HEDGE FUND LAW REPORT 3/25/2010

FRAUD

Luxembourg Court Rejects Lawsuit Brought by Investors in Defunct Luxembourg Hedge Fund LuxAlpha SICAV Against UBS and Ernst & Young in Connection with Madoff Scandal; The Hedge Fund Law Report Offers Exclusive English-Language Translation of Court Opinion

By Cicily Corbett

UBS Luxembourg was the primary custodian of Access International Advisors LLC's LuxAlpha Sicav-American Selection (LuxAlpha SICAV) fund, which was closed by the Luxembourg regulator, Commission de Surveillance du Secteur Financier (CSSF), because of investments related to Madoff. Investors seeking to recoup their losses in LuxAlpha SICAV, which once had assets of $1.4 billion, brought several lawsuits against UBS. Most recently, on March 4, 2010, a Luxembourg court rejected efforts by certain investors in the now defunct LuxAlpha SICAV to pursue a direct cause of action against UBS AG and affiliated entities, and against auditor Ernst & Young, in connection with LuxAlpha SICAV's losses upon the discovery of the fraudulent nature of Bernard Madoff's operation in December 2008. Specifically, the court found that the investors have to pursue their claims through the liquidator of their fund. The French-language opinion, as made available to The Hedge Fund Law Report on Friday, March 5, 2010, has been redacted to strike the name of the principal petitioner. What follows is the only unofficial English-language translation of that opinion. (No official English-language translation is available).

I. (121 258) *[[Unnamed Petitioner] v. UBS S.A., UBS Third Party Management Co., S.A., UBS Fund Services S.A., UBS AG]*

Between:

[Unnamed petitioner] electing domicile in the office of, and appearing through, attorney Pierre Reuter, a Luxembourg resident. and

1. UBS (Luxembourg) S.A., the public corporation established and having its headquarters at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, represented by its board of directors, as currently functioning, inscribed in Luxembourg's commerce and corporations registry under the number B 11 142;

2. UBS Third Party Management Company S.A., the public corporation established and having its headquarters at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, represented by its board of directors currently functioning, inscribed in Luxembourg's commerce and corporations registry under the number B 45 991;

3. UBS Fund Services (Luxembourg) S.A., the public corporation established and having its headquarters at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, represented by its board of directors currently functioning, inscribed in Luxembourg's commerce and corporations registry under the number B 58 535;

4. UBS AG, the UBS corporation established under Swiss law and having its headquarters at CH-8001 Zurich, Bahnhofstrasse 45, and at CH-4051 Bâle, Aeschenvorstadt 1, represented by its board of directors, as currently functioning, inscribed in Bâle and Zurich's registry of commerce under the number CH-270.3.004.646.4;

[The above four] defendants, appearing by attorney Marc Kerger, residing in Luxembourg,

5. Ernst & Young S.A., the public corporation established and having its headquarters at L-5365 Munsbach, 7, Parc d'Activité Syrdall, represented by its board of directors, as currently functioning, inscribed in Luxembourg's commerce and corporations registry under the number B 47 771; defendant, appearing by attorney Marc Kleyr, residing in Luxembourg.

II. (125 283) [Ernst & Young, SA v. LuxAlpha SICAV, Alain Rukavina and Paul Laplume]

Between:

Ernst & Young S.A., the public corporation established and having its headquarters at L-5365 Munsbach, 7, Parc d'Activité Syrdall, represented by its current board of directors, inscribed in Luxembourg's commerce and corporations registry under the number B 47 771; electing domicile in the office of and appearing by its attorney Marc Kleyr, residing in Luxembourg,

and:

1. LuxAlpha SICAV, the variable capital investment corporation, established under the laws of the Grand Duchy of Luxembourg and headquartered at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, inscribed in Luxembourg's commerce registry under the number B 98 874, declared as a condition of a judicial liquidation rendered on April 2, 2009, represented by its hereafter qualified receivers;

2. Alain Rukavina, a lawyer, residing at L-2016 Luxembourg, 10A, Boulevard de la Foire, acting in his capacity as judicial receiver and as a representative of the investors and creditors of the SICAV LuxAlpha, set forth above;

3. Mr. Paul LaPlume, an auditor, residing at L-6113 Junglinster, 42, Rue des Cerises, acting in his capacity as judicial receiver of SICAV LuxAlpha, set forth above;

defendants, appearing by Marie-Paule Kettenmeyer, a lawyer, residing in Luxembourg, in the place of Alain Rukavina, a lawyer as set forth above.

