# REPORT FOR THE HEARING*

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.

## I Introduction

1. By letter of 17 December 2013, Reykjavík District Court requested an Advisory Opinion in a case pending before it between LBI hf. ("the plaintiff") and Merrill Lynch International Ltd ("the defendant"). The case before the national court concerns a demand for the rescission of three payments made by the plaintiff to the defendant.

## II Legal background

*EEA law*

2. 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 ("the Decision") (OJ 2003 L 38, p. 28, and EEA Supplement No 9, p. 20).

3. Iceland and Liechtenstein indicated constitutional requirements for the purposes of Article 103 EEA. As the second of those two countries, Liechtenstein gave notification on 6 June 2003 that constitutional requirements

* Revised in paragraphs 14, 16 and 18.

had been fulfilled. Consequently, the Decision entered into force on 1 August 2003. According to Article 34 of the Directive, the deadline for transposition was 5 May 2004.

4. Recital 16 in the preamble to the Directive reads:

*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.*

5. Recital 23 in the preamble to the Directive reads:

*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.*

6. Recital 28 in the preamble to the Directive reads:

*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.*

7. Article 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.*

*2. The provisions of this Directive concerning the branches of a credit institution having a head office outside the Community shall apply only where that institution has branches in at least two Member States of the Community.*

8. Article 10(1) and 10(2)(l) of the Directive reads:

*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.*

9. 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*

10. Article 134 of the Bankruptcy Act No 21/1991 ("the Bankruptcy Act") 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.*

11. Act No 161/2002 on Financial Undertakings ("the Financial Undertakings Act") states that Chapter XX of the Bankruptcy Act applies to a financial undertaking when it is evident that its assets will not be sufficient to meet its liabilities. Article 99(2)(n) of the Financial Undertakings Act, which, according to the request by the national court, was intended to implement the provisions of Article 30(1) of the Directive, reads as follows:

*Notwithstanding the provisions of subparagraphs d and e, 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.*

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

## III Facts and procedure

13. 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, a credit institution.

14. 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.

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

16. In 2008 the plaintiff made three payments of certain amounts to the defendant in relation to the bonds. The first of these was the 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 the 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 the payment of 9 September 2008 in the amount of EUR 87 616.39 in accordance with a bond due on 19 October 2010.

17. On 7 October 2008, the Financial Supervisory Authority in Iceland 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.

18. 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.

19. 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.

20. 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, the defendant argues that, under Article 30 (also with reference to Article 10) of the Directive, the measures in question can only be rescinded if this would also be permissible under English law. In its 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, only applies to the invalidation of agreements in accordance with 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.

21. 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.**

## IV Written observations

22. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Jóhannes Sigurðsson, Supreme Court Attorney, and Hafliði Kristján Lárusson, Solicitor, of AKTIS Legal Services;
- the defendant, represented by Hróbjartur Jónatansson, Supreme Court Attorney, assisted by Margrét Anna Einarsdóttir, District Court Attorney, Jónatansson & Co Legal Services;
- the Belgian Government, represented by Jean-Christophe Halleux and Marie Jacobs, Attachés within the 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;
- 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.

## V Summary of the arguments submitted

*The plaintiff*

23. As regards the first question, the plaintiff submits that the words "rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors" in Article 10(2)(l) of the Directive seemingly refer to rules relating to the rescission of certain acts made by an insolvent credit institution prior to its winding up.

24. More importantly, the plaintiff asserts, the words "detrimental to the creditors as a whole" in Article 30(1) of the Directive similarly seem to refer to such rules, as the purpose of rules authorising the setting aside in insolvency proceedings of certain acts made by the insolvent credit institution prior to its winding up is to ensure equality among the creditors and to avoid the possibility that individual creditors receive a preferential treatment to the detriment of other creditors within a specified time period prior to the credit institution's insolvency. It finds support for its view in recital 16 in the preamble to the Directive, as well as in case law[1] and academic writing.[2]

25. Turning to the second question, the plaintiff submits that the question should be read as referring to procedural rules of any type, and not substantive rules.

