Friday, 28 October 2011

No. 310/2011.

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 SA

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

(Eyvindur Sólnes, Supreme Court Attorney) **and**

Landsbanki Guernsey Ltd.

(Gunnar Jónsson, Supreme Court attorney)

v

Landsbanki Íslands hf.

(Kristinn Bjarnason, Supreme Court attorney) **and**

University of Oxford

(Ólafur Eiríksson, Supreme Court attorney)

and

Landsbanki Íslands hf.

(Kristinn Bjarnason, Supreme Court attorney) **v**

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)

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Ohio National Life Assurance Corporation

PHL Variable Insurance Company

Phoenix Life Insurance Company

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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

Várde Investment Partners (Offshore) Master LP

(Ragnar Aðalsteinsson, Supreme Court attorney)

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Sparkasse Pforzheim Calw

Sparkasse-Jena-Saale-Holzland

Sparkasse Hannover

Nassauische Sparkasse

Anstalt des öffentlichen Rechts Kreissparkasse Peine

Die Sparkasse Bremen AG

Sparkasse Oder-Spree

WGZ Bank Luxembourg SA

(Arnar Þór Jónsson, Supreme Court attorney)

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

(Eyvindur Sólnes, Supreme Court Attorney) **and**

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 University of Oxford in the UK 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 10 January 2007 to 11 January 2009 and with 8% annual interest from 12 January 2009 to 22 April that same year. LÍ hf. appealed the District Court's Ruling for its part, as it considered that the claim for 8% annual interest from 12 January 2009 to 22 April that same year should be rejected. 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; a verdict had been pronounced in this case 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 applies 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 turned to the question of whether the transaction of UO 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 described the legal relationship between the university and LÍ hf. in connection with those funds that the university had placed with the bank; the Court concluded that in accordance with what was presented there, cf. also the Supreme Court verdict in case no. 311/2011, which had been pronounced that same day, and in other respects with reference to the premises of the appealed Ruling, the conclusion of the Ruling should be upheld, that the university had held 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 university 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 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 then turned to the dispute between UO and LÍ hf. on interest from 12 January 2009 to 22 April that same year. The Supreme Court's verdict agreed with UO and LÍ hf. that the law of that country should be applied with which the parties' contract 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 UK. The Court's verdict then stated that the dispute between UO and LÍ hf. with regard to interest was concerned primarily with whether the conditions of paragraph 3 of Rule 4.93 of the UK Insolvency Rules of 1986 were satisfied, that the bank's deposit obligation towards the university had been due in accordance with a written instrument, as that concept should be construed under UK law. If this condition was deemed to be satisfied the defendants agreed that as a result of the provisions of paragraph 6 of the same rules the university was entitled to 8% penalty interest annually on the amount of the deposit from 12 January 2009 until 22 April that same year, and this had been the conclusion of the District Court as previously mentioned. The Supreme Court's conclusion in this respect was that, when regard was had for the substance and wording of paragraph 3 of Rule 4.93 and consideration given to those verdicts of UK courts previously described, it could not be concluded that the confirmation of a deposit by LÍ hf. to UO could in accordance with its form and contents be considered a written instrument in the sense of UK law. Penalty interest from the due date of the deposit to the date of commencement of the winding-up proceedings of LÍ hf. could not therefore be awarded with reference to this provision. It was undisputed that the university had not sent the bank a claim for payment of the principal and interest as provided for in paragraph 4 of Rule 4.93 of the UK Rules, and for this reason alone penalty interest could not be awarded on the basis of this provision. As a result of the above, the university's claim for 8% penalty interest on the basis of paragraph 6 of the above-mentioned Rule 4.93 of the UK Rules should be rejected. The Supreme Court also rejected UO's second alternate claim for recognition of 5.85% contractual interest from 12 January 2009 to 22 April that same year, on the grounds that with reference to the wording of paragraph 1 of the above-mentioned Rule 4.93 the interest rate agreed on was not part of the debt after the commencement of liquidation. In accordance therewith and, as the university was not deemed to have presented arguments to support its entitlement on other legal grounds to interest on the deposit obligation after its due date, such interest could not be awarded. In accordance with all of the above, the outcome of the case was that UO's claim in the amount of ISK 1,141,463,934 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 18 May that same year. Appealed is a Ruling of the Reykjavík District Court of 1 April 2011, recognising a claim of the defendant, the University of Oxford, in the amount of GBP 5,000,000, including contractual interest of 5.85% from 10 January 2007 up until and including 11 January 2009, and including 8% annual interest from 12 January 2009 until 22 April that same year, as a priority claim in the winding-up of the defendant Landsbanki Íslands hf. pursuant to Article 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 the University of Oxford, lodged in the amount of ISK 1,141,463,934, 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 defendant the University of Oxford, that accrued interest on the claim enjoy priority with reference to Art. 112 of Act No. 21/1991, be rejected. These plaintiffs furthermore demand payment of court costs before the District Court and appeal costs.

