JUDGMENT OF THE COURT
17 October 2014*

(Article 30(1) of Directive 2001/24/EC – Winding up of credit institutions – Applicable law – Voidness, voidability or unenforceability of legal acts – Acts governed by the law of another EEA State)

In Case E-28/13,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Reykjavík District Court (*Héraðsdómur Reykjavíkur*) in the case between

LBI hf.

and

Merrill Lynch International Ltd

concerning the interpretation of Article 30(1) of Directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions,

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Páll Hreinsson, Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- LBI hf. ("the plaintiff"), represented by Jóhannes Sigurðsson, Supreme Court Attorney, and Hafliði Kristján Lárusson, Solicitor, of AKTIS Legal Services;
- Merrill Lynch International Ltd. ("the defendant"), represented by Hróbjartur Jónatansson, Supreme Court Attorney, assisted by Margrét

* Language of the request: Icelandic.

Anna Einarsdóttir, District Court Attorney, Jónatansson & Co Legal Services;

- the Belgian Government, represented by Jean-Christophe Halleux and Marie Jacobs, Attachés, Directorate General Legal Affairs of the Federal Public Service for Foreign Affairs, Foreign Trade and Development Cooperation, acting as Agents;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, acting as Agent;
- the EFTA Surveillance Authority ("ESA"), represented by Xavier Lewis, Director, and Maria Moustakali, Officer, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission ("the Commission"), represented by Audroné Steiblyté and Karl-Philipp Wojcik, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiff, represented by Jóhannes Sigurðsson; the defendant, represented by Hróbjartur Jónatansson; the Liechtenstein Government, represented by Dr Andrea Entner-Koch; ESA, represented by Maria Moustakali; and the Commission, represented by Audroné Steiblyté, at the hearing on 10 June 2014,

gives the following

Judgment

I Legal background

EEA law

1 Directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions ("the Directive") (OJ 2001 L 125, p. 15) was incorporated into Annex IX to the EEA Agreement at point 16c by Decision of the EEA Joint Committee No 167/2002 of 6 December 2002 ("Decision No 167/2002") (OJ 2003 L 38, p. 28, and EEA Supplement No 9, p. 20). Decision No 167/2002 entered into force on 1 August 2003. Pursuant to Article 34 of the Directive, the deadline for transposition was 5 May 2004.

2 Recitals 3, 4, 6, 16, 23 and 28 in the preamble to the Directive read:

> *(3) This Directive forms part of the Community legislative framework set up by Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions. It follows therefrom that, while they are in operation, a credit institution and its branches form a single entity subject*

to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted.

(4) It would be particularly undesirable to relinquish such unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings.

…

(6) The administrative or judicial authorities of the home Member State must have sole power to decide upon and to implement the reorganisation measures provided for in the law and practices in force in that Member State. Owing to the difficulty of harmonising Member States' laws and practices, it is necessary to establish mutual recognition by the Member States of the measures taken by each of them to restore to viability the credit institutions which it has authorised.

…

(16) Equal treatment of creditors requires that the credit institution is wound up according to the principles of unity and universality, which require the administrative or judicial authorities of the home Member State to have sole jurisdiction and their decisions to be recognised and to be capable of producing in all the other Member States, without any formality, the effects ascribed to them by the law of the home Member State, except where this Directive provides otherwise.

…

(23) Although it is important to follow the principle that the law of the home Member State determines all the effects of reorganisation measures or winding-up proceedings, both procedural and substantive, it is also necessary to bear in mind that those effects may conflict with the rules normally applicable in the context of the economic and financial activity of the credit institution in question and its branches in other Member States. In some cases reference to the law of another Member State represents an unavoidable qualification of the principle that the law of the home Member State is to apply.

…

(28) Creditors who have entered into contracts with a credit institution before a reorganisation measure is adopted or winding-up proceedings are opened should be protected against provisions relating to voidness, voidability or unenforceability laid down in the law of the home Member State, where the beneficiary of the transaction produces evidence that in the law applicable to that transaction there is no available means of contesting the act concerned in the case in point.