26. The plaintiff submits that Article 30(1) of the Directive does not appear to make a distinction between procedural and substantive rules. However, procedural rules, such as rules on time limits within which to commence legal action, have no relevance regarding the voidness, voidability or unenforceability of the act as such. Moreover, Article 9(1) of the Directive makes it clear that the relevant authorities of the home Member State alone have jurisdiction in the relevant winding-up proceedings. Hence it can be concluded that the applicable procedural rules are the procedural rules of the home Member State alone and that only those rules will apply to any procedural issues, such as the time limits within which to commence legal action in relation to the act in question. According to the plaintiff, this interpretation is supported by Article 13 of Council Regulation (EC) No 1346/2000 on insolvency proceedings (OJ 2000 L

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1 Reference is made to Cases 133/78 *Gourdain* [1979] ECR 1733 and C-339/07 *Frick* [2009] ECR I-767.

2 Reference is made to Ian F. Fletcher and Marcus Haywood, "United Kingdom", in *EU Banking and Insurance Insolvency*, edited by Gabriel Moss and Bob Wessels, Oxford University Press, 2006, paragraph 20.89, and Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law & Practice*, Kluwer Law International, 2004, p. 138.

160, p. 1) ("the Insolvency Regulation"), on which Article 30(1) of the Directive is based, and Article 13 of the Convention on Insolvency Proceedings.[3]

27. Finally, concerning the third question, the plaintiff submits at the outset that the question should be read as referring not only to the conditions for rescission but also to voidness, voidability and unenforceability, as in the first two questions.

28. The plaintiff observes that the Directive is silent on the standard of proof required of a party wishing to invoke an Article 30(1) defence. However, it submits that, since Article 30(1) is an exception to the general principle that the law of the State of the opening of insolvency proceedings shall apply ("*lex fori concursus*"), that provision must be interpreted strictly.[4] Therefore, the standard of proof should be high.

29. Consequently, according to the plaintiff, it is not sufficient to adduce a likelihood of the existence of an Article 30(1) defence. 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 voidness, voidability or unenforceability under the laws of the Member State applicable to the act have not been met.

30. The plaintiff proposes that the Court should answer the questions as follows:

*Question 1: Yes.*

*Question 2 (with suggested amendments): No.*

*Question 3 (with suggested amendments): Yes.*

*The defendant*

31. The defendant submits that the objective of the Directive clearly indicates that Article 30(1) is to be construed to mean that it pertains to rescission under national bankruptcy law. The terms voidness, voidability or unenforceability should therefore extend to all instances when a legal act is deemed detrimental to creditors and thus voidable as a result of the opening of winding-up proceedings, whether the act is rescinded on the basis of the provisions of bankruptcy law, the voiding provisions of contract law, or other statutory provisions.

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[3] Reference is made to Miguel Virgós & Etienne Schmit, *Report on the Convention on Insolvency Proceedings*, Council Doc. 6500/96, DRS 8(CFC), 3 May 1996; *The European Insolvency Regulation: Law & Practice*, cited above, p. 138; *EU Banking and Insurance Insolvency*, cited above, paragraph 20.90; and François Mélin, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité*, Forum Européen de la Communication and Bruylant, 2008, paragraph 240.

[4] Reference is made to Case C-85/12 *LBI*, judgment of 24 October 2013, published electronically, paragraph 52, and *EU Banking and Insurance Insolvency*, cited above, paragraph 20.90.

32. The defendant contends that in interpreting Article 30(1) of the Directive the expression "any means" clearly indicates that the legal act, allegedly detrimental to the creditors, cannot be challenged whether by specific provisions of insolvency law or by any other laws of the Member State governing the act at issue. Thus, to confine the exception to the application of home Member State law, for example, simply to contract law provisions would be contrary to the meaning of the said expression and entail a significant reduction in the protection that Article 30(1) of the Directive is intended to afford creditors. According to the defendant, the purpose of this provision is to ensure protection against retroactive actions by the estate to invalidate a legal act in relation to which the creditor has legitimate expectations that it will be regarded as binding on the financial institution.

33. In the defendant's view, the expression "in the relevant case" means that the detrimental act should not be capable of being challenged in fact, taking account of all the individual circumstances of the case at hand. It is not sufficient to determine whether the act can be challenged in the abstract. In this regard, it relies also on Article 13 of the Insolvency Regulation. This provision establishes an exception to the applicability of *lex fori concursus* in relation to acts detrimental to all creditors in the same way as Article 30(1) of the Directive.[5]

34. The defendant submits that the Danish, Norwegian and Swedish language versions of the Directive support this interpretation. However, the Icelandic language version differs somewhat concerning the key words of Article 10 and 30 of the Directive: "voidness, voidability or unenforceability". The Icelandic version contains the terms "ógildir, ógildanlegir eða skortir réttarvernd". According to the defendant, the proper translation of these terms into English would be "invalid, invalidatable or lack of judicial protection". It contends that the legislation implementing the Directive in Iceland reflects the terms used in the Icelandic version of the Directive.

