Friday, 28 October 2011

No. 312/2011. **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 (Offshore) Master LP
(Ragnar Aðalsteinsson, Supreme Court attorney)
Bayerische Landesbank

Bremer Landesbank

Commerzbank AG

Commerzbank International S.A.

Erste Europäische Pfandbrief- und Kommunaikreditbank 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 Wiltshire Council**

(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

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Nassauische Sparkasse

Anstalt des öffentlichen Rechts Kreissparkasse Peine

Die Sparkasse Bremen AG

Sparkasse Oder-Spree

(Arnar Þór Jónsson, Supreme Court attorney)

WGZ Bank Luxembourg SA

Landesbank Berlin AG

Deutsche Postbank AG

Caixa Geral de Depositos

The Royal Bank of Scotland plc.

ABN AMRO Bank NV, London Branch

Sparkasse zu Lübeck AG

Vereinigte Sparkassen im Landkreis Weilheim

KfW Bankengruppe

Arrowgrass Special Situations S. à r. l.

Skiki ehf.

Blómstri ehf.

Íslenska útflutningsmiðstöðin hf.

Óttar Yngvason

Rakel Óttarsdóttir

(no one)

Deutsche Bank Trust Company Americas

(Eyvindur Jónsson, 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 UK local authority W 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 4 June 2008 to 1 March 2009 and with 8% annual interest from 2 March 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 2 March 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 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 turned to the question of whether the transaction of W 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 premises of 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 W and LÍ hf. on interest from 2 March 2009 to 22 April that same year. The Supreme Court's verdict agreed with W 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 W 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 local authority 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 local authority was entitled to 8% penalty interest annually on the amount of the deposit from 2 March 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 by LÍ hf. of a deposit to W 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 local authority 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 local authority'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 W's *second alternate claim for recognition of 6.1% contractual interest from 2 March 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 local authority 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 W's claim in the amount of ISK 599,202,275 was recognised with priority with reference to Art. 112 of Act No. 21/1991.*

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Verdict:

The claim of the defendant, Wiltshire Council, in the amount of ISK 599,202,275, 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.