3 Article 1(1) of the Directive reads:

Scope

1. This Directive shall apply to credit institutions and their branches set up in Member States other than those in which they have their head offices, as defined in points (1) and (3) of Article 1 of Directive 2000/12/EC, subject to the conditions and exemptions laid down in Article 2(3) of that Directive.

4 Article 2 of the Directive reads:

Definitions

For the purposes of this Directive:

- "home Member State" shall mean the Member State of origin within the meaning of Article 1, point (6) of Directive 2000/12/EC;

…

5 Article 3 of the Directive reads:

Adoption of reorganisation measures - applicable law

1. The administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of one or more reorganisation measures in a credit institution, including branches established in other Member States.

2. The reorganisation measures shall be applied in accordance with the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in this Directive.

They shall be fully effective in accordance with the legislation of that Member State throughout the Community without any further formalities, including as against third parties in other Member States, even where the rules of the host Member State applicable to them do not provide for such measures or make their implementation subject to conditions which are not fulfilled.

…

6 Article 9(1) of the Directive reads:

Opening of winding-up proceedings - Information to be communicated to other competent authorities

1. The administrative or judicial authorities of the home Member State which are responsible for winding up shall alone be empowered to decide on the opening of winding-up proceedings concerning a credit institution, including branches established in other Member States.

A decision to open winding-up proceedings taken by the administrative or judicial authority of the home Member State shall be recognised, without further formality, within the territory of all other Member States and shall be effective there when the decision is effective in the Member State in which the proceedings are opened.

7 Article 10(1) and Article 10(2)(l) of the Directive read:

Law applicable

1. A credit institution shall be wound up in accordance with the laws, regulations and procedures applicable in its home Member State insofar as this Directive does not provide otherwise.

2. The law of the home Member State shall determine in particular:

…

(l) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

8 Article 30(1) of the Directive reads:

Detrimental acts

1. Article 10 shall not apply as regards the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole, where the beneficiary of these acts provides proof that:

- the act detrimental to the creditors as a whole is subject to the law of a Member State other than the home Member State, and

- that law does not allow any means of challenging that act in the case in point.

National law

9 Chapter XII (Articles 98 to 105) of Act No 161/2002 on Financial Undertakings ("the Financial Undertakings Act") governs financial reorganisation, winding up and merger of financial undertakings.

10 Article 103(4) of the Financial Undertakings Act states that, in winding-up proceedings, rescission under Chapter XX of Act No 21/1991 on Bankruptcy

("the Bankruptcy Act") applies to a financial undertaking when it is evident that its assets will not be sufficient to meet its liabilities.

11 According to the request, rescission under Chapter XX of the Bankruptcy Act is intended to void retroactively measures taken by a bankrupt party, the aim being to avoid discrimination between claimholders and to have more assets subject to division in the winding-up process.

12 Article 134 of the Bankruptcy Act, which is placed in Chapter XX, reads as follows:

> *Rescission may be claimed of a payment of a debt in the six months preceding the reference date, if the payment was made in an unusual form, made unreasonably early, or made in an amount that significantly impaired the bankrupt's payment ability, unless the payment appeared ordinary in the circumstances.*
>
> *Rescission may be claimed of such payment to the bankrupt's relatives in the six to twenty-four months before the reference date, unless it is established that the bankrupt was solvent at that time, despite the payment.*

13 It follows from Article 104(1) of the Financial Undertakings Act that the winding up of a credit institution which is established and licensed to operate in Iceland shall be governed by Icelandic law subject to the exceptions listed in the second paragraph of Article 99.

14 Article 99 of the Financial Undertakings Act reads:

> *Financial reorganisation of a credit institution with head offices in Iceland and branches in another EEA state*
>
> *1. If a court of law in Iceland grants to a credit institution permission for suspension of payment or composition with creditors such permission shall automatically extend to all branches operated by the credit institution in another member state.*
>
> *2. Icelandic law shall apply concerning the legal effect, procedure and implementation of the decision, with the following exceptions:*
>
> …
>
> *(n)… the provision of Chapter III of the Act on conclusion of contracts, power of attorney and invalid legal instruments, No 7/1936, on invalid legal instruments, may be applied unless the law of the host State does not allow this. A legal instrument may not, however, be invalidated if the party benefiting from the continuing validity of such a legal instrument provides satisfactory evidence that the law of another State should apply*

to the legal instrument and that the respective law does not include an invalidating rule which applies to the instance in question.