35. The Defendant notes that, according to Article 129 EEA, all versions of a directive are equally authentic. However, when there is a discrepancy between official languages, the wording contained in the majority of the language versions should be accepted.[6]

36. Consequently, in the defendant's view, insofar as the Icelandic version of the Directive is considered ambiguous and not to reflect clearly the subject matter of Article 30(1), it should be ignored. Furthermore, the Directive must prevail over domestic law regardless of the form and method of implementation.

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[5] Reference is made to *Report on the Convention on Insolvency Proceedings*, cited above, paragraph 137.

[6] Reference is made to Cases E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraphs 88 to 90, and C-64/95 *Lubella* [1996] ECR I-5124, paragraph 18.

37. Turning to the second question, the defendant submits that Article 30 must be construed such that it affords creditors a protection from actions intended to have retroactive effects on 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 stated in Article 30 of the Directive. In this regard, the defendant makes reference to Article 12(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).[7]

38. As regards the third question, the defendant submits that the term "provides proof" in Article 30(1) of the Directive must refer to the general standard of proof applicable in the law of civil procedure of the *lex fori concursus*.[8] Consequently, it must be sufficient to present proof that the act in question is not likely to be rescindable under the laws of the Member State concerned. Adverse construction of the provision would lead to an undue burden of proof on the defendant and set the standard of proof significantly higher than the preponderance of the evidence criteria does in general. Such an interpretation has neither a foundation in the Directive nor in the Insolvency Regulation.[9]

39. The defendant proposes that the Court should answer the questions as follows:

> *1. Article 30, Paragraph 1 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions must be construed to the effect that rules relating to voidness, voidability or unenforceability include rules regarding the rescission of a disposition by a financial undertaking under rules which are comparable to those which are in effect regarding the rescission of dispositions by a bankrupt under the Act on Bankruptcy.*
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> *2. Article 30, Paragraph 1 of the Directive must be construed to the effect that it is sufficient for the party to which a demand for rescission is directed to present proof that rescission of the disposition under the laws of the Member State applicable to said disposition would be prohibited on the basis of any type of rules, e.g. rules regarding the statute of limitations to bring legal action.*
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> *3. If answer to the second question is in the negative, Article 30, Paragraph 1 of the Directive must be construed to the effect that it is sufficient for the party to which a demand for rescission is directed to present sufficient proof that the conditions for rescission of the disposition*

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7 Reference is made to *The European Insolvency Regulation: Law & Practice*, cited above, p. 136.

8 Reference is made to Article 18 of Regulation (EC) No 593/2008, which concerns burden of proof.

9 Reference is made to the judgment of 24 October 1997 of the Supreme Court of the Netherlands, reported NIPR 1998, 114, and NJ 1999, 316. In this case, it was held that Article 13 of the Insolvency Regulation does not require a higher standard with respect to the burden of proof than is generally required in civil cases.

*under the laws of the Member State applicable to the disposition have likely not been met.*

*The Belgian Government*

40. At the outset, the Belgian Government observes that the Directive unifies the rules on jurisdiction and legislative competence in reorganising and liquidating credit institutions by providing that the home Member State has sole jurisdiction (*lex fori concursus*).

41. The Belgian Government submits that the Directive provides for two kinds of exceptions to the application of the *lex fori concursus*. These are certain issues affected by the proceedings, for which the Directive provides the application of another law, and certain issues not affected by the procedures (that is subject to "negative rules of conflict"), whereby the application of the *lex fori concursus* is not questioned. In its view, Article 30 of the Directive has to be interpreted from the perspective of such negative rules of conflict, establishing issues not affected by the proceedings.

42. In the view of the Belgian Government, the first question seeks to establish whether the words "the voidness, voidability or unenforceability of legal acts" in Article 30(1) of the Directive refers to the rules on the rescission of measures taken by a financial institution in accordance with rules comparable to those that apply to the rescission of measures taken by a bankrupt individual under the Bankruptcy (Etc.) Act.

