and wholesale deposits. When this was borne in mind, regard was had for the events leading up to the publication of this notification on the website, and its contents were viewed in their entirety in view of the activities and operating authorisations of the branch, it must be concluded that it should have been evident to all the branch's depositors, including the owners of wholesale deposits, from the message conveyed by the notification that the bank's branch would not fulfil its obligations towards them on the due date. The basis was therefore that GAR was entitled, with reference to subparagraph c of section 6:83 of the Dutch Civil Code (Burgerlijk Wetboek), cf. subparagraph b of the first paragraph of section 6:80 of the same code, to penalty interest on its claim based on section 6:119 of the same code from 10 October 2008 until 22 April 2009, as it could not be concluded that this premise of the local authority was presented too late for its right to penalty interest to be supported by section 6:83 of the said code. The Supreme Court then rejected GAR's claim that the costs incurred by the local authority be recognised as a priority claim in the winding-up of LÍ hf. In accordance with all of the above, the outcome of the case was that GAR's claim in the amount of ISK 523,480,019 was recognised with priority with reference to Art. 112 of Act No. 21/1991.

Supreme Court Verdict

This case is judged by Supreme Court Judges Ingibjörg Benediktsdóttir, Garðar Gíslason, Gunnlaugur Claessen, Jón Steinar Gunnlaugsson and Þorgeir Örlygsson, and

Eggert Óskarsson, District Court Judge, and Hjördís Hákonardóttir, former Supreme Court Judge.

The plaintiffs referred the case to the Supreme Court in an appeal of 15 April 2011, received by the Court together with appeal documents on 17 May that same year. Appealed is a Ruling by the Reykjavík District Court of 1 April 2011, recognising the claim of the defendant, the Dutch local authority Gemeente Alphen aan de Rijn, hereafter “GAR”, in the amount of EUR 3,000,000, with 4.92% contractual interest from 28 August 2008 until 10 October that same year, and 6% penalty interest on EUR 3,017,630 from that date until 7 April 2009, and on EUR 2,996,743 from that date up until and including 22 April 2009, as a priority claim in the winding-up of the defendant Landsbanki Íslands hf., with reference to Art. 112 of Act No. 21/1991, on Bankruptcy etc. Grounds for appeal are found in the first paragraph of Art. 179 of the same Act.

The plaintiff Arrowgrass Distressed Opportunities Fund Limited, together with 32 others in the same group, demands that the claim of the defendant GAR be rejected as a priority claim with reference to the first paragraph of Art. 112 of Act No. 21/1991 in the winding up of the defendant Landsbanki Íslands hf. Alternately, it is demanded that, if it is accepted that some portion of the claim should enjoy priority, then this amount should be a maximum of EUR 20,887. Failing this, it is demanded that the local authority's claim, that accrued interest on the claim enjoy priority with reference to Art. 112 of Act No. 21/1991, be rejected. Finally, it is demanded that all the counterclaims of the local authority, to have claims for specific amounts recognised, together with the priority of these claims, exceeding what was recognised by the Winding-up Board of Landsbanki Íslands hf., be rejected. In all instances court costs before the District Court and appeal costs are demanded.

The plaintiff Bayerische Landesbank and 24 others in the same group demand that the claim of the local authority be rejected as a priority claim with reference to the first paragraph of Art. 112 of Act No. 21/1991 in the winding up of the defendant Landsbanki Íslands hf. Alternately, it is demanded that, if it is accepted that some portion of the claim should enjoy priority, then this amount should be a maximum of EUR 20,887. Failing this, it is demanded that the claim of the local authority, that interest accrued on the claim after 6 October 2008 enjoy priority with reference to Art. 112 of Act No. 21/1991, be rejected. Finally, it is demanded that the local authority's counterclaims for recognition of claims amounts exceeding those amounts recognised by the Winding-up Board of Landsbanki

Íslands hf. be rejected, including claims for the priority of such amounts. In all instances court costs before the District Court and appeal costs are demanded.

The plaintiff Deutsche Bank Trust Company Americas demands that the District Court's conclusion, that the previously mentioned claim of the local authority should be recognised as a priority claim with reference to Art. 112 of Act No. 21/1991, be overturned. It also demands payment of court costs before the District Court and appeal costs.

