Friday, 28 October 2011

No. 341/2011.

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 Europaische 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**

De Nederlandsche Bank NV

(Heiðar Ásberg Atlason, Supreme Court attorney)

and

Landsbanki Íslands hf.

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

De Nederlandsche Bank NV
(Heiðar Ásberg Atlason, 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 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 the ruling of the Reykjavík District Court, recognising for the most part the claim of the Dutch Central Bank (DNB) which was based on claims of deposit owners taken over by DNB following the collapse of the bank LÍ hf., and accepting that portion of the claim as a priority claim with reference to Art. 112 of Act No. 21/1991, on

Bankruptcy etc., in the bank's winding up. 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.

DNB and LÍ hf. appealed the District Court's Ruling on their part due to disputes between them on interest and as to whether part of DNB's claim, which arose from 26 so-called wholesale deposits, could be considered to be a deposit in the sense of the third paragraph of Article 9 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's verdict described the substance of the confirmation by the Dutch broker I of the deposit of a specific local authority with the Amsterdam branch of LÍ hf. This confirmation, together with other documentation in the case, did not give any indication otherwise than that the 26 wholesale

deposits, which DNB had taken over and were the object of dispute in this case, had all the same characteristics of the wholesale deposit discussed in case no. 300/2011, and according to the Supreme Court verdict pronounced on that same day in that case, a wholesale deposit of the Dutch local authority GAR was deemed to be a deposit in the sense of the third paragraph of Article 9 of Act No. 98/1999 and to enjoy the guarantee protection of that Act. It also should be considered that the wholesale deposit of the local authority KCC, which was discussed in case no. 311/2011, in which a verdict had also been pronounced that same day, had in its main respects the same characteristics as the wholesale deposits in the case to be resolved here. In accordance with this and in other respects with reference to the appealed Ruling, the conclusion of the Ruling was upheld, that the said 26 wholesale deposits which the defendant DNB had taken over were, like the Icesave deposits, deposits in the sense of the third paragraph of Act No. 98/1999 and enjoyed the guarantee protection of that Act. 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.

With regard to disagreement on interest, the Supreme Court first discussed the so-called Icesave deposits and then the above-mentioned 26 wholesale deposits. With regard to the Icesave deposits, the Court's verdict states that with reference to subparagraph c of the third paragraph of Article 10 of Act No. 43/2000, on the limits of legal applicability in the law of contracts, and in other respect having regard for the premises of the appealed Ruling, the conclusion of that Ruling was upheld, that the rules of Dutch law applied to DNB's right to demand penalty interest on its claims concerning Icesave deposits, even though Icelandic law applied to the handling and priority of the claims in winding-up and to deposit guarantee protection. During their pleading of the case, DNB and LÍ hf. had presented documentation on the provisions of Dutch law on interest. If these legal provisions were to apply in this case, the defendants did not dispute their substance but only whether the conditions for awarding penalty interest stated therein were satisfied. In accordance with this and having regard for the documentation in the case, both the existence and substance of these rules was deemed to have been sufficiently demonstrated, in the sense of the second paragraph of Article 44 of Act No. 91/1991, on Civil Proceedings. When regard was had for the substance of the notification published by Amsterdam branch of LÍ hf. on its website on 8 October 2008, when consideration was given to the events leading up to its publication on the website, and in other respects with reference to the premises of the appealed Ruling, its conclusion was upheld that as a result of the Icesave deposits which DNB had taken over it was entitled, as a creditor on the basis of section 6:119 in the Dutch Civil Code (Burgerlijk Wetboek), to 6% penalty interest on its claims up until 22 April 2009, in the manner provided for in detail in the appealed Ruling. With regard to the above-mentioned 26 wholesale deposits, the Supreme Court's verdict stated that there was no dispute between DNB and LÍ hf. that the agreement between the bank and depositors had not stated specifically which country's laws should apply to any legal disputes which might arise from their agreement, and that the selection of law could not be conclusively determined from the contracts themselves or other events, cf. the first paragraph of Article 3 of Act No. 43/2000. As a result, the law of that country should be applied with which the agreements on the deposits had the strongest connections, cf. the first paragraph of Art. 4 of the Act. The Supreme Court's conclusion was that these contracts had the strongest connections with the Netherlands and therefore the laws of that country should apply to the dispute to be resolved here. The Court's verdict also stated that it could be concluded, on the basis of subparagraph c of the first paragraph of Article 10 of Act No. 43/2000, that those laws should also apply to the consequences of