15 According to the request by the national court, Article 99(2)(n) was intended to implement the provisions of Article 30(1) of the Directive.

16 Chapter III of Act No 7/1936 on Contracts, Mandates and Invalid Legal Instruments ("the Act on Invalid Legal Instruments") contains the general rules on the rescission of legal acts in contract law, for example in cases where they have been executed under coercion, through deception, the abuse of position or by unfair means. However, the Act on Invalid Legal Instruments contains no rules on the rescission of measures taken by a bankrupt party within the meaning of the Bankruptcy Act.

II Facts and procedure before the national court

17 Under the name Landsbanki Íslands hf., the plaintiff operated as a financial undertaking, registered in Iceland, until it collapsed in October 2008. The plaintiff had business relations with the defendant, another credit institution.

18 Between 2001 and 2008, the plaintiff issued bonds in the form of Temporary Global Notes. The bonds were lodged with Euroclear Bank SA and Clearstream Banking SA as common depositories. When bonds had been issued and lodged with one of the common depositories, investors were able to subscribe to units corresponding to the bonds. According to the terms of issue, the issuer and its agents were to regard those who were registered in the records of the common depositories as owning units in the bonds at any given time as the holders of bonds for corresponding amounts. However, no bonds or written documents were issued to those who purchased unit claims.

19 According to the national court, the agency agreement, bonds and payment coupons are subject to English law.

20 In 2008 the plaintiff made three payments to the defendant in relation to the bonds. The first was payment of 9 July 2008 in the amount of EUR 4 131 879.16 in accordance with a bond due on 21 December 2009. The second was payment of 15 August 2008 in the amount of EUR 243 710.67 in accordance with a bond due on 18 May 2012. The third was payment of 9 September 2008 in the amount of EUR 87 616.39 in accordance with a bond due on 19 October 2010.

21 On 7 October 2008, the Icelandic Financial Supervisory Authority dismissed the plaintiff's board of directors and appointed a resolution committee to exercise all the functions of the board and see to all the plaintiff's affairs, including its operations and the supervision of its assets. By the Financial Supervisory Authority's decision of 9 October 2008, the plaintiff's domestic activities were transferred to another legal entity established for this purpose.

22 Following the adoption of Act No 44/2009, which amended certain provisions of the Financial Undertakings Act, the plaintiff was to be put into winding-up proceedings. These proceedings were to begin on the date of entry into force of the Act on 22 April 2009, with a reference date of 15 November 2008.

23 On 29 May 2012, the plaintiff brought a claim against the defendant before the requesting court. Pursuant to Article 134 of the Bankruptcy Act, the plaintiff seeks rescission of the three aforementioned payments. In essence, the plaintiff argues that the payments must be regarded as repayment by an insolvent actor of debts before the date of maturity.

24 The defendant argues that the situation must be qualified as a purchase by the plaintiff of its own securities and not as the repayment of a debt. In any event, under Article 30 (also with reference to Article 10) of the Directive, the measures in question can only be rescinded if this would be permissible also under English law. In the defendant's view, rescission would not be possible under English law. The plaintiff rejects this argument, arguing that Article 99(2)(n) of the Financial Undertakings Act, which implements Article 30 of the Directive, applies only to the invalidation of agreements pursuant to Chapter III of the Act on Invalid Legal Instruments. In the plaintiff's view, it is not relevant to the resolution of the case whether Article 30 of the Directive also applies to rescission under Chapter XX of the Bankruptcy Act, since the Directive cannot overrule Icelandic law.