The plaintiff Landsbanki Guernsey Ltd. demands that the appealed Ruling be altered so that the local authority's claim is recognised as a general claim with reference to Art. 113 of Act No. 21/1991. Alternately, it demands that it be only recognised as a priority claim with reference to Art. 112 of Act No. 21/1991 up to a maximum of EUR 20,887. Finally it demands payment of court costs before the District Court and appeal costs.

The defendant Landsbanki Íslands hf. appealed the District Court's Ruling on its part on 14 April 2011. It demands that the appealed Ruling be upheld with the exception that the recognition of 6% penalty interest from 10 October 2008 to 22 April 2009 be rejected. Finally it demands that appeal costs be cancelled.

The defendant GAR appealed the District Court's Ruling for its part on 24 May 2011. It demands primarily that its claim against the defendant Landsbanki Íslands hf. in the amount of EUR 3,418,331.08, alternate claim of EUR 3,185,489.37, second alternate claim of EUR 3,102,329.16, or failing this EUR 3,093,305.08, be recognised and that it enjoy priority ranking in the winding-up of the defendant Landsbanki Íslands hf. as provided for in Art. 112 of Act No. 21/1991. It also demands payment of court costs before the District Court and appeal costs.

The defendants WGZ Bank Luxembourg SA, Landesbank Berlin AG, Deutsche Postbank AG, Caixa Geral de Depositos, The Royal Bank of Scotland plc., ABN AMRO Bank NV, London Branch, Sparkasse zu Lübeck AG, Vereinigte Sparkassen im Landkreis Weilheim, KfW Bankengruppe, Arrowgrass Special Situations S. à r. l., Skiki ehf., Blomstri ehf., Íslenska útflutningsmiðstöðin hf., Óttar Yngvason and Rakel Óttarsdóttir did not make representations to the Supreme Court.

Before the District Court the plaintiffs Arrowgrass Distressed Opportunities Fund Limited et al. and Bayerische Landesbank et al. demanded that the claims of the defendant GAR be dismissed by the court in other respects than concerning amounts in excess of what the Winding-up Board of Landsbanki Íslands hf. has recognised as priority claims. The District Court's premises for the appealed Ruling rejected this claim, but in the appeals

of these plaintiffs to the Supreme Court this claim was still made. In letters from these plaintiffs to the Supreme Court of 25 August 2011 this claim was withdrawn and the conclusion of the District Court on this point will not therefore be treated by this Court.

According to a decision by the Supreme Court oral arguments were heard in the case on 20 September 2011.

I.

According to an authorisation in Article 100 a of Act No. 161/2002, on Financial Undertakings, cf. Art. 5 of Act No. 125/2008, on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc., on 7 October 2008 the Financial Supervisory Authority took over the power of the shareholders' meeting of the defendant Landsbanki Íslands hf., dismissed its Board of Directors and appointed it a Resolution Committee. Thereafter the bank was granted a moratorium with a ruling of the Reykjavík District Court on 5 December that same year. Adoption of Act No. 44/2009, which amended several provisions of the above-mentioned Acts, placed the bank in winding-up, with its commencement dated to 22 April 2009, when the Act came into force. On the 29th of that same month the Reykjavík District Court appointed a Winding-up Board for the bank which handles, among other things, processing of claims against the bank. The Board issued an invitation to the company's creditors to lodge claims on 30 April 2009; the deadline for lodging claims was 30 October that same year. A large number of parties lodged their claims as a result, among them the plaintiffs in this case or in some instances creditors from whom the plaintiffs subsequently acquired their rights. The claims of almost all of these parties, furthermore, shared the status of general claims, as referred to in Art. 113 of Act No. 21/1991. In by far the greatest number of instances, the plaintiffs are international financial undertakings, which hold bonds and other securities issued by the defendant Landsbanki Íslands hf. There have been some changes to the original group of plaintiffs in this case: several of them withdrew from the action when the case was being heard by the District Court, another fifteen of them accepted the outcome of the District Court and have not for their part appealed it to the Supreme Court. Due to the defendants' appeal of the District Court's Ruling, these fifteen creditors are party to the case before the Supreme Court.

