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

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

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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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 Liibeck 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 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.*

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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.