non-fulfilment by LÍ hf. of its obligations towards the deposit owners. When the substance of the above-mentioned notification of 8 October 2008 was considered, cf. also the discussion of the same in the Supreme Court's verdict in case no. 300/2011, which had been pronounced earlier that same day, when regard was had for the events leading up to its publication on the website of the bank's branch in the Netherlands, and in other respects with reference to the premises of the District Court's verdict, its conclusion was upheld, that DNB was entitled to 6% penalty interest on its claims for the 26 wholesale deposits up until 22 April 2009, based on section 6:119 of the Burgerlijk Wetboek. Finally, the Supreme Court rejected DNB's claim for costs incurred up until 22 April 2009, with reference to the premises of the appealed Ruling. In accordance with all of the above, the outcome of the case was that DNB's claim in the amount of ISK 282,301,014,008 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 appeals of 10 and 11 May 2011, received by the Court together with appeal documents on the 30th of that same month. Appealed is a Ruling by the Reykjavík District Court of 27 April 2011, upholding the decision of the Winding-up Board of the defendant Landsbanki Íslands hf. to recognise the claim of the defendant De Nederlandsche Bank NV, hereafter referred to as DNB, in the principal amount of EUR 1,635,821,300 or ISK 276,830,038,599, with interest as specified in detail. The claim was also recognised as a priority claim in the winding-up of the defendant Landsbanki Íslands hf., as provided for in 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 DNB, lodged in the amount of ISK 301,156,622,982, 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 the same plaintiffs demand that, if it is accepted that some portion of the claim should enjoy priority, as provided for in the provision cited, this amount should be a maximum of EUR 20,887 for each depositor from whom the defendant has derived its rights, and that interest which the claim bears from 6 October 2008 should not enjoy priority under this same statutory provision. Failing this, they demand that the defendant DNB's claim for interest which has accrued on the claim from 6 October 2008 should not enjoy

priority under this statutory provision. They also demand that all claims of the defendant DNB concerning recognition of claims amounts exceeding what was recognised by the Winding-up Board of Landsbanki Íslands hf., be rejected, including claims for the priority of such claims. These plaintiffs also 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 previously related.

The plaintiff Deutsche Bank Trust Company Americas demands that the District Court's conclusion, that the claim of the defendant DNB 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 DNB 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 for each deposit covered by the claim lodged by the above-mentioned defendant. 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 10 May 2011. It demands that the Ruling be upheld, with the exception that the recognition of 6% penalty interest on redeemed amounts “according to the dates in the Ruling” up until 22 April 2009 be rejected, and instead that the Winding-up Board's decision to recognise contractual interest for the same period in the amount of EUR 28,288,649 be upheld. It demands furthermore that claims that it pay court costs at both court levels be rejected.

The defendant DNB appealed the District Court's Ruling for its part on 11 May 2011. It demands that the appealed Ruling be upheld, with the exception that the defendant's claim for penalty interest as provided in the first paragraph of Art. 6 of Act No. 38/2001, on Interest and Inflation Indexation, totalling EUR 134,368,438, be recognised as a priority claim in the winding-up of the defendant Landsbanki Íslands hf., as referred to in Art. 112 of Act No. 21/1991. Furthermore, it demands that a claim for costs incurred up until 22 April 2009, totalling EUR 7,016,621, be recognised as a priority claim in the winding-up as provided for

in the statutory provision cited. 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 DNB 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 9 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 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 DNB also lodged a claim which it demanded be accorded the ranking of a priority claim with reference to Art. 112 of Act No. 21/1991. This defendant's involvement in the case is connected with events in 2008 when the defendant Landsbanki Íslands hf. began accepting deposits in so-called Icesave deposit accounts in a branch of the bank in the Netherlands which were intended for individual savers. The total amounts on deposit in such accounts, or retail savings accounts as they are sometimes referred to, totalled very high amounts at the beginning of October 2008 when the bank became insolvent and the accounts were closed without settlement being made with their owners. After this the defendant DNB acquired the claims of depositors, which each of them transferred to it, including claims for interest. The appealed Ruling accounts in more detail for the activities of the defendant Landsbanki Íslands hf. with regard to the Icesave accounts in the Netherlands, and the decisions of the Dutch authorities to declare certain emergency rules in force against the bank in early October 2008 when it faced failure. It also describes the transfer by account owners of claims to the defendant DNB and verification of the amounts in individual accounts resulting from this and explains that deposits were either term deposits or demand deposits when electronic access to the Icesave accounts in the Netherlands was closed on 7 October 2008.

Following the expiration of the time limit for lodging claims, the Winding-up Board of Landsbanki Íslands hf. announced its decisions on individual claims. The claim of the defendant DNB was accepted in respects other than interest and costs. It was also recognised that the claim should be ranked as a priority claim with reference to Art. 112 of Act No. 21/1991. The plaintiffs and others who had lodged their claims objected to the claim being accorded priority with reference to the above-mentioned statutory provision, and also to its amount and interest. The defendant DNB objected to the Winding-up Board's decision on

interest and costs. 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 28 March 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 claim of the defendant DNB. Further details of the parties' premises will be referred to hereafter as necessary for the resolution of the case.