III. (125 482)

[UBS S.A. UBS Third Party Management Co., S.A., UBS Fund Services S.A., UBS SG v. LuxAlpha SICAV, Alain Rukavina and Paul LaPlume]

Between:

1. UBS (Luxembourg) S.A., the public corporation established and headquartered at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, represented by its board of directors, as currently functioning, inscribed in Luxembourg's commerce and corporations registry under the number B 11 142;

2. UBS Third Party Management Company S.A., the public corporation established and headquartered at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, represented by its board of directors, as currently functioning, inscribed in Luxembourg's commerce and corporations registry under the number B 45 991;

3. UBS Fund Services (Luxembourg) S.A., the public limited company established and headquartered at L-2453 Luxembourg, 12, Rue Eugène Ruppert, represented by its current board of directors, inscribed in Luxembourg's commerce and corporations registry under the number B 58 535; electing domicile in the office of François Kremer, a lawyer, residing in Luxembourg,

petitioners, initially represented by said François Kremer and currently represented by Marc Kerger, a lawyer residing in Luxembourg,

4. UBS AG, the corporation established under Swiss law, and headquartered at CH-4051 Bâle, Aeschenvorstadt 1, as represented by its current corporate officials, inscribed in the registry of commerce and corporations in the central index of the commercial reasons of the Swiss confederation under the number CH-270.3.004.646-4; electing domicile in the office of Paul Mousel, a lawyer, residing in Luxembourg; petitioner, initially represented by Paul Mousel, the lawyer referenced above, and currently represented by Marc Kerger, lawyer, residing in Luxembourg,

and:

1. LuxAlpha SICAV, the variable capital investment corporation established under the laws of the Grand Duchy of Luxembourg and headquartered at L-1855 Luxembourg, J.F. Kennedy Avenue, #33A, inscribed in Luxembourg's commerce registry under the number B 98 874, declared as a condition of a judicial liquidation rendered on April 2, 2009, represented by its hereafter qualified receivers;

2. Alain Rukavina, a lawyer, residing at L-2016 Luxembourg, 10A, Boulevard de la Foire, acting in his capacity as judicial receiver of the LuxAlpha SICAV, set forth above;

3. Mr. Paul LaPlume, auditor, residing at L-6113 Junglinster, 42, Rue des Cerises, acting in his capacity as judicial receiver of LuxAlpha SICAV, set forth above; defendants, appearing by Marie-Paule Kettenmeyer, a lawyer, residing in Luxembourg, in the office of Alain Rukavina, the lawyer referenced above.

I. (121 258)

Proceedings:

By act of the bailiff Patrick Kurdyban of Luxembourg on March 19, 2009 and March 24, 2009, the petitioner summoned the defendants to appear on Friday, April 24,

2009 at 9 o'clock in front of the district court of Luxembourg, second chamber, presiding over commercial matters, located at Cité Judiciaire, Building CO, 7, Rue du Saint Esprit, 1st floor, room CO.1.01, [courtroom] in order to hear the merits of the arguments contained in the said service of the bailiff and reproduced hereafter:

II. (125 283)

Proceedings:

By act of the bailiff surrogate Gilles Hoffmann, replacing bailiff Carlos Calvo of Luxembourg, on October 28, 2009, the petitioner summoned the defendants to appear on Friday, November 6, 2009, at 9 o'clock in front of the district court of Luxembourg, second chamber, presiding over commercial matters located at the courtroom.

III. (125 482)

Proceedings

By act of the bailiff surrogate Gilles Hoffmann, replacing bailiff Carlos Calvo of Luxembourg, on November 4, 2009, the petitioners summoned the defendants to appear on Friday, November 13, 2009 at the courtroom:

The matter introduced by the bailiff on the March 19 and 24, 2009 was registered under the number 121 258 of the rolls, for a public hearing on April 24, 2009 in front of the second chamber, presiding over commercial matters, at which time the matter was put to the "role general" and continued to a public hearing on October 16, 2009.

The matter introduced by act on October 28, 2009 was registered under the number 125 283 for a public hearing on November 6, 2009 in front of the second chamber, presiding over commercial matters.

The matter introduced by act on November 4, 2009 was registered under the number 125 482, for a public hearing on November 13, 2009 in front of the second chamber, presiding over commercial matters.

These public hearings took place on November 25 and 26, 2009, and on the 2nd and 3rd of December, 2009, respectively, at which time the arguments took place as follows:

Pierre Reuter read the introductory summons as reproduced above and explained his reasoning. Marc Kerger responded and explained the reasoning of his parties. Marc Kleyr replied and explained his reasoning. Marie-Paule Kettenmeyer, in the place of Alain Rukavina, explained her reasoning. Whereon, the court took these matters under deliberation and on this day rendered judgment as follows:

By acts of the bailiff Patrick Kurdyban of Luxembourg on 19 and 24 of March, 2009, [Unnamed Petitioner] summoned: 1) UBS (Luxembourg) S.A., 2) UBS Third Party Management Company S.A., 3) UBS Fund Services (Luxembourg) S.A., 4) UBS AG and 5) Ernst & Young S.A., to appear before the district court of Luxembourg, presiding over commercial matters, to hear the case against the defendants jointly and separately or in any case *in solidum*, to pay the petitioner the sum of 1,530,706.49 EUR with legal interest dating from December 11, 2008 for restitution for principal damages and the sum of 2,000,000 EUR for reparation for auxiliary damages.