The plaintiff Bayerische Landesbank and 24 others in the same group make the same demands as the plaintiff Arrowgrass Distressed Opportunities Fund Limited et al. as referred to previously, with the exception that they demand that interest accruing on the claim after 6 October 2008 should not enjoy priority with reference to Art. 112 of Act No. 21/1991.

The plaintiff Deutsche Bank Trust Company Americas demands that the District Court's conclusion that the claim of the defendant the University of Oxford enjoy priority 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 principally that the appealed Ruling be altered so that the claim by the defendant the University of Oxford is recognised as a general claim with reference to Art. 113 of Act No. 21/1991 in the winding-up of

Landsbanki Íslands hf., and alternately that it be recognised only as a priority claim with reference to Art. 112 of the Act to a maximum of EUR 20,887. It also 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 Ruling be upheld with the exception that the recognition of 8% annual interest from 12 January 2009 until 22 April that same year be rejected. Finally it demands that appeal costs be cancelled.

The defendant the University of Oxford demands that the appealed Ruling be upheld and the claims of the plaintiffs rejected. It also demands payment of 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 subparagraph a of the principal claim of the defendant the University of Oxford be dismissed by the District Court. 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.

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 Winding-up 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 the University of Oxford, which is a university in Oxford, in the UK, demanded from the Winding-up Board that its claim in the amount of GBP 5,000,000 be recognised as a priority claim with reference to Art. 112 of Act No. 21/1991, together with contractual interest of GBP 587,404.11 for the period from 10 January 2007 up until and including 11 January 2009. The University also demanded that penalty interest which had accrued on the claim until 22 April 2009 be recognised as a priority claim. It based its claim for penalty interest primarily on the first paragraph of Art. 6 of Act No. 38/2001, on Interest and Inflation Indexation, and alternately on the rules of UK law on penalty interest. Finally, it demanded payment of cost which had accrued on the claim until 22 April 2009, and that this cost be recognised as a priority claim.

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 university's claim as a priority claim with reference to Art. 112 of Act No. 21/1991, as well as contractual interest from 10 January 2007 up until and including 11 January 2009, totalling GBP 5,587,404.11, but rejected other aspects of the claim or did not make a decision on them. The university objected to this decision by the Winding-up Board and demanded that the claim be recognised in full as lodged. 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. Thereafter 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 23 February 2010, 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 university‘s claim. 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 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 those conclusions of the parliamentary Special Investigation Commission 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 in section I above, the parties' dispute concerns, among other things, where the above-mentioned claim of the defendant the University of Oxford 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 university plus contractual interest from 10 January 2007 up until and including 11 January 2009, 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 university's claim as lodged in the winding-up proceedings of Landsbanki Íslands hf. should be considered a deposit as referred to in the third paragraph 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 university and the bank to have been in the form of investment or a loan facility, and therefore the university's claim cannot be considered a deposit in the above-mentioned sense and should not therefore enjoy priority. Before the Supreme Court the bank only disputes the university's claim for penalty interest for the period from 11

January 2009 until 22 April the same year. From the defendants' claims and pleadings it can be concluded that they do not dispute that 11 January 2009 is the last day for which contractual interest should be calculated on the principal of the claim of the defendant the University of Oxford; their dispute with regards to interest, however, concerns the university's right to penalty interest from 12 January 2009, which was the date for repayment of the deposit, until 22 April that year, which is the relevant date for the winding up of the defendant Landsbanki Íslands hf.

IV.