43. According to the Belgian Government, the question should be answered in the affirmative. Except where provided otherwise, the same bankruptcy rules apply to non-financial companies, individuals and financial institutions. There is no distinction as to the meaning of the words "the voidness, voidability or unenforceability of legal acts" whether the party concerned is a natural person, a non-financial company or a financial institution.

44. The Belgian Government submits that also the second question should be answered in the affirmative. Reference is made to the explanatory report on the Insolvency Convention,[10] which became the Insolvency Regulation. Given that the wording of the Convention and the Regulation – and by extension also the Directive – is the same, the Report constitutes a source of interpretation for the Directive as well.

45. Specifically, the Belgian Government stresses that, according to the explanatory report, 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 act, such as a Paulian action.

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[10] Reference is made to *Report on the Convention on Insolvency Proceedings*, cited above.

46. As to the wording "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 can be challenged.[11]

47. The Belgian Government proposes that the Court should answer the questions as follows:

> *Since the same bankruptcy rules apply to non-financial companies, individuals and financial institutions there is no distinction as to the meaning of the words "the voidness, voidability or unenforceability of legal acts" whether the concerned party is a natural person, a non-financial company or a financial institution. The general rules of bankruptcy law should apply.*
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> *Since Directive 2001/24/EC refers to "any means", the party against whom a demand for rescission is directed should provide proof that under the law applying to the detrimental act (both insolvency law and the national law's general rules applying to the act) such act cannot be challenged.*
>
> *Since Directive 2001/24/EC refers to "in the case in point" proof of the fact that such act cannot be challenged should be delivered in a concrete manner, taken into account all concrete elements of the case at hand.*

*The Liechtenstein Government*

48. As regards the first question, the Liechtenstein Government submits that it is clear from recital 16 in the preamble and Articles 10 and 20 et seq. of the Directive that even though the *lex fori concursus* should be applied as a general rule, the European legislature never intended the rule to be exclusive and all-encompassing. Rather, it recognised that in certain instances an act needs to be assessed under the laws of an EU Member State other than the home State.

49. The Liechtenstein Government submits that while Article 10(2)(l) of the Directive specifies that the home Member State's laws should generally govern the rules "relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors", Article 30(1) provides an exception if the beneficiary of the contested act proves that the act is subject to the law of another Member State and that other law does not foresee any possibility to challenge the act at stake "in the case in point". Only where these two requirements can be proven by the beneficiary of such an act do the laws of the home Member State not apply.

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[11] Reference is made to *The European Insolvency Regulation: Law & Practice*, cited above, no 240.

50. In the view of the Liechtenstein Government, it is for the national court to decide whether the evidence submitted by the beneficiary in support of these two requirements set out in Article 30(1) of the Directive is sufficient to establish this exception to Article 10. It is therefore a question of the *lex fori* and its rules on conflict of laws whether and to what extent evidence on the law applicable to the act at stake is permissible and has to be considered. This applies likewise to evidence on the state of foreign law, that is in this case on the absence of provisions corresponding to the domestic rules on the voidness, voidability or unenforceability of legal acts detrimental to creditors as a whole.

51. Turning to the second question, the Liechtenstein Government submits that, when interpreting Article 30(1) of the Directive, it is evident that it does not restrict the "rules relating to 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. This is true not only with respect to the rules that would otherwise apply according to Article 10 of the Directive, but also to the corresponding provisions of another Member State which have to be considered according to the second indent of Article 30(1), which even spells out that "that law" as a whole must be silent with respect to "any means of challenging that act in the case in point".

52. However, the Liechtenstein Government continues, having regard to the context surrounding Article 30(1) and to recital 28 in the preamble to the Directive, it is clear that 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 Member 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 fails to foresee any imaginable possibility to challenge said act in all circumstances whatsoever, proof thereof would be bound to fail in every case, thus rendering Article 30(1) moot.

53. Furthermore, according to the Liechtenstein Government, where a Member State whose laws are applicable to the act at stake provides for rules allowing such an act to be challenged in theory, but the conditions thereof are not fulfilled with respect to the act at stake in the circumstances of the individual case, that foreign law equally "does not allow any means of challenging that act in the case in point". Again, this is also for the beneficiary to prove as specified in Article 30(1) of the Directive. If the beneficiary is successful, the home Member State's rules would not apply.