The party petitioner also demands that the defendant parties pay a compensation of 50,000 EUR for costs that it [otherwise] would be inequitable for the petitioner to bear in view of article 240 of the New Civil Procedure Code, as well as all expenses and costs of the case.

[Unnamed Petitioner] demands that the present judgment be declared binding and executed *nonobstant* with provision for appeal and without guarantee.

In support of her demands [Unnamed Petitioner] says that from November 14, 2005 until November 8, 2007, she subscribed to and repurchased shares of the funds LuxAlpha SICAV – American Selection, so that she currently holds 1,086,553 shares (in fact, in contrast to the assertions of petitioner, the funds repurchased the shares and [Unnamed Petitioner] did not own them). On the basis of the last net value of inventory calculated on November 17, 2008, by UBS Fund Services, [Unnamed Petitioner] evaluates her shares at the sum of 1,530,706.49 EUR.

[Unnamed Petitioner] explains that her shares are held by the intermediary of the Bank of Luxembourg that appears as shareholder in the LuxAlpha SICAV shareholder registry for the exclusive account of the petitioner and that the value of these shares is to be considered as null, the responsibility of the SICAV LuxAlpha having been entrusted to an entity controlled by Bernard Madoff, whose fraud was revealed on December 12, 2008.

[Unnamed Petitioner] initially brought this action against the defendants based on what it claimed was UBS (Luxembourg) S.A.'s responsibility to the shareholders of LuxAlpha SICAV, in its capacity as agent of the LuxAlpha SICAV. Unnamed Petitioner bases her demand on Article 7 of Directive 85/611 of the counsel of December 20, 1985 . . . [on] the legislative, administrative, and regulatory opinions concerning certain undertakings of collective investment in transferable securities, on Article 34 of the law of December 20, 2002 concerning the collective investment undertakings (hereinafter the law of 2002) and on Article 7 of the prospectus.

[Unnamed Petitioner] supposes that by virtue of the disposition of article 36 of the law of 2002, she has a direct cause of action against the custodian and invokes as the basis of her request the joint responsibility of UBS Third Party Management Co., in its capacity as the management corporation of the funds, attended by representatives of UBS Fund Services. Petitioner bases her request on Articles 84, 85, and 86 of the law of 2002.

[Unnamed Petitioner] invokes the co-responsibility of UBS Fund Services, in its capacity as administrative accountant and fund administrator, respectively of central

administration and of domicile. Petitioner bases her request on Article 8 of the complete prospectus of March 2007.

[Unnamed Petitioner] invokes the shared co-responsibility of UBS AG, in its capacity as fund promoter. Petitioner bases her request on the circular IML 91/75 of the CSSF and the prospectus.

[Unnamed Petitioner] invokes the co-responsibility of Ernst & Young, in their capacity as LuxAlpha SICAV's auditor. Petitioner bases her request on items 110(5), 113 of the law of 2002, the circular CSSF 02/81 of December 6, 2002, as well as on articles 1382 and 1383 of the Civil Code.

[Unnamed Petitioner] contends that the faults committed by the co-defendants and the failure of the corporation LuxAlpha SICAV have caused her significant supplementary harm, that the announcements in the press of the Madoff scandal and of its implications for LuxAlpha have tainted her public image in the eyes of her clientele. The petitioner estimates the monetary amount of this injury to be valued at 2,000,000 EUR. In applying Articles 1382 and 1383 of the Civil Code, [Unnamed Petitioner] demands the condemnation, jointly and severally, of the co-defendants to the extent of the aforementioned sums.

By act of the bailiff surrogate Gilles Hoffmann of Luxembourg on October 28, 2009, Ernst & Young S.A., summoned and intervened in the liquidation of the variable capital investment corporation, LuxAlpha SICAV, declared in judicial liquidation by judgment of April 2, 2009, represented by its judicial receivers, Alain Rukavina and Paul LaPlume, in their capacity as receivers of LuxAlpha SICAV and in their capacity as representatives of the investors and creditors of this judicial liquidation, to appear in front of the Luxembourg district court, presiding over commercial matters, in order to adopt a definite position on the issue of admissibility, and then in the matter of the underlying merits of the principal demand, and to make itself heard on the universal issues of the present judgment.

The party petitioner by intervention asks that the defendants on intervention be held liable for all the expenses and costs arising from this intervention, and in the alternative, that these expenses be charged to the party petitioner.

By act of the bailiff surrogate Gilles Hoffmann of Luxembourg on November 4, 2009, UBS (Luxembourg) S.A., UBS Third Party Management Company S.A., UBS Fund Services (Luxembourg) S.A. and UBS AG summoned and intervened in the matter of LuxAlpha SICAV, declared in judicial liquidation by judgment of April 2, 2009 on the basis of Article 104(1) of the law of 2002, represented by its judicial receivers currently functioning, Alain Rukavina and Paul LaPlume, in their capacity as receivers of LuxAlpha SICAV, to appear in front of the district court of Luxembourg, presiding over commercial matters, and to make itself heard on the universal issues of the present judgment.