The defendant GAR, which is a local authority in the Netherlands, demanded from the Winding-up Board that its claim in the amount of EUR 3,000,000 be recognised as a priority claim with reference to Art. 112 of Act No. 21/1991, plus 4.92% contractual

interest for the period from 28 August 2008 up until and including 10 October that same year in the amount of EUR 17,630. The local authority also demanded the recognition as a priority claim of penalty interest for the period from 10 October 2008 until 22 April 2009 in the amount of EUR 412,564, calculated on the claim as provided for in the first paragraph of Art. 6 of Act No. 38/2001, on Interest and Indexation. Finally, it demanded payment of cost of EUR 9,024.08, which the claim had accrued until 22 April 2009, and that this cost be recognised as a priority claim. From the amount of the claim lodged the local authority deducted a payment of EUR 20,887 made on 7 April 2009 in connection with deposit guarantee protection. Accordingly, the amount of the claim lodged by the local authority was EUR 3,418,331.08.

Following the expiration of the time limit for lodging claims, the Winding-up Board of Landsbanki Íslands hf. announced its decisions on individual claims. As explained in the appealed Ruling, it recognised the principal of the local authority's claim as a priority claim with reference to Art. 112 of Act No. 21/1991, together with contractual interest from 28 August 2008 until 10 October that same year, for a total of EUR 3,017,630.00, but rejected other aspects of the claim. The local authority objected to this decision by the Winding-up Board and demanded that the claim be recognised in full as lodged as per the above. The plaintiffs and others who had lodged claims objected to the Winding-up Board's decision on recognising the priority ranking of the claim with reference to the statutory provision cited above. In processing the claim, the Winding-up Board attempted to resolve the dispute without success. It thereupon referred the case to the Reykjavík District Court in a letter of 2 March 2009, with reference to the second paragraph of Art. 120, cf. Art. 171 of Act No. 21/1991.

The parties' dispute is multifaceted, but traces its roots to the above-mentioned Act No. 125/2008, which was adopted on 6 October 2008 and entered into force on the following day. It amended previous legislation in a manner which the plaintiffs consider invalid and significantly damaging to their interests in the anticipated distributions to creditors from the assets of the defendant Landsbanki Íslands hf. upon its winding-up. It has also been suggested by the plaintiffs that their rights were further infringed with the adoption of the above-mentioned Act No. 44/2009. The dispute in the case is for the most part between the plaintiffs and the defendants, but the defendants also disagree between themselves on the resolution of certain limited aspects of the claim of the defendant GAR.

Further details of the parties' premises will be referred to hereafter as necessary for the resolution of the case.

II.

This case, and ten others in addition which were heard by the Supreme Court in September 2011, either with oral or written arguments, tests the constitutionality of Art. 6 of Act No. 125/2008. In one of these cases, Supreme Court Case no. 340/2011, the plaintiffs based their case on the same premises as is done in this case concerning the flaws in Act No. 125/2008; a verdict has been pronounced in this case earlier today. Section II of the above-mentioned Supreme Court verdict gives an account of the substance of Act No. 125/2008, quoting Art. 6 thereof, which is disputed in particular by the parties and which had altered the order of ranking of claims upon the winding-up of financial undertakings, making deposit claims priority claims with reference to Art. 112 of Act No. 21/1991. This same section of the verdict described the takeover by the Financial Supervisory Authority of the country's three largest commercial banks directly following the adoption of the Act, including the defendant Landsbanki Íslands hf., and the establishment of new banks on the basis of the older ones. Finally, this section of the verdict explains the views of the plaintiffs regarding the constitutional flaws of Act No. 125/2008 which should result in its being disregarded in resolving this case, together with the opposing views of the defendants in the case, who are of the opinion that the Act complies both with the Icelandic Constitution and international agreements to which Iceland has acceded. Section III of the above-mentioned verdict gives an account of the interpretative sources for the Bill which became Act No. 125/2008, to the extent this is relevant for resolution of the parties' dispute. It furthermore explains that at the end of 2008, Act No. 142/2008, on Investigation of the Causes of and Events Leading to the Collapse of the Icelandic Banks in 2008 and Related Events, was adopted and describes the conclusions of the parliamentary Special Investigation Commission (SIC) which are of significance here. Section IV of the above-mentioned verdict then resolves the dispute on the constitutionality of Act No. 125/2008, rejecting the plaintiffs' contentions that the Act violates the Constitution and international agreements. The discussion in sections II and III of the Supreme Court's verdict in case no. 340/2011 applies equally in the case to be resolved here as do furthermore the conclusions in section IV of the verdict. General considerations discussed there also apply in this case. Accordingly, the plaintiffs' contentions in this case, that the Act does not comply with the Constitution and international agreements, are rejected.

III.