25 On 7 November 2013, the District Court decided to seek an Advisory Opinion from the Court and referred the following questions:

1. *Should Article 30(1) of Directive 2001/24/EC, on the reorganisation and winding up of credit institutions, be interpreted as meaning that "the voidness, voidability or unenforceability of legal acts" refers to the rules on the rescission of measures taken by a financial undertaking according to rules that are comparable to those that apply to the rescission of measures taken by a bankrupt individual under the Bankruptcy (Etc.) Act?*

2. *If the answer to the first question is in the affirmative, should Article 30(1) of the Directive be interpreted as meaning that it is sufficient for the party against whom a demand for rescission is directed to present proof that rescission of the measure would not be permitted under the laws of the Member State applicable to the measure, with reference to rules of any type, e.g. rules on time limits for taking legal action?*

3. *If the answer to the second question is in the negative, should Article 30(1) of the Directive be interpreted as meaning that it is necessary for the party against whom a demand for rescission is directed to present proof that the conditions for rescission under the laws of the Member State applicable to the measure have evidently not been met, e.g. because there is a complete lack of authorisation for the rescission of the type of measure involved?*

26 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the, Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III The questions referred to the Court

Preliminary remarks on the scope of the Directive

27 As explained in recital 3 of its preamble, the Directive forms part of the legislative framework set up by Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1), later replaced by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ 2006 L 177, p. 1).

28 That framework establishes mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the EEA, and the application of the principle of home EEA State prudential supervision. While a credit institution and its branches are in operation, they form a single entity subject to the supervision of the competent authorities of the home State where the authorisation valid throughout the EEA was granted.

29 In order to keep such unity between an institution and its branches where it is necessary to adopt reorganisation measures or open winding-up proceedings, the Directive lays down uniform rules on jurisdiction, applicable law and mutual recognition and enforcement of measures taken (see recitals 4, 6, 16 and 23 in the preamble to the Directive).

30 In relation to jurisdiction, Articles 3 and 9 of the Directive provide that only the administrative or judicial authorities of the home EEA State shall have jurisdiction to decide on the implementation of reorganisation measures and on the opening of winding-up proceedings in accordance with the law in that State.

31 As regards applicable law, Articles 3(2) and 10(1) of the Directive state that a credit institution shall be reorganised or wound up in accordance with the laws, regulations and procedures applicable in its home EEA State unless otherwise provided in the Directive.

32 In winding-up proceedings, Article 10(2)(l) of the Directive specifically sets out that the law of the home EEA State shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

33 Moreover, as stated in recital 23 of the preamble to the Directive, it is important to follow the principle that the law of the home EEA State determines all the

effects of reorganisation measures or winding-up proceedings, i.e. both procedural and substantive. However, those effects may conflict with the rules normally applicable to the economic and financial activities of the credit institution in question in other EEA States. For example, as set out in recital 28 of the preamble, creditors who have entered into contracts with a credit institution before a reorganisation measure is adopted or winding-up proceedings are opened should be protected.

34 Therefore, as an exception to the main rule that the law of the home EEA State applies, Article 30(1) of the Directive provides that the law of the home State shall not apply as regards the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole, where the beneficiary of these acts provides proof that (i) the act detrimental to the creditors as a whole is subject to the law of an EEA State other than the home EEA State, and (ii) that law does not allow any means of challenging that act in the case in point. In the case before the national court, it is undisputed that English law applies to the payments in question.

The first question

35 By its first question, the requesting court seeks in essence to clarify whether the expression "voidness, voidability or unenforceability" of legal acts in Article 30(1) of the Directive refers merely to rescission under contract law, or also to rescission in bankruptcy law on the basis of avoidance rules, such as those included in Chapter XX of the Bankruptcy Act. Avoidance rules in the context of bankruptcy allow for the reversal of transactions and other acts made before the opening of the bankruptcy proceedings deemed to be to the detriment of a fair distribution of the bankrupt estate's property among the unsecured creditors.

36 All those who have submitted observations argue that the first question must be answered in the affirmative.

37 Article 30(1) of the Directive does not limit the basis on which to invoke voidness, voidability or unenforceability of an act. The decisive criterion is the capacity of an act to be prejudicial to creditors' rights. According to the description given in the request, it appears that the rules on rescission in Icelandic bankruptcy law may apply to acts that affect the creditors as a whole in a detrimental manner.