In their presentations to the District Court, the plaintiffs Arrowgrass Distressed Opportunities Fund Limited et al. and Bayerische Landesbank et al. maintained, inter alia, that transfers by owners of Icesave accounts to the defendant DNB were subject to shortcomings which should result in their being deemed invalid and without legal effect, in addition to which insufficient explanations had been provided of the verification of amounts in individual accounts, as is explained in more detail in the District Court's Ruling. In their presentation to the Supreme Court the plaintiffs have withdrawn these premises and they are no longer under consideration in 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 DNB 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 defendant DNB plus contractual interest up until 22 April 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 same Act. The claim lodged by the defendant DNB in the winding-up of the defendant Landsbanki Íslands hf. arises, firstly, from deposits in the bank's branch in the Netherlands which DNB took over and were transferred to it by 135,435 owners of so-called Icesave deposits and, secondly, from the owners of 26 so-called wholesale deposits, following statements by Dutch authorities on 13 October 2008 on the insolvency of the branch. The wholesale deposits are discussed in more detail in section IV below. The appealed Ruling adequately describes the circumstances of the case with regards

to the dealings between the Amsterdam branch of Landsbanki Íslands hf. and the Icesave depositors. It is not disputed in this case that the Dutch Icesave deposits are considered deposits in the understanding of the third paragraph of Art. 9 of Act No. 98/1999, on Deposit Guarantees and an Investor-Compensation Scheme. Having regard for this, and given the conclusion described in section II above on the constitutionality of Act No. 125/2008, it remains to resolve the dispute between the parties concerning the right of the defendant DNB to interest on the claims of owners of the Icesave deposits which it took over; this will be done in section V below.

IV

The parties dispute whether the above-mentioned 26 wholesale deposits, which the defendant DNB took over, are considered deposits in the understanding of the third paragraph of Art. 9 of Act No. 98/1999, 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, on Financial Undertakings, as 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 owners of wholesale deposits and the bank to have been in the form of investments or loan facilities, and therefore the claims transferred cannot be considered deposits in the above-mentioned sense and should not therefore enjoy priority.

Among the documents in the case is a confirmation sent by the Dutch broker Intercessie to the local authority Gemeenschappelijke Regeling Drechtsteden in the Netherlands concerning a deposit of this local authority with the Amsterdam branch of Landsbanki Íslands hf. This document was provided by the defendant DNB as an example of the arrangements for transactions with so-called wholesale deposits in the Dutch branch of Landsbanki Íslands hf. The deposit of the local authority concerned was among those wholesale deposits which the defendant took over following the Dutch authorities' declaration of the insolvency of the bank's Amsterdam branch. The confirmation is dated 18 September 2008 with the title *Fax Bevestiging*. It states that the reference *(kenmerk)* is 59018, the party depositing the funds *(geldgever)* is the Gemeenschappelijke Regeling Drechtsteden, the recipient of the funds *(geldnemer)* is Landsbanki Íslands hf. Amsterdam, the amount of the deposit is EUR 7,000,000.00, interest *(rente)* is 4.8800% annual interest *(p.a. maand juist),* start date *(begindatum)* is 19 September 2008, due date *(einddatum)* is 20 October 2008, no. of days *(aantal dagen)* is 31, redemption (*terugbetaling*) is by NV Bank Nederlandsche Gemeenten te Den Haag, the interest rate differential to which the broker is

entitled *(ons toekomend renteverschil)* is EUR 120.56 and a monthly invoice will follow *(maandnota volgt).*

The above describes the contents of the confirmation from the Dutch broker Intercessie of a deposit of the local authority Gemeenschappelijke Regeling Drechtsteden with the Amsterdam branch of Landsbanki Íslands hf. This confirmation, together with other documentation in the case, does not give any indication otherwise than that the 26 wholesale deposits, which DNB took over and are discussed in this case, had all the same characteristics as the wholesale deposit discussed in case no. 300/2011, and according to the Supreme Court verdict pronounced earlier today in that case, a wholesale deposit of the Dutch local authority Gemeente Alphen aan den Rijn is deemed to be a deposit in the sense of the third paragraph of Art. 9 of Act No. 98/1999 and to enjoy the guarantee protection of that Act. It also should be considered that the wholesale deposit of the local authority Kent County Council, which is discussed in case no. 311/2011, in which a verdict was also pronounced earlier today, has in its main respects the same characteristics as the wholesale deposits in the case to be resolved here. In accordance with this and in other respects with reference to the premises of the appealed Ruling, the conclusion of the Ruling is upheld, that the said 26 wholesale deposits which the defendant DNB took over are, like the Icesave deposits, deposits in the sense of the third paragraph of Act No. Art. 9 of Act No. 98/1999 and enjoy the guarantee protection of that Act.

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 in this case, that conclusion was also accepted 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.

V.

