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

Värde Investment Partners (Offshore) Master LP

The Värde Fund IX LP/The Värde Fund IX-A LP Värde Investment Partners 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. and

(Kristinn Bjarnason, Supreme Court attorney) 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

Arrowgrass Distressed Opportunities Fund Limited Arrowgrass Master Fund Ltd.

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Commerzbank International SSA

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Sparkasse Hannover

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 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.*

The plaintiffs and DNB also disputed 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.

For their part, DNB and LÍ hf. appealed the District Court's ruling regarding their disagreement on interest on so-called Icesave deposits and 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.

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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.