54. Therefore, in the view of the Liechtenstein Government, while it is sufficient for the beneficiary to show that the law applicable to the act concerned does not provide a corresponding possibility to challenge said act, it is evidently

equally "sufficient" (albeit in excess of his burden of proof) for the beneficiary to prove "that the rescission of a disposition under the laws of the Member State applicable to said disposition would be prohibited on the basis of any type of rules, for example rules regarding the statute of limitations to bring legal action".

55. Since the Liechtenstein Government proposes that the second question should be answered in the affirmative, it does not see any need to answer the third question.

56. The Liechtenstein Government proposes that the Court should answer the questions as follows:

> *1. Article 30, Paragraph 1 of Directive 2001/24/EC on the reorganisation and winding up of credit institutions must be construed to the effect that rules relating to voidness, voidability or enforceability refer to rules regarding the rescission of a disposition by a financial undertaking under rules which are comparable to those which are in effect regarding the rescission of dispositions by a bankrupt under the Act on Bankruptcy.*
>
> *2. Article 30, Paragraph 1 of the Directive has the effect that it is sufficient for the party to which a demand for rescission is directed to submit evidence showing that the rescission of a disposition under the laws of the Member State applicable to said disposition would be prohibited on the basis of any type of rules, e.g. rules regarding the statute of limitations to bring legal action.*

*ESA*

57. ESA submits that Article 30(1) of the Directive is formulated in a broad manner, comprising voidness, voidability and unenforceability of acts, intended to reflect the different concepts used in different EEA States. Article 30(1) of the Directive provides that the *lex fori concursus* is competent to determine the rules concerning legal actions against a detrimental act, provided that this act in the specific circumstances of the case could also be challenged on the basis of the law governing the act itself. Otherwise the *lex fori concursus* does not apply and the act remains free from any challenge.

58. ESA contends that the distinctive element of this provision concerns not the nature of the invalidity applicable to the act but its capacity of being prejudicial to creditors' rights. Article 30(1) of the Directive introduces an exception to Article 10(2)(l) on the law applicable in relation to acts detrimental to the estate, that is to say, to all creditors. Pursuant to Article 30(1), notwithstanding the fact that an act may be characterised as detrimental to all creditors, it may not be challenged and avoided if the beneficiary of the act provides proof that the act as a whole is subject to the law of another EEA State and that law does not allow any means of challenging that act.

59. Thus, ESA continues, the essential question to be answered in the present case is whether the payments made by Landsbanki in exchange for securities must be regarded as payments detrimental to its creditors as a whole. In ESA's view, the referring court has not provided sufficient details on the transactions in question. As a consequence, ESA cannot make submissions on this point which could provide any useful guidance. If the payments are detrimental to the creditors as a whole, it must be assessed whether the requirements for the application of Article 30(1) of the Directive are met in the case at hand, that is whether the beneficiary of the payment provides proof that (a) the act detrimental to creditors as a whole is subject to the law of another EEA State and (b) that law does not allow any means of challenging that act in the case at hand.

60. ESA asserts that Article 30(1) of the Directive does not contain any limitation as regards the underlying basis on which to invoke voidness, voidability or unenforceability other than the fact that the act must be detrimental to the creditors as a whole.

61. ESA observes that, according to the table of correspondence notified to it by Iceland, Article 30(1) of the Directive is implemented into Icelandic law by Article 99(2)(n) of the Act on Financial Undertakings.

62. Consequently, ESA argues, also the implementing provision of the Icelandic legislation, that is Article 99(2)(n) of the Act on Financial Undertakings, should, in the light of Article 30(1) of the Directive, be read as free of any such limitation on its scope. If the beneficiary of the act provides the necessary evidence concerning the application and substance of the law applicable to the act, Article 99(2)(n) should apply whatever the underlying basis on which invalidity is invoked; in other words, regardless of whether the invalidity is asserted on the basis of the Act on Invalid Legal Instruments or Chapter XX of the Bankruptcy Act.

63. Therefore, in the case at hand, according to ESA, if the national court concludes that the payment for the securities was an act detrimental to the creditors of Landsbanki as a whole, it should assess the action for the invalidation of such payments according to Icelandic law unless the defendant provides proof that English law is applicable to all transactions related to the securities and that the English law does not allow any means of challenging that act in the case in point.