As explained in the appealed Ruling, Landsbanki Íslands hf. notified the Financial Supervisory Authority in a letter of 19 January 2005 that the bank intended to establish and operate a branch in London. The letter stated that this would involve two types of activities, firstly, syndicated lending activities where the bank would either be a participant or an arranger, and secondly corporate finance. The activities which the bank planned to pursue were “in accordance with the list in Annex I of Directive 2000/12/EC”. In a letter of 29 June that same year the bank notified the Financial Supervisory Authority that planned on expanding the branch's activities to include accepting deposits. This would involve “accepting wholesale deposits in the name of the branch which would be acquired through the intermediation of Heritable Bank Ltd.” The activities which were to be pursued were covered by “Point 1. *Acceptance of deposits and other repayable funds* of the list in Annex I to Directive 2000/12/EB” to quote from the letter.

Landsbanki Íslands hf. concluded a service level agreement with Heritable Bank Ltd. on 27 November 2005 for handling of wholesale deposits. In this agreement the word *client* refers to Landsbanki Íslands hf. The agreement defined the word *account* as an account under the administration of Heritable Bank Ltd. which contained information on entries in connection with clients' wholesale deposits, including receipts, withdrawals, debit entries, interest and various fees, while the word *customer* referred to parties who had applied to open a wholesale deposit account with Landsbanki Íslands hf. and had deposited funds therein. The word *portfolio* referred to any collection of wholesale deposits, regardless of whether this was a portfolio which had been created from new transactions or splitting up of older deposit portfolios. A *wholesale deposit* referred to an amount of money which an enterprise or institution deposited with Landsbanki Íslands hf., mainly through the intermediation of recognised money market brokers, on which the bank paid fixed interest or other compensation, and which was to be repaid in full or in part in accordance with a

claim thereto following a specified term or at an agreed date and which was subject to the relevant terms and conditions of Landsbanki Íslands hf.

As the appealed Ruling explains, on 10 January 2007, through the intermediation of the broker Prebon Yamane (UK), an agreement was reached between the defendants in the case for the defendant the University of Oxford to deposit GBP 5,000,000 in an account with the London branch of Landsbanki Íslands hf. This amount the university regards as a wholesale deposit in the understanding above. On the occasion of this transaction, the bank issued a so-called *deposit confirmation* to the university. This is undated, but states that the bank confirms receipt of the university's deposit. It states that the *contract date* is 10 January 2007, the account number is 20000202 and the *deal number* is 487226. The *deposit* was made of GBP 5,000,000 from 10 January 2007 until 12 January 2009, the *interest rate* was 5.85% annual interest for 733 days and the *balance due at maturity* was GBP 5,587,404.11. The university sent Landsbanki Íslands a *confirmation of deposit* on 10 January 2007, confirming the agreement concluded by telephone on Wednesday, 10 January 2007, and the university's confirmation contains substantially the same details as described above in the bank's confirmation, in addition to instructions as to where and how *repayment* should be made at maturity. 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 as referred to in 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 University of Oxford and Landsbanki Íslands hf. in connection with the funds which the university 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 university held a deposit with the bank which should be regarded as a deposit in the sense of the third paragraph of Art. 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 university 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 was 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 concluded that the dispute concerning the university's entitlement to penalty interest during the period in question should be resolved on the basis of UK rules of law and not Icelandic ones. In accordance with the provisions of UK rules, the District Court concluded that the university's claim should bear 8% penalty interest during the said period. The university, which in its claim and before the District Court demanded penalty interest on the basis of Act No. 38/2001, has not appealed the District Court's Ruling for its part. The university accepted the conclusion of the Ruling to apply Rule 4.93 of the *UK Insolvency Rules 1986* and demands that the Ruling be upheld. Before the Supreme Court the defendant Landsbanki Íslands hf. accepted the conclusion of the appealed Ruling, that resolving the question of whether the university was entitled to penalty interest during the period in question should be determined by Rule 4.93 of the UK Rules. Accordingly, the defendants' disagreement before the Supreme Court with regard to interest concerns solely whether the conditions of Rule 4.93. are satisfied.

The defendants do not dispute that the university and Landsbanki Íslands hf. did not have an agreement as to what the consequences should be if the bank did not repay the deposits upon their proper due date. The university's claim for repayment of the deposit 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 university and the bank 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 position of the defendants is accepted, that the law of that country should be applied with which the parties' agreement has the strongest connections, cf. the first paragraph of Art. 4 of the Act. This agreement was concluded in the UK, 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 university 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 UK. 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 the university's deposit guarantee protection.