38 Accordingly, in winding-up proceedings of financial undertakings governed by the Directive, the rules in the home State on rescission in bankruptcy law, such as those included in Chapter XX of the Bankruptcy Act, shall not apply to an act detrimental to the creditors as a whole, if the act in question is subject to the law of an EEA State other than the home State and the law in that other EEA State does not allow any means of challenging that act in the case in point.

39 Article 99(2)(n) of the Financial Undertakings Act was intended to implement Article 30(1) of the Directive. However, according to the request, Article

99(2)(n) seems to limit the non-application of Icelandic law, where the act in question is governed by the law of another EEA State, to rescission in accordance with Chapter III of the Act on Invalid Legal Instruments.

40 The EEA/EFTA States' obligations arising from a directive to achieve its result and from Article 3 EEA to take all appropriate measures, whether general or particular, are binding on all the authorities of the EEA/EFTA States, including the courts, for matters within their competence. It is therefore the responsibility of the national courts in particular to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective.

41 This is the case all the more when the national court is seised of a dispute concerning the interpretation of domestic provisions specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. In the light of Article 7(b) EEA, the national court must presume that the EEA/EFTA State had the intention of fulfilling entirely the obligations arising from the directive concerned.

42 Moreover, it is inherent in the objectives of the EEA Agreement, as well as in recital 15 in its preamble and Articles 1 and 3 EEA, that when a national court applies domestic law, whether adopted before or after the directive, it is bound to interpret national law within its competence in conformity with EEA law. The Court has therefore consistently held that a national court must apply the interpretative methods recognised by national law, as far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive, favouring the interpretation of the national rules which is the most consistent with that purpose. This complies with Article 7(b) and Article 104 EEA (see, to that effect, Case E-25/13 *Engilbertsson*, judgment of 28 August 2014, not yet reported, paragraph 159, and case law cited).

43 Although this principle chiefly concerns domestic provisions to implement the directive in question, the national court must consider the whole body of domestic law in order to assess to what extent the principle may be applied to prevent a result contrary to the directive (see, to that effect, *Engilbertsson*, cited above, paragraph 163, and case law cited).

44 Therefore, if the national court finds that the payments in question are acts detrimental to the creditors as a whole, which entails that Article 30(1) of the Directive is applicable, it must apply the methods of interpretation recognised by Icelandic law as far as possible in order to achieve the result sought by this provision (see Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 39).

45 However, an interpretation in line with Article 30(1) of the Directive may be impossible according to the interpretative methods recognised by national law. If this leads to a violation of EEA law, the EEA State concerned is obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance with the principle of State liability. This principle is an

integral part of the EEA Agreement (see, *inter alia*, Case E-18/11 *Irish Bank Resolution Corporation* [2012] EFTA Ct. Rep. 592, paragraph 125, and case law cited).

46 The answer to the first question must therefore be that the expression "voidness, voidability or unenforceability of legal acts" in Article 30(1) of the Directive also refers to rescission in bankruptcy law on the basis of avoidance rules, such as those included in Chapter XX of the Icelandic Bankruptcy Act No 21/1991.

The second and third questions

47 By its second and third questions, the national court seeks in essence to ascertain what the beneficiary must prove and which standard of proof is required under the second indent of Article 30(1) of the Directive in order to trigger the non-application of the law of the home EEA State.

48 More precisely, in terms of what the beneficiary must prove, the national court queries whether it is sufficient for the beneficiary to submit proof that the law of the EEA State governing the act does not permit a challenge to the act on the basis of any type of rule, including formal rules such as time limits for bringing an action, or if only substantive rules are relevant in this regard. Second, the national court queries whether the beneficiary is required to demonstrate that under the law of that other EEA State, the act in question is as such unchallengeable, or if it suffices for the beneficiary to prove that the act is challengeable, but that the requirements for such a challenge are not fulfilled in the specific case.