As explained previously, the parties' dispute concerns, among other things, where the above-mentioned claim of the defendant GAR should be ranked in priority in the winding-up of the defendant Landsbanki Íslands hf. The plaintiffs, all of whom are general creditors as referred to in Art. 113 of Act No. 21/1991, do not object to the decision by the Winding-up Board of Landsbanki Íslands hf. to recognise the principal of the claim of the local authority plus contractual interest from 28 August 2008 up until and including 10 October that same year, but they regard this as a general claim as referred to in Art. 113 of Act No. 21/1991, and not a priority claim, with reference to Art. No. 112 of the Act. The parties' dispute in this respect concerns whether the local authority's claim as lodged in the winding-up proceedings of Landsbanki Íslands hf. should be considered a deposit in the sense of Art. 9 of Act No. 98/1999, on Deposit Guarantees and an Investor-Compensation Scheme, and as such enjoy priority in the bank's winding-up as provided for in the third paragraph of Art. 102 of Act No. 161/2002, as this paragraph was amended by Art. 6 of Act No. 125/2008 and subsequently by Art. 6 of Act No. 44/2009, as this is the understanding of both defendants. On the other hand, the plaintiffs regard the dealings between the local authority and the bank to have been in the form of investment or a loan facility, and therefore the local authority's claim cannot be considered a deposit in the above-mentioned sense and should not therefore enjoy priority. The parties' disagreement on interest concerns, as will be subsequently explained, primarily the claim by the defendant GAR for penalty interest from 10 October 2008 until 22 April 2009.

IV.

As explained in the appealed Ruling, Landsbanki Íslands hf. notified the Financial Supervisory Authority in a letter of 6 March 2006 that the bank intended to establish and operate a branch in Amsterdam in the Netherlands. The letter stated that, to begin with, this would consist exclusively of lending activities, with Landsbanki participating in syndicated facilities and offering general corporate lending as well as corporate and investors' real estate financing. The activities would likely be expanded subsequently to include accepting deposits on the wholesale deposit market together with corporate finance operations. The bank's notification to the Financial Supervisory Authority on 6 September 2007 states that accepting deposits and other funds for repayment will shortly be included in the activities of the bank's Amsterdam branch.

The appealed Ruling provides an account of an agreement concluded between the defendants in the case on 27 August 2008, which was arranged through the intermediation of the broker Wallich and Matthes. Among the documents in the case is a confirmation dated 27 August 2008 for a deposit *(domestic depot)* sent to the defendant GAR by the broker. It confirms a telephone conversation earlier that day, in which the broker had executed on behalf of the local authority a deposit transaction under certain conditions. The confirmation states that the reference number was 034566, the recipient of the funds *(geldneemster)* was Landsbanki Íslands hf. in Amsterdam, the contributor of the funds *(geldgeefster)* was the local authority Alphen aan den Rijn, the amount *(bedrag)* was EUR 3,000,000, the interest *(rente)* was 4,9200000% annual interest, calculation of interest *(renteberekening)* was based on act/360, term of the loan *(looptijd)* was 28 August 2008 until 10 October the same year, or 43 days, the amount of interest *(rente bedrag)* was EUR 17,360, payment *(betaling)* would be made by Fortis Bank NV Rotterdam, repayment *(terugbetaling)* was to be made to a specified bank in The Hague, commission *(provisie)* was EUR 71.67 and will be set on a monthly invoice.

The above broker's confirmation is, according to the documentation in the case, the only document issued concerning the said transaction of the defendant GAR with Landsbanki Íslands hf. According to the pleading of the local authority before the Supreme Court, it could have obtained a confirmation with the same contents from the bank if it had so requested, and this had been done by various Dutch local authorities which had had similar dealings with Landsbanki Íslands hf. in the Netherlands as GAR had had. The defendant refers in this connection to the Dutch local authority Gemeente Texel, which had obtained a confirmation from both the broker Wallich and Matthes and from the bank itself, and the bank's confirmation had had the same contents as the broker's confirmation. Both of these confirmations are among the documents in the case and no objection has been raised to them as examples of the arrangements which generally applied in transactions of the Amsterdam branch of the bank in so-called wholesale deposits.

V.

According to the third paragraph of Art. 102 of Act No. 161/2002, the same rules apply to the winding-up of a financial undertaking as apply to the priority of claims against an insolvent estate. However, claims for deposits, as provided for in Act No. 98/1999, on Deposit Guarantees and an Investor Compensation Scheme, are in addition to be considered claims enjoying priority as referred to in the first and second paragraphs of Art.