From subparagraph c of the first paragraph of Art. 10 of Act No. 43/2000 it can be concluded that UK law should also apply to the consequences of non-fulfilment by Landsbanki Íslands hf. of its obligations towards the university. It makes no difference in this connection though the provisions of UK law on entitlement to interest in the event of default are considered to be procedural rules in that country, since the classification by legal field is subject to Icelandic law. Before the Supreme Court the defendants do not dispute that the university's entitlement to penalty interest from 12 January 2009 until 22 April 2009 is determined by the above-mentioned Rule 4.93 of UK Insolvency Rules 1986 and the parties do not dispute the substance of these Rules. When the case was heard by the District Court and the Supreme Court the defendants have submitted summaries and opinions on the substance of the UK Rules as well as judgements by UK courts interpreting them. 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.

In the premises of the appealed Ruling the substance of Rule 4.93 is explained to some degree; the Rule prescribes the basis for a creditor to demand penalty interest on a debt in liquidation. Paragraph 1 of the Rule states that if a debt recognised in liquidation is to bear interest, this is a verifiable part of the debt with the exception of interest accruing during the period after the relevant date for the liquidation. The provision is worded as follows: *"Where a debt proved in the liquidation bears interest, that interest is provable as part of the debt, except insofar as it is payable in respect of any period after the relevant date."* Paragraph 2 of the Rule states that in the instances subsequently described a debt may bear interest during the period prior to the relevant date even if this interest was not previously reserved or agreed. The provision is worded as follows: *"In the following circumstances the creditor's claim may include interest on the debt for periods before the relevant date , although not previously reserved or agreed."* Those instances referred to in

Paragraph 2 are then described in Paragraphs 3 and 4 of the Rule. Paragraph 3 of Rule 4.93 states that interest may be claimed on a debt for the period from the due date to the commencement of liquidation or winding-up, if the debt is due in accordance with a written instrument. The provision is worded as follows: *"If the debt is due by virtue of a written instrument, and payable at a certain time, interest may be claimed for the period from that time to the relevant date."* Paragraph 4 of Rule 4.93 states that if a debt is otherwise due, interest may only be demanded if a creditor or other party acting on the creditor's behalf, has demanded payment in writing prior to the relevant date and furthermore given notice that interest will accrue on the claim from that date until the date of payment. The provision is worded as follows: *"If the debt is due otherwise, interest may only be claimed if before the relevant date, a demand for payment of the debt was made in writing by or on behalf of the creditor, and notice given that interest would be payable from the date of the demand to the date of payment."* Paragraph 6 of Rule 4.93 states that interest which may be claimed with reference to Paragraphs 3 and 4 is the interest rate prescribed in Section 17 of the *Judgements Act 1838.* The provision is worded as follows: *"The rate of interest to be claimed under paragraph (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the relevant date."* The relevant date referred to in the above provisions is the date upon which the undertaking is placed in liquidation or, if liquidation follows immediately after the winding-up, then the date when the undertaking was placed in winding-up as this concept is defined in Paragraph A1 of Rule 4.93. The provision in Paragraph A1 is worded as follows: *"In this Rule, "the relevant date" means the date on which company went into liquidation or, if the liquidation was immediately preceded by an administration, the date on which the company entered administration."*

The defendants do not dispute that Landsbanki Íslands hf. should repay the University of Oxford the deposit together with accrued contractual interest from 10 January 2007 until 11 January 2009. It is also undisputed, as previously mentioned, that the defendants did not agree specifically on interest payments after the due date. The defendants' dispute on interest, however, concerns primarily whether the conditions of Paragraph 3 of Rule 4.93 are satisfied, that the bank's deposit obligation towards the university became due in accordance with a *written instrument*, as that concept should be construed under UK law. If this condition is deemed to be satisfied the defendants agree that as a result of the provisions of paragraph 6 of the same Rule the university is entitled to 8% penalty interest annually on the amount of the deposit during the said period, and this

was the conclusion of the District Court as previously mentioned. The defendant Landsbanki Íslands hf. rejects that the bank's *deposit confirmation* should be regarded as written instrument in the sense of Paragraph 3 of Rule 4.93 of the UK Rules. The university, on the other hand, maintains that the said deposit confirmation is a record of the substance of the oral agreement concluded by the university and the bank and that such a record can, in the understanding of UK law, be regarded as a written instrument.