Given the connection between the causes, there is reason to move immediately to the point and to join the demands of the interveners to those of the principal in order to issue one single and consistent judgment.

In the interests of the administration of justice, it was suitable, as agreed by all the parties, to limit the first exchange of briefs and the first pleadings to the question of admissibility of the [Unnamed Petitioner's] request before getting to the substance of the matter.

As previously mentioned, prior to the commencement of this action, , the court had ordered the judicial liquidation of LuxAlpha SICAV on April 2, 2009, naming Alain Rukavina and Paul LaPlume as receivers and representatives of the investors and creditors.

Reasoning of the Court

Defendants (UBS) asserted that the court was incompetent to make any determinations as to the demands the defendants had made regarding allocation of damages and interest for the not otherwise calculated injury to the Unnamed

Petitioner. Defendants (UBS) claim that the petitioner has calculated her damages to exceed 10,000 EUR specifically to escape [a finding] that her cause was unreviewable *rationae summae*.

In the language of Article 10 of the New Code of Civil Procedure, "When several petitions pressed by one or more petitioners against one or more defendants collectively, by virtue of a common title, are reunited in a single instance, the competence and the rate of resort are determined by the total claimed sum, without regard to the share of each one of them in this sum."

The jurisprudence and the doctrine say that in the absence of any condition or legal restriction, the notion of 'common title' figuring in Article 10 is intended not in the narrow sense of an act or of a writing pertaining to the existence of the law from which the action proceeds, in which case this article would not apply in this contractual matter, but in the wider direction of lawful cause. The particular disposition of Article 10 applies therefore just as well when the cause is criminal or almost criminal as when it is common to the plurality of the petitioners or of the defendants (cf. Solus and Perrot, Droit judiciaire privé, T.ll, La compétence, n 450).

In the case before us, petitioners invoke common cause as to the common injuries to the principal title and as a supplementary title, the faults and collective omissions of the defendants.

Finally, it matters little how high a number the petitioner claims for supplementary harm, given that the defendant parties are not protesting the evaluation of the amount the petitioner claims by principal title. The competence of the court is determined by the total value of the claims, which in this case surpasses the threshold of competence of the district court, which is consequently competent to decide on the value of the claims being made by the litigants.

Representations in Judicial Proceedings by Petitioning Parties

Ernst & Young argued that the summons was null, if not inadmissible, by virtue of the fact that the petitioning party had not made any representations as to the value of the summons. Under Luxembourg law references to services bringing the case within the purview of the Grand Duchy of Luxembourg are relevant.

Article 153 of the New Code of Civil Procedure enunciates that if the summoned one is a “moral person” the summons must indicate, upon pain of nonsuit: its form, its denomination and its address and, in the case where the summoned person is inscribed in the commercial register, the number under which he is registered when committing the commercial acts that are the basis of the cause of action. Service of summons requires that the petitioner be represented by its current board of directors.

The powers at the heart of a corporation stem from the law of that corporation’s place of original incorporation. It follows that the question of knowing who, at the heart of a Swiss company, has power to represent it in judicial proceedings is decided in accordance with Swiss law. The petitioning party was constituted as a corporation.

Article 718 of the Swiss Civil Code of complete federal law provides:

V. Representation. 1. In general. The board of directors represents the corporation with respect to third parties. In the absence of contrary provision by statute or corporate bylaws, every member of the board of directors can represent the corporation. The board of directors may delegate the power of representation to one or more of its members (delegates), or to third parties (directors). A member of the board of directors must at least have the capacity to represent the corporation. The corporation must be subject to representation by a person domiciled in Switzerland. A member of the board or a director must satisfy this requirement.

By virtue of the first indentation above, the petitioner has reason to be represented by her board of directors. The petitioner elsewhere invokes in this respect a decision of her counsel of February 3, 2009, such that this means is to be rejected.

The Titles of the LuxAlpha SICAV Shares

The defending parties contest [Unnamed Petitioner's] claim to be acting as a shareholder of the corporation LuxAlpha SICAV on the grounds that she is not inscribed in LuxAlpha SICAV's shareholder registry, but in fact she is recognized elsewhere by the petitioner. The defending parties refuse to acknowledge that Article 8 of the law of August 1, 2001, concerning the circulation of titles and other fungible instruments granting the recipient the right to exercise the rights attached to the titles residing in the hands of an agent, applies to the certificates delivered on March 25, 2009 and February 11, 2009.

Even if at the hearing, the UBS parties expressed a desire to abandon this part of the present dispute, the court decided that it was in their domain to determine what would be admissible and how it would affect the underlying demand.