112 of Act No. 21/1991. A deposit in the sense of the first paragraph of Art. 9 of Act No. 98/1999, is according to the third paragraph of the provision [sic] any credit balance resulting from financial deposits or transfers in normal banking transactions, which a commercial bank or savings bank is under obligation to refund under existing legal or contractual terms.

Section IV above describes the dealings between the local authority GAR and the Amsterdam branch of Landsbanki Íslands hf. in connection with the funds which the local authority had in the bank. According to this discussion, cf. also the Supreme Court's verdict in case no. 311/2011, which was pronounced earlier today, and in other respects with reference to the premises of the appealed Ruling, the conclusion of the Ruling is upheld, that the local authority held a deposit with the bank which should be regarded as a deposit in the sense of the third paragraph of Article 9 of Act No. 98/1999, and that this deposit enjoys guarantee protection as provided for by that Act. As a result, the claim lodged by the local authority enjoys priority with reference to Art. 112 of Act No. 21/1991 in the bank’s winding-up. Also with reference to the premises of the Supreme Court's verdict in case no. 340/2011, as well as the premises of the appealed Ruling, the conclusion is accepted in this case that the minimum deposit guarantee provided for in the first paragraph of Art. 10 of Act No. 98/1999 makes no difference to the fact that the insured deposit in its entirety enjoys priority with reference to Art. 112 of Act No. 21/1991.

VI.

The appealed Ruling concludes that the dispute as to the right of the defendant GAR to penalty interest on its claim from the repayment date of the said deposit until 22 April 2009, which is the reference date for the winding-up of the defendant Landsbanki Íslands hf., should be resolved on the basis of Dutch rules of law and not Icelandic ones. With reference to the provisions of those rules, and having regard for the repayment from the Dutch central bank De Nederlandsche Bank NV (DNB) in the amount of EUR 20,887 on 7 April 2009, the Ruling concluded that the claim of the defendant GAR should bear 6% penalty interest from 10 October 2008 until 22 April 2009.

The defendant GAR, which demanded in its claim lodged with the Winding-up Board of Landsbanki Íslands hf. and before the District Court penalty interest on its claim on the basis of Act No. 38/2001, on Interest and Inflation Indexation, did not accept the conclusion of the appealed Ruling that Dutch law should apply in resolving this dispute. If its principal claim for penalty interest as provided for in Icelandic law is not accepted, it

demands that the conclusion of the ruling on penalty interest as provided for in Dutch law be upheld. In GAR's principal claim in the amount of EUR 3,418,331.08, as described above, in addition to costs penalty interest is calculated as provided for in Act No. 38/2001. In GAR's alternate claim of EUR 3,185,489.37, in addition to costs penalty interest is calculated as provided for in the first paragraph of Art. 6 of Act No. 38/2001, with a default premium as provided for in a decision of the Central Bank of Iceland and the basic penalty interest rate of the European Central Bank. In GAR's second alternate claim of EUR 3,102,329.16, in addition to costs 6% penalty interest is claimed in accordance with Dutch law, and in its third alternate claim of EUR 3,061,501.33, contractual interest of 4.92% annually is calculated from 28 August 2008 up until and including 22 April 2009. Before the Supreme Court the defendant Landsbanki Íslands hf. demands that the appealed Ruling be amended by rejecting the 6% penalty interest on the local authority's claim until 22 April 2009 and the Ruling upheld in other respects. This defendant maintains that provisions of Icelandic law on penalty interest do not apply in the case but rather Dutch law; however, it does not consider the conditions of that law for awarding penalty interest to be fulfilled. According to this the conclusion in the appealed Ruling is not contested, that the local authority is entitled to penalty interest on the basis of section 119 of Chapter 6 of the Dutch Civil Code *(Burgerlijk Wetboek)*, i.e. 6:119, but the Ruling's conclusion, that the claim of the local authority was non-performing in the sense of section 6:83 of the Dutch Civil Code, is rejected.