49 The Court finds it appropriate to assess the two questions together.

Observations submitted to the Court

50 The plaintiff submits that only substantive rules are relevant in the context of Article 30(1) of the Directive. Only substantive rules can be used to challenge the validity of an act and no procedural rules decide whether an act is void, voidable or unenforceable. A procedural rule may have an effect on the ability to commence a legal action in relation to the act. However, Article 30(1) is not concerned with legal actions in relation to the act, but rather with the act itself. Moreover, the rationale behind the rule is to protect the fair and legitimate expectations of the beneficiary concerning the validity of the act. In this regard, only substantive rules are relevant.

51 Moreover, it is a general principle of private international law that the procedural rules applicable to an action are those of the court hearing the case. Hence, according to the plaintiff, the procedural rules of the home EEA State must apply to any procedural issues, such as the time limits within which to commence legal action in relation to the act in question.

52 Furthermore, since Article 30(1) of the Directive is an exception to the general principle set out in Article 10(1), it should be interpreted narrowly.

53 Finally, the standard of proof should be high. Also in this regard, the plaintiff refers to the fact that Article 30(1) of the Directive is an exception to the main rule that the law of the home State applies. Consequently, the party relying on this defence must clearly demonstrate that the relevant law does not allow any means of challenging that act in the case in point and, hence, that the conditions for challenging the act have not been met.

54 The defendant submits that Article 30(1) of the Directive must be construed such that it affords creditors protection against actions intended to produce retroactive effects with regard to the validity of a legal act on the basis of any type of rules. In its view, there is no basis for excluding the rules on prescription and limitation of actions from the exception provided for in Article 30(1).

55 The defendant challenges the plaintiff's contention that procedural rules should be separated from substantive rules in the context of Article 30(1) of the Directive. Not only does the wording not allow for such a distinction, but such a split would differ between the EEA States and thus prevent Article 30(1) from having uniform effect. In any event, in the defendant's view, rules regarding limitation periods are considered to be substantive.

56 At the same time, however, in the defendant's view, the phrase "any means" must be limited to insolvency law. Therefore, it is sufficient for the beneficiary to prove that the act cannot be challenged under the insolvency law of the EEA State governing the act. Whether the act can be challenged according to contract law is not relevant, as contract law does not permit voidance of an act on the sole basis that the act is detrimental to the general body of creditors.

57 The right to challenge the act must be examined at the point in time when the voidance action is initiated. Consequently, according to the defendant, the requirement established in Article 30(1) of the Directive will be fulfilled also where there is a possibility to challenge the act in the law of the EEA State governing the act, but where the time limit for bringing an action of that kind has expired. Such an interpretation is consistent with legal certainty and the provision's objective of upholding the legitimate expectations of a counterparty of a credit institution.

58 In the defendant's view, the general standard of proof in the law of the home EEA State applies. Consequently, it must be sufficient to present proof that the act in question is not likely to be rescindable under the law of the EEA State concerned.

59 The Belgian Government argues that the wording "any means" implies that the impossibility under the law applying to the detrimental act to challenge it concerns both the insolvency rules and the general rules of national law applying to such an act. As for the phrase "in the case in point", the Belgian Government

argues that it implies that the possibility of challenging the detrimental act must be assessed in a concrete manner, taking into account all the specific elements of the case in point. It is therefore not sufficient to determine in an abstract manner whether or not the act may be challenged.

60 The Liechtenstein Government submits that Article 30(1) of the Directive does not restrict the voidness, voidability or unenforceability to rules arising out of or applicable only within the constraints of insolvency proceedings in general or winding-up proceedings in particular. Nor is the expression "any means" restricted to substantive law. This is for good reasons. It may well be that a rule of English procedural law may be deemed substantive law in Iceland or vice versa.

61 However, in its view, the burden of proof resting upon the beneficiary cannot extend to the foreign law applicable to the act concerned as a whole, but is limited to provisions of said law corresponding in essence to those otherwise applicable under the home EEA State's law. Therefore, the beneficiary can prevent their application by proving that there are no corresponding provisions under the law applicable to the act concerned which would equally lead to its voidness, voidability or unenforceability on comparable grounds. If the beneficiary were required to prove that the law applicable to the act at issue does not provide any possibility to challenge such an act in all circumstances whatsoever, proof thereof would be bound to fail in every case, thus rendering Article 30(1) of the Directive moot.