Section IV above described the events leading up to the university's placing of funds on deposit with the London branch of Landsbanki Íslands hf. It also explained the substance of the confirmations issued by the bank and the university on the occasion of their transaction. The defendants have referred to several verdicts of UK courts concerning the interpretation of the concept of a "written instrument" in Paragraph 3 of Rule 4.93 of the UK Insolvency Rules. In a judgement of 1864 in the case TAYLOR v HOLT (3 H&C 452) it was rejected that a written request for a loan was considered a written instrument in the sense of a similar rule as the one to be applied here. In another judgement from 1974 in the case ROLLS-ROYCE CO. LTD. (WLR 1584) it was rejected that an *invoice* could be considered a written instrument in the sense of Art. 100 of the then applicable 1949 Rules on winding-up of companies. Reference was made, for instance, to the fact that a written instrument generally referred to a document which created or affected rights and obligations. In a judgement of 1969, THEO. GARVIN Ltd. (1 Ch 624), a dispute was resolved concerning the right of a depositor to interest from a company which had accepted deposits and then been placed in liquidation. The company accepted deposits, for instance, on accounts with a maximum 11-month fixed term. The conditions of the scheme were stated on a fact sheet entitled *Details of Fixed Term Deposit Accounts, (Fixed Rate of Interest).* According to the terms and conditions, depositors had to notify the company of a withdrawal in advance and the company was obliged to repay the deposit at the end of the fixed term. The court concluded that the terms which applied in dealings between the company and depositors were a written instrument, in the understanding of the above-mentioned Rule 100 on winding-up of companies.

After examining the substance and wording of the above-mentioned Paragraph 3 of Rule 4.93 and giving consideration to those verdicts of UK courts described above, it cannot be concluded that the above-mentioned confirmation of a deposit by LÍ hf. to the University of Oxford can, in accordance with its form and contents, be considered a written instrument in the sense of UK law. Penalty interest from the due date of the deposit to the

date of commencement of the winding-up proceedings of the defendant Landsbanki Íslands hf. cannot therefore be awarded with reference to this provision. It is undisputed that the university did not send the bank a claim for payment of the principal and interest as provided for in paragraph 4 of Rule 4.93 of the UK Rules, and for this reason alone penalty interest cannot be awarded on the basis of this provision. From the above it is concluded that the university's claim for penalty interest of 8% from 12 January 2009 to 22 April that same year, based on Paragraph 6 of the above-mentioned Rule 4.93 of the UK Insolvency Rules, should be rejected.

Before the District Court the university had made a second alternate claim for contractual interest of 5.85% from 12 January 2009 until 22 April that same year, totalling GBP 90,447, to be recognised as a priority claim with reference to Art. 112 of Act No. 21/1991, cf. the third paragraph of Art. 102 of Act No. 161/2002, which appears to be based on Paragraph 1 of Rule 4.93 of the UK Insolvency Rules. With reference to the wording of the provision that interest agreed upon is not part of the debt after the commencement of winding-up, this view of the defendant is not accepted. In accordance therewith and, as the university is not deemed to have presented arguments to support its entitlement on other legal grounds to interest on the deposit obligation after its due date, such interest cannot be awarded.

VII.

In accordance with all of the above, 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 the University of Oxford, amounting to GBP 5,000,000 together with 5.85% contractual interest from 10 January 2007 up until and including 11 January 2009, for a total of GBP 5,587,404.11, which converts to ISK 1,067,641,177 based on the exchange rate of 22 April 2009, cf. the third paragraph of Art. 99 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 appealed Ruling. This conclusion is upheld with reference to the premises of the Ruling. The same considerations also apply in the main with regard to 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, the University of Oxford, in the amount of ISK 1,067,641,177, against the defendant, Landsbanki Íslands hf., is recognised in the latter's winding-up. The claim is ranked in priority pursuant 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 the University of Oxford 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 University of Oxford can be a party to this case.

Certified true copy
28/10/2011
Fee: ISK 4,750.