In fact, the question of the effective existence of the right invoked by the petitioner does not affect the admissibility of the demand as a procedural issue, but is a purely substantive question (cf. Solus et Perrot, Droit jud. privé, T.1, nos. 221, 262). The effective existence of the right invoked by the petitioner is not based on the admissibility of the demand, but solely the condition of her ultimate success on the issue. In other words, it is based on the fundamental merits of her demand (Cour June 26, 1979, Pas. 24, 312, Cass. fr. du 18 Octobre 2007, no. 06-19.677).

Shareholder's Capacity to Bring Action

The defendants argued that [Unnamed Petitioner] lacks capacity to bring the present action. Rather, they argued that only LuxAlpha SICAV has the authority to bring this action. This is a good place to resolve the question of whether the petitioning party, allegedly in the capacity of a LuxAlpha SICAV shareholder, has the capacity to act against the defending parties as part of this case.

By virtue of article 50 of the New Code of Civil Procedure, only the parties introduce the question, except for cases for which the law disposes otherwise. The capacity to act is the power by virtue of which a person initiates a cause of action to acknowledge the existence of an unrecognized or contested right (cf. Solus et Perrot, "Droit judiciare privé," T 1, no. 262). The capacity to act is the judicial title conferred by action of the law, that is to say, in calling it a right a judge examines the merits of the claim. It constitutes for the subject a legal opportunity to seize justice in a given, concrete situation. To have this capacity to act, a person must have a personal interest in the success or failure of a claim. Any person who claims that an injury was done to him, and who can take personal advantage of a measure that he demands, has an interest to act justly and therefore the capacity to act.

Nevertheless, sometimes the capacity is disassociated from the interest. Even though a person has a direct and personal interest in the action, sometimes he does not have the capacity to act. Such is the case with what are called "official" [attitrées] actions, which can only be instituted by certain persons who have been enabled. On the other hand, actions known as "banales" are open to all. This restriction in acting for justice must necessarily result from the law. The legislature only attributes authority to certain persons who could have an interest in action. It does this within a framework of actions which tend towards the abolishment of a juridical position.

In this case, the court ordered the liquidation of LuxAlpha SICAV on April 2, 2009, conditioned upon the verification of its debts. However, when summoned for this particular action, LuxAlpha was not yet in judicial liquidation. Consequently, the demand of [Unnamed Petitioner] previously engaged in the liquidation judgment

does not fall under our analysis of distinguishing official actions from banal actions, given that on the day of the introduction of the demand the investor was not removed from her action.

There is consequently grounds for a sharp distinction between the inadmissibility of the liquidation of LuxAlpha SICAV and analysis of the admissibility of the demand of [Unnamed Petitioner] the moment LuxAlpha SICAV was no longer in judicial liquidation. In any case, even in the presence of a corporation *in bonis*, that is, not subject to a liquidation procedure, the link between the capacity to act and the right to litigate erases the distinction between the actions of the corporation and those of its shareholders.

Nonetheless, the petitioning party claims that Article 36 of the law of 2002 grants her a direct action, which is without relation to the right of corporations and without distinction from that time between corporate and individual actions. Consequently, at first glance, there are grounds for analyzing Article 36 of the law of December 20, 2002 before tending towards the actions subject to common law.

Action against UBS, Custodian of the Funds, Based on Article 36 of the Law of 2002

[Unnamed Petitioner] argues that Article 36 of the law of 2002 grants her a direct action against the custodial bank. In principle, a direct action allows a creditor to exercise his right of pledge against the estate of a debtor, while acting against that party's debtor, the "under-debtor." This is distinct from an indirect action, in which a creditor has a right of action against the under-debtor, who then becomes the direct debtor of the creditor, without the intermediary of the estate of the debtor (cf. Malaurie et Aynès, Obligations t. 3, no. 88). It allows a creditor to follow directly, in his name and on his own account, the debtor of his debtor (cf. Terré, Simler et Lequette, Les obligations, no 1090).

According to the classic thesis, direct action is a mechanism *sui generis*, unrelated to a known mechanism of the right of obligations, and thus, need not be legitimated except by the express will of the legislature. Article 36 of the law of 2002 says that: "The custodian is responsible, according to the law of Luxembourg, with regard to any prejudice undergone by the shareholders resulting from the nonfulfillment or faulty execution of its obligations." The petitioning party prevails according to the directive 85/611/CEE of the Counsel of December 20, 1985. According to Article 288 of the Treaty on the Functioning of the European Union (old Article 189 of the Treaty of Rome), the directive sets up a goal to obtain, but allows the States to choose the means to arrive at that goal. Thus, in contrast to the regulations, the directives necessitate an intervention of the States. In this case, the law of 2002, respectively the law of March 30, 1988, has transposed the Directive into the terms of national law. Besides, the said Directive is not a text that creates a common legal order, since as a Treaty, it concedes to the States room to maneuver for its implementation, such that it has grounds to refuse a direct horizontal effect.

Nevertheless, by virtue of the primacy principle, in case of conflict between the community norm and the internal norm, the first one prevails, so that the internal law is to be interpreted in the light of the European text.