62 Furthermore, where an EEA State whose laws are applicable to the act at issue provides for rules allowing such an act to be challenged in theory, but the conditions for such challenge are not fulfilled in the case at hand, according to the Liechtenstein Government, that foreign law equally does not allow any means of challenging that act in the case in point.

63 Therefore, it is for the beneficiary – in this case the defendant – to prove that, in the specific circumstances of the present case, English law would not allow rescission of the legal act challenged by the plaintiff. In this regard, it is irrelevant whether rescission is impossible under English law by reason of substantive or procedural rules.

64 As regards the standard of proof, including whether and, if so, to what extent evidence on the law applicable to the act at stake is permissible and has to be considered, the Liechtenstein Government submits that this matter has to be determined by the law of the home State.

65 ESA submits that the wording of Article 30(1) of the Directive does not distinguish between substantive and procedural rules of the law applicable to the act. In the legal systems of Iceland, Norway and Liechtenstein, as well as in many other EEA States, the possibility to obtain rescission or, in general, the voidance of an act detrimental to all creditors is subject to certain substantive and procedural conditions, including rules on time limitation or the duration of the

reach-back period. In its view, these conditions, and also rules on time limitations and on the duration of the reach-back period, should not be disregarded when the law of the other State is invoked on the basis of Article 30(1) of the Directive.

66 Therefore, according to ESA, the wording "any means" indicates that the impossibility to challenge the detrimental act under the law applicable to such act relates both to substantive and procedural rules and both to insolvency rules as well as general contract law.

67 Moreover, ESA continues, the phrase "in the case in point" suggests that the fulfilment of the requirement has to be assessed on an ad hoc basis. Thus, the specific features of the act challenged must be taken into account when assessing whether the law applicable to the act allows for any means of challenging that act in the case at hand. The exception to the general rule introduced by Article 30(1) of the Directive cannot be interpreted as expanding the possibilities for rescission afforded under the law governing the act. Therefore, if there is no possibility of challenging the act under the law governing it or no longer such a possibility, whether for substantive or procedural reasons, rescission under the law of the home State must be regarded as precluded.

68 As regards the standard of proof, ESA observes that, under private international law, foreign law must be proved as a fact. Therefore, the level of proof required under Article 30(1) of the Directive is the standard of proof applicable in civil proceedings in the home EEA State with regard to proving the factual elements of the case.

69 The Commission submits that a beneficiary must demonstrate that no court action for a declaration of voidness, voidability or unenforceability in relation to the act in question would be available under the law of the EEA State governing the act.

70 The reference to "any means" indicates that voidness, voidability or unenforceability is not restricted to the rules that directly govern insolvency proceedings. It covers all provisions of national law applicable to the act on the basis of which voidness, voidability or unenforceability of the legal act may be decided. The wording does not explicitly distinguish between substantive and procedural rules.

71 According to the Commission, the phrase "in the case in point" requires a concrete assessment of the possibility to challenge the act. However, this does not mean that the condition that the act cannot be challenged is met where it was possible to challenge the act, but where it is no longer possible to do so, for example, because the period in which to bring an action has expired. This interpretation ensures that it is always clear which law is applicable and that this clarity is not impaired or affected by any possible negligence on the part of the interested party in not bringing an action in time.

72 As regards the standard of proof, the Commission contends that this should be determined by the law of the home EEA State.

Findings of the Court

73 The application of the law of the home EEA State on voidness, voidability and unenforceability of acts detrimental to the creditors as a whole may be prevented by the cumulative effects of the first and second indents of Article 30(1) of the Directive. The second indent requires the beneficiary of such an act to provide proof that the law of the EEA State applicable to the act does not allow any means of challenging that act in the case in point. As an exception to the general rule that the effects of reorganisation and winding-up measures are governed by the law of the home EEA State, it must be interpreted strictly (compare Case C-85/12 *LBI*, judgment of 24 October 2013, published electronically, paragraph 52).

