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Judgment in Case E-28/13 *LBI hf. v Merrill Lynch Int.Ltd.*

RESCISSION UNDER BANKRUPTCY LAW AND CHOICE OF LAW

In a judgment delivered today, the Court answered the questions referred to it by *Héraðsdómur Reykjavíkur* (Reykjavík District Court) on the interpretation of Directive 2001/24/EC of the European Parliament and of the Council on the reorganisation and winding up of credit institutions.

Pursuant to the Directive, credit institutions shall be wound up in accordance with the law of their home State. An exception applies to the rules on voidness, voidability or unenforceability of legal acts detrimental to the creditors as a whole, provided that the beneficiary proves that the act is subject to the law of another EEA State, and that the law of that State does not allow any means of challenging the act in question.

The dispute concerned three payments made by an Icelandic credit institution prior to its winding-up. The beneficiary was an English credit institution, and the acts were subject to English law. Reykjavík District Court asked the Court to clarify whether the expression voidness, voidability and unenforceability of legal acts refers to rescission in bankruptcy law. It also raised the issue of the level of proof required to conclude that the law of the EEA State governing the act does not allow any means of challenge.

The Court noted that 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. Thus, the Court found that the expression voidness, voidability or unenforceability of legal acts also refers to rescission in bankruptcy law on the basis of avoidance rules.

The Court further noted that as long as the act is regarded as detrimental to the entire mass of creditors, it is not decisive whether the possibility of challenging it is classified as a part of bankruptcy law. Neither is it of significance whether the challenge is based on a substantive or procedural rule, such as for example that a time limit has passed. A concrete assessment of the specific act must be undertaken. Consequently, even if the act can be challenged, in principle, under the national law governing it, it is sufficient for the beneficiary to prove that the requirements for a challenge are not fulfilled in the case at hand.

Finally, as regards the standard of proof, the Court concluded that 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.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.