The defendants do not dispute that the Amsterdam branch of Landsbanki Íslands hf. and the local authority did not have an agreement as to what the consequences should be if the bank did not repay the deposits upon their maturity. The local authority's claim for repayment of the amount which it placed for investment with the bank's Amsterdam branch is a civil contractual obligation in the sense of the first paragraph of Art. 1 of Act No. 43/2000 on limits of legal applicability in the law of contracts. There is no dispute between the defendants that the agreement between the bank and local authority did not state specifically which country's laws should apply to any legal disputes which might arise from their agreement, and that the selection of law cannot be conclusively determined from the contracts themselves or other events, cf. the first paragraph of Art. 3 of Act No. 43/2000. As a result, the law of that country should be applied with which the agreement on the deposit has the strongest connections, cf. the first paragraph of Art. 4 of the Act. This agreement was concluded in the Netherlands, acceptance of wholesale deposits was

part of the activities of the bank's branch in that country and the bank was responsible for fulfilling its obligations towards the local authority there. It will be used as a basis therefore, as is done in the appealed Ruling, that the agreements for these deposits have the strongest connections with the Netherlands. As a result, the law of that state should apply to the dispute to be resolved here, even though Icelandic law applies to the handling and priority of the claims in winding-up and deposit guarantee protection.

From subparagraph c of the first paragraph of Art. 10 of Act No. 43/2000 it can be concluded that Dutch law should also apply to the consequences of non-fulfilment by Landsbanki Íslands hf. of its obligations towards the local authority. During their pleading of this case the defendants have presented documentation on the provisions of Dutch law on interest, which are to some extent described in the premises of the appealed Ruling. If these legal provisions are to apply in this case, the defendants do not dispute their substance but only whether the conditions for awarding penalty interest stated therein are satisfied. In accordance with this and having regard for the documentation in the case, both the existence and substance of these rules is deemed to have been sufficiently demonstrated, in the sense of the second paragraph of Art. 44 of Act No. 91/1991, on Civil Proceedings.

As explained in the appealed Ruling, a creditor can, according to section 6:119 of the Dutch Civil Code *(Burgerlijk Wetboek)*, hereafter referred to as BW, be entitled to penalty interest if its monetary claim against the debtor is non-performing as understood by the law. Subparagraph b of the first paragraph of section 6:80 of the BW contains a provision on foreseeable non-performance and its effects. It states that a claim which will soon be payable is considered non-performing if the creditor can conclude from a communication from the debtor that it will not be able to fulfil the obligation. In an English translation of the provision which was among the documents in the case this is worded as follows: *"The consequences of non-performance take effect in anticipation of the eligibility of the claim: ... (b) if the creditor must conclude from a communication of the debtor that the latter will fail in his performance ..."*. A general provision on non-performance can be found in section 6:81 of the BW, section 6:82 discusses non-performance following written notification from the creditor to the debtor, and section 6:83 of the BW lists in subparagraphs a) to c) when non-performance is deemed to have occurred without it having been formally announced. Subparagraph c of section 6:83 states that non-performance is deemed to have occurred without formal notification

having to be given if it should be clear to the creditor from a communication from the debtor that the latter will fail to fulfil its obligation. In an English translation of the provision which was among the documents in the case this is worded as follows: *"Default commences without the formality of notice of default: ... (c) where the creditor must conclude from a notice by the debtor that the latter will fail in the performance of the obligation."*

The Amsterdam branch of Landsbanki Íslands hf. posted a notification on its website on 8 October 2008, or two days before the branch had to repay the deposit to the local authority. It states, inter alia, that it regretted having to announce that "Icesave" could no longer fulfil its obligations "as a savings bank" after its parent company, Landsbanki Íslands hf., had ended up in serious difficulties in the wake of the credit crisis. Deposits "with Icesave" were subject to compensation under Icelandic and Dutch deposit guarantee schemes. This implies that the guarantee, up to EUR 100,000 for each depositor of the bank, would be partly, EUR 20,887, compensated by the Icelandic deposit guarantee scheme. De Nederlandsche Bank (DNB) had announced that it would assist "Icesave depositors" in collecting their compensation in Iceland and this was confirmed in the accompanying news release from DNB. Further information would be provided on DNB's website as soon as it was available. DNB's news announcement accompanying the above-mentioned news announcement from the branch states that some uncertainty had arisen in connection with Landsbanki Íslands hf. in Reykjavík and its "Icesave branch" in the Netherlands. The Dutch authorities were attempting to communicate with Icelandic authorities to obtain explanations but the Icelandic and Dutch compensation schemes applied to deposits "with Icesave". DNB would commence negotiations with Icelandic authorities as to how compensation would be paid if the institution were to collapse. If necessary, DNB would assist depositors in obtaining their compensation from Iceland.