The defending parties refer to the parliamentary works (Doc. Parl. No 3172 Commentaire des articles) relative to the old Article 35, current Article 36, saying that "This article has to do with the system of responsibility of the custodian of the activities of a sicav. Just as in regard to common placement funds, the directive abandons the system of responsibility of the custodian to the law of the nation and enunciates a responsibility for nonfulfillment or faulty execution of the obligations.

The text of Article 35 has since then been analogous to Article 18(1) of the present legal project on the question of the responsibility of the custodian. It is nevertheless noteworthy that regarding [LuxAlpha SICAV], the custodian is not held to an obligation of articulated supervisions under Article 17(2) b) and c) for the common funds of placement. Thus it has no obligation to assure itself that the calculation of the value of the shares is carried out in accordance with the law or the constituent documents. Likewise, it does not assume responsibility for conforming to the law or

regulating the management of instructions for the management corporation. In fact, the lawful structure and the functioning of [LuxAlpha SICAV] are different from those of the common funds . . . . As for the faculty of an investor to file, in the stead of an investment corporation, an action in responsibility in opposition to the custodian: such are the principles of the rights of the corporations which apply in the matter. It is not now necessary to return to this question with regard to investment companies."

The custodian suggests that the jurisprudence relating to the responsibility of the corporate leaders is fully transposable to the effort to have liability imposed against it. The defendant refers again to the Belgian and French legislation transposing the European directive in national law which rely equally on the common law of corporate administrators' responsibility.

The depositary bank proceeds in a direct line to a comparison of Articles 19 and 36 of the law of 2002. Article 19 of the law refers to the responsibility of the depository bank in the framework of the common funds of placement, clothed in the contractual form, which do not properly enjoy legal personhood, while Article 36 addresses undertakings clothed in the statutory form.

Article 19, indentation 2 specifies that: "With regard to the participants, responsibility is put into effect by the management company. If the management company does not act, notwithstanding written summation of a participant, after a delay of three months from the summation, the stockholder can directly question the responsibility of the custodian."

This disposition is the transposition in domestic law of Article 9 of the directive that looks forward with regard to the participants, assigning responsibility and liability directly or indirectly by an intermediary on the management company, according to the legal nature of the relationship existing between the custodian, the management company and the participants. In the framework of the contractual undertakings, the

community text has left the choice to the national legislature as to challenges direct or indirect (Article 9).

Article 19 of the law grants to the participant an individual action against the custodian after formal notification that the management company has been unresponsive. Articles 4 and 14 of the directive concern the extent of the responsibility of the custodian and articles 9 and 16 concern the question of this responsibility. Article 16 of the directive says that: “The custodian is responsible, according to the national law of the state in which it is headquartered with regard to the investment company and its participants, for all harm sustained by them as a result of nonfulfillment or faulty execution of its obligations.”

This item of the directive, which concerns the investment companies, does not impose any liability direct or indirect, but refers expressly to the national law of the investment company.

Contrary to the development by the petitioning party, the silence of Article 16 as to direct or indirect liability, offers no analysis but leaves disposition to the choice of the member states and does not impose upon them the introduction of a direct action for the benefit of the shareholders.

It is with reason that, in the commentary to Article 35 of the legal project (currently Article 36 of the law) there is a direct reference to the principles of the law of corporations, because this reasoning does nothing but transpose the issue to Article 16 of the directive, which aims expressly to leave the liability and responsibility of the custodian to the shareholder with the law of the nation of the investment company. Thus the custodian engages its responsibility according to the national law of the investment company with regard to this last and the action of the investor against the custodian is equally subject to this law, notably to corporate legislation.

Moving on, there are grounds to conclude that the community and internal norms are not in conflict, analyzing the national law in accord with the community text does

not allow us to recognize a direct express action for the benefit of the shareholders of an investment company with regard to the custodian.

A certain doctrine questions and discusses restrictive analyses regarding direct actions and contends that their appearance owes more to an audacious jurisprudential interpretation than to a real legislative will. Contemporary jurisprudence widely interprets texts, sometimes discovering there direct actions which did not there figure, and even creates out of nothing certain direct actions, when a narrow connectedness exists between the credit of the creditor against the debtor and the one of the debtor against the under-debtor.

Before determining whether a interpretation is appropriate, the court determined that it is necessary to look into the lawful mechanism of the direct action. The analysis of the system of direct actions must begin with the fact that direct action, in its exercise, is doubly limited: on the one hand, it is a title that one cannot exercise if and to the degree that one is a creditor of the principal debtor; on the other hand, the under-debtor is not obliged to the principal debtor except in and to the measure that it is the debtor of the principal debtor (cf. Malaurie et Aynès, Obligations t. 3, no 90).