74 Both the expression "rules relating to the voidance, voidability and unenforceability" and the phrase "any means of challenging" are broad. Neither limits the basis on which the act may be challenged. Therefore, as long as the act is regarded as detrimental to the entire mass of creditors, it is not decisive whether or not the possibility of challenging it is classified as part of bankruptcy law. Moreover, there is nothing to suggest that only substantive rules are relevant. A rule may be classified as substantive in one jurisdiction and procedural in another. Therefore, rules such as time limits for bringing an action must also be relevant.

75 Furthermore, the use of the words "in the case in point" entails that a concrete assessment of the specific act in question must be undertaken. Consequently, it is not necessary for the beneficiary to prove that the act is unchallengeable as such. Even if the act may be challenged, in principle, under the law of the EEA State governing it, it is sufficient if the beneficiary proves that the requirements for such a challenge are not fulfilled in the specific case at hand.

76 The Commission has argued that the condition that the act is unchallengeable under the law governing it should not be considered met if, for example, the act could have been challenged but such legal action is now time-barred.

77 There is not much to support this interpretation. The phrase "in the case in point" does not suggest it. Furthermore, the purpose of Article 30(1) of the Directive is to protect those who have entered into transactions with a credit institution from challenges under the law of the home EEA State that would not be possible under the law of the EEA State governing the act. This requires that the possibilities to challenge the act may not be expanded by the law of the home State when compared with what would follow under the law governing the act. Therefore, the purpose of that provision would be better served if the requirement that the act is unchallengeable is also considered met where the act can no longer be challenged under the law governing the act, for example, because the period within which to bring an action has expired.

78 Finally, as regards the standard of proof, the main rule in Article 10(1) of the Directive is that the law of the home EEA State shall apply to the winding-up proceedings. This must entail that the standard of proof is determined by the law of the home State. In some jurisdictions, the content of foreign law, when applicable, is treated as a matter of fact, in others as a matter of law. Consequently, the question whether the beneficiary has proved that the law applicable to the act does not allow any means of challenging it must be assessed according to the rules of the home EEA State for determining the substance of foreign law.

79 The answer to the second and third questions must therefore be that under the second indent of Article 30(1) of the Directive, the beneficiary must prove that, whether for substantive or procedural reasons, under the law governing the act detrimental to the creditors as a whole, there is no possibility, or no longer any possibility, to challenge the act in question.

80 A concrete assessment of the specific act in question must be undertaken. Consequently, even if the act can in principle be challenged under the law of the EEA State governing it, it is sufficient that the beneficiary proves that the requirements for such a challenge are not fulfilled in the case at hand.

81 It must be assessed according to the rules of the home EEA State whether or not the beneficiary has proved that the law applicable to the act does not allow any means of challenge.

IV Costs

82 The costs incurred by the Belgian and Liechtenstein Governments, ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before Reykjavík District Court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Héraðsdómur Reykjavíkur hereby gives the following Advisory Opinion:

1. **The expression "voidness, voidability or unenforceability of legal acts" in Article 30(1) of Directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions also refers to rescission in bankruptcy law on the basis of avoidance rules, such as those included in Chapter XX of the Icelandic Bankruptcy Act No 21/1991.**

2. **Under the second indent of Article 30(1) of Directive 2001/24/EC the beneficiary must prove that, whether for substantive or procedural reasons, under the law governing the act detrimental to the creditors as a whole, there is no possibility, or no longer a possibility, to challenge the act in question.**

   A concrete assessment of the specific act in question must be undertaken. Consequently, even if the act can in principle be challenged under the law of the EEA State governing it, it is sufficient that the beneficiary proves that the requirements for such a challenge are not fulfilled in the case at hand.

   It must be assessed according to the rules of the home EEA State whether or not the beneficiary has proved that the law applicable to the act does not allow any means of challenge.

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 17 October 2014.

Gunnar Selvik
Registrar

Carl Baudenbacher
President