64. As regards the second question referred, ESA submits that the wording of Article 30(1) of the Directive does not distinguish in the second cumulative requirement between substantive and procedural rules of the law applicable to the act. Moreover, the phrase "in the case in point" suggests that the fulfilment of the second requirement has to be assessed on an *ad hoc* basis. In other words, 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.

65. Thus, in ESA's view, Article 30(1) of the Directive should 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 EEA State applicable to the measure with reference to both substantive and procedural rules.

66. Given its view on the first and second questions, ESA considers it unnecessary to answer the third question referred.

67. ESA contends further that, according to established case law of the Court, it is inherent in the objectives of the EEA Agreement that national courts are bound to interpret national law in conformity with EEA law. In particular, the national court is bound to interpret domestic law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result sought and consequently comply with Articles 3 and 7 EEA and Protocol 35 to the EEA Agreement.[12] In order to attain this objective, the national courts must apply the methods of interpretation recognised by national law in order to achieve the result sought by the relevant EEA rule.[13]

68. Thus, in the present case, the principle of interpretation in conformity with EEA law requires that the referring court does whatever lies within its competence, having regard to the whole body of rules of national law, to ensure that these rules are interpreted in the light of Article 30(1) of the Directive as regards the voidness, voidability and unenforceability of acts detrimental to creditors.

69. In particular, ESA continues, the national court is required to interpret national law to the effect that Icelandic law does not apply in relation to the voidness, voidability or unenforceability of legal acts detrimental to all creditors, whether these acts fall to be dealt with under Chapter III of the Act on Invalid Legal Instruments or the invalidation rules under Chapter XX of the Bankruptcy Act, where the beneficiary of these acts provides proof that (a) the act detrimental to the creditors as a whole is subject to English law, and (b) that law does not allow any means of challenging that act in the case in point.

70. However, ESA adds, if, in accordance with the interpretative methods recognised by national law, an interpretation in line with Article 30(1) of the Directive is not possible, Iceland would be obliged to provide compensation for loss and damage caused to individuals and economic operators, in accordance

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[12] Reference is made to *Irish Bank*, cited above, paragraph 123 and the case law cited.

[13] Reference is made to Cases E-12/13 *ESA* v *Iceland*, judgment of 11 February 2014, not yet reported, paragraph 73, and E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, paragraph 54 and the case law cited.

with the principle of State liability, which is an integral part of the EEA Agreement.[14]

71. ESA proposes that the Court should answer the questions as follows:

> *1. Article 30(1) of Directive 2001/24/EC, on the reorganisation and winding up of credit institutions should be interpreted as meaning that "the voidness, voidability or unenforceability of legal acts" also 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 Act.*
>
> *2. Article 30(1) of the Directive should 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 law of the Member State applicable to the measure with reference to rules of any type, i.e. both substantive and procedural.*

*The Commission*

72. At the outset, the Commission submits that Article 10 of the Directive is a cornerstone of the Directive laying down the principle whereby a credit institution is to be wound up subject to the laws, regulations and procedures applicable in its home Member State. It is a conflict of laws rule which together with the rule of competence laid down in Article 9 of the Directive, which provides that the authorities of the Member State where a credit institution is established (the home Member State) have sole responsibility to decide on the opening of winding-up proceedings concerning that institution, illustrate, as stated in recital 16 in the preamble to the Directive, the principles of "unity" and "universality" of winding-up proceedings. They complement the EU banking directives which, in accordance with Treaty provisions on freedom of establishment and the freedom to provide services, allow credit institutions to operate freely throughout the internal market on the sole basis of an authorisation issued in the Member State of establishment.

73. The Commission observes further that the principles of unity and universality may be subject to explicit exceptions laid down in the Directive. However, all provisions which constitute an exception to the general rule that the effects of reorganisation and winding-up measures are governed by the law of the home Member State must be interpreted strictly.[15]

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[14] Reference is made to Cases E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 62 et seq., E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 240, paragraphs 25 and 37 to 48, and E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct. Rep. 246, paragraph 42.

[15] Reference is made to *LBI*, cited above, paragraph 52.

74. The terms “rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors” is rather broad. Voidness, voidability or unenforceability encompass various situations and aim at undoing the prejudicial effect of such acts on all creditors. Thus, it is in light of the objective of creditor protection that the terms have to be interpreted. Consequently, it is the Commission’s view that rules which do not under private law void a measure but which legally or economically reverse the detrimental effect of a legal act for the entire mass of creditors can be qualified as “rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors”.