The petitioning party describes the direct action as “a right against the under-debtor, right which does not pass through by the estate of the intermediary debtor.” Now, an essential condition is lacking in the situation of the shareholder-investor: it is not creditor of LuxAlpha SICAV for the amounts for which condemnation is required. In fact, even if one distinguishes between the actions introduced before the liquidation of the corporation and those introduced later, one can at most say that the shareholder of a corporation in surplus has a unique right to the dividend, it is surely not thereby an actual creditor.

In consideration of these inferences, one must conclude that the shareholder does not have a direct action against the custodian.

Common Law Shareholder Action against Responsible Third Parties

In conformity with Article 26 of the law of 2002, the common law of corporations is applicable to the SICAV, as far as it is not breached by that law. It is a central principle that the personality of the individual shareholder disappears and is in some sense absorbed by the corporation, endowed with a individuality distinct from the individuality of the different associates which make it up.

Insofar as they take action through a corporation, the investors find themselves to have in that context, by the intermediary of the corporate moral person, an indirect, or intermediate right, to a fraction corresponding to the social activity of the corporation. (Cf. Guy-Auguste Likillimba Le prejudice individual et/ou collectif en droit des groupements, RTDcom 2009, page 1, no 20). The shareholders do not have the rights of the corporation.

In this case the petitioner questions, in her capacity as shareholder of the investment corporation, the responsibility of the joint contractors of this last one to ask for reparations for damages owing to faults or omissions on the part of the defendants.

The shareholders do not have the capacity to bring an action where the corporation has the sole right and title to that action: the moral personality of the corporation forbids this, in application of the rule that “no one pleads for others without having that authority.” Only the corporation benefits from the capacity to act and be responsible, which makes it a potential victim of damages: the existence of moral personality allows us to ascertain whether the harm was sustained by the corporation’s estate or by one of the stockholders.

In contrast to the petitioner’s conclusions the existence of the interest to act to obtain damages for the alleged prejudice is a condition of admissibility of his request. Thus the defending parties quote the decision of August 10, 1891 (Pas. 3,

page 537) which says that “Each time the shareholders sustain a damage *ut universi*, it is up to the group of shareholders to which it belongs to ask for damages, and in this case the action must be refused to the shareholder *ut singulus*. However, if the injury strikes only one or more shareholders *ut singuli*, each has the right to act individually, and their action is admissible.”

Neither the French law (Article 1843-5 of the Civil Code) nor the Civil Code of Luxembourg, nor the law concerning commercial corporations of August 10, 1915, have opened subsidiary actions to shareholders.

Although the articles on doctrine and legal decisions in this matter often expound on the issue of shareholders’ injury caused by faults committed by the corporate leader, the principles apply as well to conflicts between shareholders and other joint contractors of the corporation. Even more so in this case, where the alleged responsibility of the defendants is focused only in the framework of LuxAlpha SICAV’s external reports in which this shareholder is fully considered as a third party.

It appears that the criterion which allows us to distinguish reparable individual injury consists in the fact that the latter will directly affect the value of the shareholders’ titles or estate without affecting the estate of the corporation. The reparable individual injury is the one that directly affects the estate of the shareholder without tainting or impoverishing the corporate estate. The individual injury must not constitute a simple repercussion of the corporate injury and consequently must be disconnected from a loss that would affect corporate activities (Frédéric Danos, La réparation du prejudice individuel de l’actionnaire, no 13 RJDA 5/08, page 471).

Moving on, even if a shareholder has access to an individual action to remedy a harm distinct from any done to the corporation and other shareholders, the admissibility of such an action in liability is subject to the allegation of that personal injury and jurisprudence imposes on the petitioner a duty to characterize this distinct

harm (Cass. Com. Française, 7 Mars 2006, no 04-16536, Bulletin 2006, IV, No 61, p. 61).

Under the title of principal injury, the petitioner invokes the loss of the value of her stock held with the capital of the investment corporation. The referenced injuries constitute not a damage proper to every associate, a special injury, distinct, independent of the injury to the corporation, but a damage undergone by the corporation itself. The damage caused to the stockholder is only the "corollary" of the corporate injury. (Cass.com. 26 Janvier 1970, no 67-14.787, Cass.com. 18 Juillet 1989, no 87-20.261, Cass.com., 1 Avril 1997, no 94-18.912).

Since the objective of public limited companies is the collective placement of capital, the link between the estate of the company and the share value is more direct, as both reflect the net value of inventory. There is a perfect assimilation between the capital of the company, the net value of its activities and the value of the stock in circulation. The losses undergone by the activities of this corporation represent the mathematical sum of the losses undergone by the shareholders taken individually.

It follows from this reasoning that the principal harm alleged by [Unnamed Petitioner], the devalorization of the actions held, constitute at the same time an aspect of the LuxAlpha SICAV's corporate losses; the one is only the repercussion of the other.

By way of supplementary injury, [Unnamed Petitioner] was harmed by the announcements in the press of the "Madoff" scandal and of its implications for LuxAlpha. The news gave rise to many demands for reclamations from her clientele and concerns about her prospects, and these announcements have induced a serious taint to her public image. For her demand to be admissible the petitioner must not only allege an individual injury proper, but, just as importantly, must also show a link of direct causality between the invoked prejudice and the ascribed faults of the defendants.