The appealed Ruling concludes that the dispute as to the right of the defendant DNB to penalty interest on its claim 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 provisions of those rules, the Ruling concluded that the claim of the defendant DNB should bear 6% penalty interest, which should be calculated on the amount of each claim redeemed, from the day after the registered date of payment to each depositor up until and including 22 April 2009.

The defendant DNB, 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, did not accept that Dutch law should be applied in resolving this dispute. If its principal claim for Icelandic penalty interest is not accepted, it demands that the conclusion of the ruling on penalty interest as provided for in Dutch law be upheld. Before the Supreme Court the defendant Landsbanki Íslands hf. demands that the appealed Ruling be amended by rejecting the 6% penalty interest on the amounts redeemed until 22 April 2009 and instead upholding the decision of the Winding-up Board to recognise contractual interest for this same period.

With reference to subparagraph c of the third paragraph of Art. 10 of Act No. 43/2000, on the limits of legal applicability in the law of contracts, and in other respect having regard for the premises of the appealed Ruling, the conclusion of that Ruling is upheld, that the rules of Dutch law apply to DNB's right to demand penalty interest on its claims concerning the so-called Icesave deposits, even though Icelandic law applies to the handling and priority of the claims in winding-up and deposit guarantee protection. During their pleading of this case, as is described in the appealed Ruling, the defendants have presented documentation on the provisions of Dutch law on interest. 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.

The notification posted by the Amsterdam branch of Landsbanki Íslands hf. on its website on 8 October 2008 states, among other things, that it regrets to announce that Icesave can no longer fulfil its obligations and that Icesave deposits are subject to compensation under Icelandic and Dutch deposit guarantee schemes. It states that “in the case of Icesave” part of the guarantee will be paid by the Icelandic deposit guarantee scheme and not by the Dutch one. If necessary, DNB will assist depositors in obtaining their compensation from Iceland. Further information will be provided on DNB's website as soon as it is available.

When regard is had for the substance of the above-mentioned notification, when consideration is given to the events leading up to its posting on the website of the Amsterdam branch of Landsbanki Íslands hf. and in other respects with reference to the premises of the appealed Ruling, its conclusion is upheld that as a result of the Icesave deposits which DNB

had taken over it is entitled, as a creditor on the basis of section 6:119 of the Dutch Civil Code *(Burgerlijk Wetboek)*, hereafter "BW", to 6% penalty interest on its claims up until 22 April 2009, in the manner provided for in detail in the appealed Ruling.

VI.

The defendants do not dispute that the Amsterdam branch of Landsbanki Íslands hf. and the owners of the 26 wholesale deposits concerned in this case did not have an agreement as to what the consequences should be if the bank did not repay the deposits upon their maturity. A claim for repayment of the amounts which depositors 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. There is no dispute between the defendants that the agreement between the bank and depositors 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 agreements on the deposits have the strongest connections, cf. the first paragraph of Art. 4 of the Act. The contracts for deposits were concluded in the Netherlands, their reception was part of the activities of the bank's branch in that country and the bank was responsible for fulfilling its obligations towards the owners there. It will be used as a basis, therefore, that the contracts 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 the same law should also apply to the consequences of non-fulfilment by Landsbanki Íslands hf. of its obligations towards the deposit owners. When the substance of the announcement discussed in section V is considered, cf. also the discussion of the same in the Supreme Court's verdict in case no. 300/2011, which was pronounced earlier today, when regard is had for the events leading up to its posting on the website of the bank's branch in the Netherlands, and in other respects with reference to the premises of the District Court, the Court's conclusion is upheld, that the defendant DNB is entitled to 6% penalty interest on its claims for the 26 wholesale deposits up until 22 April 2009, based on section 6:119 of the BW.

VII.

The defendant DNB furthermore demands that its costs incurred up until 22 April 2009 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.

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 DNB with a principal of EUR 1,635,821,300, which converts to ISK 276,830,038,599 based on the exchange rate of 22 April 2009, cf. the third paragraph of Art. 99 of Act No. 21/1991. To this amount shall be added 6% penalty interest, which should be calculated as stated in the appealed Ruling on the amount of each claim redeemed, from the day after the registered date of payment to each depositor up until and including 22 April 2009, as this reference time for interest and the base interest rate is not disputed by the defendants. Interest according to the above is EUR 32,328,638, which converts to ISK 5,470,975,409. The recognised amount shall be awarded and specified in a lump sum in ISK.

Each of the parties was ordered by the District Court to bear its own costs 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, De Nederlandsche Bank NV, in the amount of ISK 282,301,014,008, against the defendant, Landsbanki Íslands hf., is recognised in the winding-up of the bank. 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 my premises for this 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 De Nederlandsche Bank NV 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 De Nederlandsche Bank NV can be a party to this case.

Certified true copy, 28/10/2011 Fee: ISK 4500.