75. The Commission observes that, according to the requesting court’s description, rescission under Chapter XX of the Bankruptcy Act, the remedy sought by the plaintiff, is intended to void, retroactively, measures taken by a bankrupt party, the aim being to avoid discrimination between claimholders and to increase the assets available for distribution in the winding-up process. Furthermore, rescission is not equivalent to voiding the measure in private law; nor does it mean that the measure was fraudulent. Finally, rescission generally has the legal implication that the party that benefited from the measure rescinded must pay the bankruptcy estate an amount corresponding to his benefit from the bankrupt party’s payment.

76. The Commission acknowledges that, naturally, it is for the national court to assess the exact characteristics and legal effects of an action for rescission under Icelandic law. Nevertheless, the Commission takes the view that Articles 10(2)(l) and 30(1) of the Directive cover rules that void retroactively measures taken by a bankrupt party, in order to avoid discrimination between claimholders and to increase the assets available for distribution in the winding-up process, even where such action is not equivalent to voiding the measure in private law. Consequently, the exception provided for in Article 30(1) of the Directive could be applied to rules which have similar features to those provided for in Chapter XX of the Bankruptcy Act.

77. The Commission adds that it is irrelevant, for the purpose of applying Articles 10(2) and 30(1) of the Directive, whether or not these rules are laid down in general bankruptcy law, as long as the rules in question apply to measures taken by a credit institution within the meaning of Article 1 of the Directive.

78. The Commission proposes joining the second and third questions.

79. According to the Commission, recital 28 in the preamble to the Directive suggests that the purpose of the derogation in Article 30(1) is to protect creditors who have entered into contracts with a credit institution before a reorganisation measure is adopted or winding-up proceedings are opened.

80. The Commission observes that the evidence referred to in the second indent of Article 30(1) of the Directive relates to the absence of any means under

the law of a Member State other than the home Member State of an institution which is being wound up to challenge the legal act detrimental to the creditors as a whole in the case in point. In the Commission's view, a beneficiary seeking to prove that the condition is satisfied 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 Member State other than the home Member State.

81. More specifically, the Commission continues, the absence of an action for rescission under English law with regard to the payments made by the plaintiff in the main proceedings would by definition meet the condition since the action would *a fortiori* be unavailable in the case in point. However, it remains necessary to analyse whether the condition would also be met if the beneficiary demonstrated that, although a possibility to challenge acts identical to the one under consideration existed in general, it was not available or no longer available in the case in point, for example because the time limit for bringing the action had expired.

82. The Commission maintains that, even if the second indent of Article 30(1) of the Directive uses the phrase the "case in point", this phrase may not be interpreted as meaning that the condition is not deemed met because the means to challenge the act in question did indeed exist but they are no longer available at this point in time. Such an interpretation would impair upon legal certainty.

83. The Commission suggests therefore that the second indent of Article 30(1) of the Directive should be interpreted as requiring proof of the absence of legal means to challenge the specific act under the law of a Member State other than the home Member State, taking into account specific features of that act as well as the relevant circumstances of its conclusion.

84. In the Commission's view, the national judge is the best placed to assess all relevant circumstances of the case and to examine whether the proof presented by the defendant in the main proceedings, to the effect that English law does not allow for an action requiring a rescission of the payments effected by the plaintiff in the main proceedings, is adequate and sufficient.

85. The Commission proposes that the Court should answer the questions as follows:

> *1. The notion of "rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole" as referred to in Articles 10(2) and 30(1) of the Directive can be interpreted as including such rules which intend to void, retroactively, measures taken by a credit institution, the aim being to avoid discrimination between claimholders and to have more assets subject to division in the winding-up process, even where they do not entail the voidness under private law.*

*It is irrelevant, for the purpose of applying Articles 10(2) and 30(1) of the Directive, whether these rules are laid down in general bankruptcy law, as long as the rules in question apply to the measures taken by a credit institution within the meaning of Article 1 of the Directive*

*2. & 3. The second indent of Article 30(1) of the Directive should be interpreted as requiring to submit proof that the law of a Member State other than the home Member State does not permit to bring an action requesting rescission of the legal act as the one subject to dispute in the home Member State.*

Per Christiansen
Judge-Rapporteur