The courts of Luxembourg take inspiration from the question of liability and the theory of adequate causality. Thus in a decision of June 22, 1994, the Court explained, “that the injury must be the direct consequence, the necessary continuation of the fact and the harmful act. To effect a choice between the different antecedents of the damage, to trace a limit to the series of causes, the simplest method consists in examining the continuity of the chain of cause and effect. As soon as an event is itself interposed in the chain, a rupture intervened; the damage is not reparable for it is indirect.”

A decision of February 20, 2002 refers again to the event which intervenes to disrupt the chain of cause and effect, underlining that “the causality link must stop itself necessarily as early as the instant that, taking one by one the links which constitute the chain of events from the initial fact up to the alleged injury, one notes at a given moment an initiative taken by the victim, or by a third party” (cf. Georges Ravarani, La responsabilité civile des personnes privées et publiques, 2 éd., Pasicrisie Luxembourgeoise 2006, nos 906 et suivants).

The doctrine explains this solution by the criterion of the continuity of the causal chain: as soon as an event interposes itself in the chain, a rupture intervenes so that the damage, which is not an inevitable consequence of the initial fact, cannot be repaired because of indirect causality.

As for the supplementary injury to her reputation as a risk manager, the petitioning party argues that the taint to her public image is due to the negative publicity associated with the Madoff affair, such that she recognized that media announcements have […].

Moving on, from the line of reasoning above it follows that the announcements in the press and the revelations of the scandal are the source of this alleged supplementary injury.

As [Unnamed Petitioner] fails to allege and to characterize any personal injury distinct from that sustained by the corporation LuxAlpha SICAV and which is

causally, directly linked to the ascribed faults of the defendants, her demands are declared inadmissible.

Demands for Intervention

It is admitted in jurisprudence that the extinction of the principal instance can only induce the disappearance of the intervention that stretches only to support the claims of one party and which, covering an incidental character, is necessarily secured by the original demand (Cass. soc., 9 Oct. 1986, no. 83-45.747: Bull. Civ. 1986, V, no. 488. – Cass. 2d civ., 20 Janv. 1977: Bull. Civ. 1977, II, no. 14. – Cass. 3d civ., 10 Mai 1977: Bull. Civ. 1977, III, no. 195). The intervention will follow the road of the original petition on their way out.

The principal demand having been declared inadmissible, there are grounds for declaring that the forced interventions in declaration of common judgment respective of the questions are not, in consequence, admissible.

Damages for Abuse of Procedure and Harassment

As for the request for damages and interest for reckless procedure and harassment, it is necessary to follow the principle that the active pursuit of justice is free. This signifies that as a rule, the exercise of this liberty does not constitute a fault, even for the one that will lose the process. In fact, each must be an able defender of his rights in justice without being afraid of seeing itself reproached for simply wanting to submit its claims to a court either in taking the initiative to act or in resisting an adverse demand. (Jurisclasseur, Procédure civile, fasc. 125, action en justice, no. 61). The exercise of the ways of the law is not reprehensible unless the pleader committed an abuse. In this matter, it is admitted that all fault in the exercise of the ways of the law is likely to engage the responsibility of the pleaders. (Cass. Fr.

January 10, 1994, Bull. Civ. I. no. 310; Cour d'appel, 21 Mars 2002, no. 25 297 du rôle) and that liability for abuse of procedure does not require bad faith, nor ruse, and can result from faulty behavior (Cass. Civ. 2d May 5 1978, Bull. Civ. II, no. 116).

The defendants have failed to establish the least fault on the part of the petitioning party, or the damage that resulted, so they are hereby nonsuited in their demand for compensation for reckless procedure or harassment.

Procedural Indemnity

The demand on the part of the defending parties for an allocation and an indemnification of procedural costs on the basis of Article 240 of the New Code of Civil Procedure is not well founded because they do not explain why it would be inequitable to leave their expenses to their own charge. As the party in a losing cause cannot obtain procedural compensation, the demand from [Unnamed Petitioner] fails. The party in a losing cause must bear the expenses in accordance with the general principles of Article 238 of the New Code of Civil Procedure.

Wherefore:

The district court of Luxembourg, second chamber, presiding over commercial matters, ruling in a contested matter:

- Declares itself competent to judge of the principal demand;
- Receives the principal demands and intervention in pure form;
- Joins them in order to rule by a single judgment;
- Declares the principal demand inadmissible;

- Declares the demands for intervention to be without object;
- Rejects the demands for damages and interest for abuse of process or harassment;
- Nonsuits the respective parties for their demands for procedural indemnity on the basis of Article 240 of the New Code of Civil Procedure;
- Leaves the expenses of the demand for intervention on the shoulders of the petitioning parties for intervention; and
- Leaves the costs of the principal demand on the charge of [Unnamed Petitioner].