The announcement by the Amsterdam branch of Landsbanki Íslands hf. was, in accordance with its greeting, definitely directed to those customers of the branch who had deposits in so-called Icesave accounts. The activities of the branch, however, consisted of accepting both retail and wholesale deposits. When this is borne in mind, regard is had for the events leading up to the posting of this notification on the website, and its contents are viewed in their entirety in light of the activities and operating authorisations of the branch, it must be concluded that it should have been evident to all the branch's depositors,

including the owners of wholesale deposits, from the message conveyed by the notification that the bank's branch would not fulfil its obligations towards them upon due date. The basis was therefore that GAR was entitled, with reference to subparagraph c of section 6/83 of the BW, cf. subparagraph b of the first paragraph of section 6:80 of the same, to penalty interest on its claim based on section 6:119 of the BW, as it cannot be concluded that this premise of the local authority was presented too late for its right to penalty interest to be supported by section 6:83 of the said code. In accordance with the above the claim of the defendant GAR for penalty interest from 10 October 2008 up until and including 22 April 2009 is accepted and it is undisputed that penalty interest based on section 6:119 was 6% during the period to which the defendant GAR's interest claim pertains. The defendant GAR furthermore demands that its costs incurred up until 22 April 2009 in the amount of EUR 9,024.08 be recognised as a priority claim in the winding-up of the defendant Landsbanki Íslands hf. This aspect of its claim was rejected in the appealed Ruling and this outcome is upheld with reference to the premises of the District Court.

It is undisputed by the defendants that on 7 April 2009 the Dutch Central Bank paid the defendant GAR EUR 20,887 towards its claim as deposit compensation. In accordance with this and with reference to other aspects of the above discussion, the conclusion of the appealed Ruling is upheld, to recognise as a priority claim with reference to Art 112 of Act No. 21/1991 in the winding-up of the defendant Landsbanki Íslands hf. the claim of the defendant GAR in the amount of EUR 2,996,743 (3,000,000 + 17,630 - 20,887 = 2,996,743), which converts to ISK 507,138,818 based on the exchange rate of 22 April 2009, cf. the third paragraph of Art. 99 of Act No. 21/1991. Added to this amount is 6% penalty interest on EUR 3,017,630 from 10 October 2008 to 7 April 2009 and the same interest on EUR 2,996,743 from that date until 22 April 2009, which it is undisputed amounts to EUR 96,562.08 or ISK 16,341,201. This aspect of the claim shall similarly be ranked in priority with reference to Art. 112 of Act No. 21/1991. The recognised amount will be awarded in a lump sum and specified in ISK.

Each of the parties was ordered by the District Court to bear its own cost of litigation with explanations as detailed in the premises of the District Court. This conclusion is upheld with reference to those premises. The same perspectives also apply in the main concerning court costs before the Supreme Court. With regard thereto, each party shall bear its own court costs before the Supreme Court.

Verdict:

The claim of the defendant, Gemeente Alphen aan de Rijn, in the amount of ISK 523,480,019, against the defendant, Landsbanki Íslands hf., is recognised in the latter's winding-up. The claim is ranked in priority with reference to Article 112 of Act No. 21/1991, on Bankruptcy etc.

The provisions of the appealed Ruling on court costs are upheld.

Appeal costs are waived.

Dissenting opinion of Jón Steinar Gunnlaugsson.

As explained in section II of the majority verdict, this is one of eleven cases which were heard in September 2011 and concern a dispute as to whether Art. 6 of Act No. 125/2008, on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc. provided valid authorisation to recognise on its basis the priority of claims which are considered deposits, as understood by this provision, in the winding-up proceedings of Landsbanki Íslands hf. and Glitnir banki hf.

In the Supreme Court verdicts today in all of the above-mentioned cases, it is concluded that the priority of deposits should be recognised on the basis of the said statutory provision. I disagree with this conclusion and explain the premises for this disagreement in a dissenting opinion in case no. 340/2011. In this case I also disagree with the majority of the Court and I am of the opinion that the claims of the plaintiffs should be upheld, that the priority of the claim of the defendant Gemeente Alphen aan den Rijn in the winding-up of the defendant Landsbanki Íslands hf. should be rejected. I refer to my dissenting opinion in case no. 340/2011, regarding the grounds for this conclusion.

Reference is also made to the said dissenting opinion for grounds for my position that the defendant Gemeente Alphen aan den Rijn can be a party to this case.

Certified true copy
28.10.2011
Fee: ISK 4,750.I.