

Commercial Judgment, Sixth Chamber, No 507/2009

Public hearing of Thursday, the second day of April two thousand and nine

No L-6033/09

Composition:

Christiane JUNCK, Vice-President,

Jean-Paul MEYERS, First Judge,

[Signatures]

Gilles MATHAY, Judge,

Manuela FLAMMANG, Registrar.

Between:

The **State Public Prosecutor** attached to the Tribunal d'Arrondissement [District Court],
Luxembourg, Palais de Justice, Luxembourg,

applicant for the dissolution and liquidation of the investment company with variable capital
in the form of a public limited company LUXALPHA SICAV, according to an application
dated 10 March 2009,

represented by the deputy State Public Prosecutor, Mr Patrick KONSBRUCK,

and:

**the investment company with variable capital in the form of a public limited company
LUXALPHA SICAV**, whose registered office is at 33A avenue John F. Kennedy, L-1855
Luxembourg,

defendant named in the abovementioned application,

represented by Maître Gilles DUSEMON, lawyer with right of audience before the Court,
residing in Luxembourg,

FACTS:

By application dated 10 March 2009, annexed hereto, the State Public Prosecutor applied for
dissolution and liquidation of the defendant company.

GRAND DUCHY OF LUXEMBOURG

PUBLIC PROSECUTOR'S OFFICE
Tribunal d'Arrondissement, Luxembourg

The State Public Prosecutor attached to the Tribunal d'Arrondissement [District Court], Luxembourg,

Having regard to the letter dated 13 February 2009 from the Commission for Supervision of the Financial Sector regarding the investment company with variable capital LUXALPHA SICAV, and also the 9 annexes thereto;

Having regard to the letter dated 9 March 2009 from the Commission for Supervision of the Financial Sector;

Whereas:

on 13 February 2009 the Public Prosecutor's Office received a letter from the Commission for Supervision of the Financial Sector informing it that the investment company with variable capital LUXALPHA SICAV, incorporated on 5 February 2004, whose registered office is at 33A avenue John F. Kennedy, L-1855 Luxembourg, a company subject to part I of the Law of 20 December 2002, as amended, concerning collective investment undertakings, was on 3 February the subject of a decision withdrawing it from the official list of collective investment undertakings, in accordance with Article 94(2) of the Law of 20 December 2002 concerning collective investment undertakings, with effect from 3 February 2009;

The decision of withdrawal from the official list of collective investment undertakings was notified to the company LUXALPHA SICAV on 3 February 2009;

By the same letter of 3 February 2009, the Commission for Supervision of the Financial Sector asked the Public Prosecutor's Office to apply for dissolution and liquidation of the company LUXALPHA SICAV on the basis of Article 104(1) of the abovementioned Law;

By its letter of 9 March 2009, the Commission for Supervision of the Financial Sector informed the Public Prosecutor's Office that no appeal against its decision of withdrawal of the Company LUXALPHA SICAV had been submitted to the Tribunal Administratif (Administrative Court) by 6 March 2009, the date on which the period for lodging an appeal expired;

Having regard to Article 104 of the Law of 20 December 2002 concerning collective investment undertakings;

REQUESTS

that the Vice-President, the First Judge and the Judge making up the Sixth Chamber of the Tribunal d'Arrondissement, Luxembourg,

should pronounce the dissolution and order the liquidation of the investment company with variable capital LUXALPHA SICAV;

order that all the legally prescribed measures be complied with;

order provisional enforcement of the decision to be given.

Luxembourg, 10 March 2009

For the State Public Prosecutor

His deputy

[Signature]

Patrick KONSBRUCK

[Ink seal of the State Public Prosecutor, Luxembourg]

CERTIFIED TRUE TRANSLATION

CLAUDINE ADAMS
SWORN TRANSLATOR ACCORDING TO
MINISTERIAL DECREE OF 15 DECEMBER 1998
LUXEMBOURG, 6.4.2009

C. Adams

The case was duly considered at the public hearing of 25 March 2009 before the Sixth chamber, sitting as a commercial court, at which argument was presented as follows:

The representative of the Public Prosecutor's Office read the application set out above and put forward his pleas in law.

Maître Gilles Dusemon replied.

The Court retired to deliberate and at the public sitting of today's date delivered the following

Judgment

By application of 10 March 2009, reproduced above, the State Public Prosecutor applied for the dissolution and liquidation of the investment company with variable capital in the form of a public limited company LUXALPHA SICAV (hereinafter 'Luxalpha'), whose registered office is at 33a avenue John F. Kennedy, L-1855 Luxembourg.

The application was notified, through the Registry, on 11 March 2009 to the party concerned.

The Public Prosecutor's Office stated in support of its application that it had received from the Commission for Supervision of the Financial Sector (*Commission de Surveillance du Secteur Financier*, hereinafter 'the CSSF'), pursuant to Article 104(1) of the Law of 20 December 2002 concerning collective investment undertakings, as amended (hereinafter 'the 2002 Law'), an application for dissolution and liquidation of the company Luxalpha, in so far as that company was, on 3 February 2009, the subject of a decision withdrawing it from the official list of collective investment undertakings, in accordance with Article 94(2) of the 2002 Law, and that no appeal against that withdrawal decision had been brought before the Tribunal Administratif by 6 March 2009, the date on which the period for lodging an appeal expired.

The application made by the Public Prosecutor's Office is based, according to the application submitted to it by the CSSF, on Article 104(1) of the 2002 Law, which provides that 'the Tribunal d'Arrondissement, sitting as a commercial court, shall give a decision on the application from the State Public Prosecutor, acting on its own initiative or at the request of the CSSF, for dissolution and liquidation of the collective investment undertakings referred to by Articles 2 and 63 of the present Law, whose registration on the list provided for by Article 94(1) has been definitively refused or withdrawn'.

It is not disputed either that the 2002 Law is applicable to the company Luxalpha or that the decision of withdrawal from the official list of collective investment undertakings is definitive.

Consequently, and in so far as the company Luxalpha does not oppose the commencement of judicial liquidation proceedings, and such proceedings are justified in the interests of the rights of creditors and investors, it is appropriate to pronounce the dissolution and order the judicial liquidation of the company Luxalpha, pursuant to Article 104 of the 2002 Law and to appoint a supervising judge and two liquidators.

Liquidators

Pursuant to Article 104(2) of the 2002 Law, liquidators may bring and conduct all actions for the undertaking, receive all payments, grant releases with or without giving a receipt, realise all transferable securities of the undertaking and re-employ the same, issue or endorse all commercial paper, settle or compromise all disputes. They may dispose of the immovable property of the undertaking by public auction. They may also, but only with the authorisation of the Court, mortgage its property, pledge the same and dispose of its immovable property by private contract.

Pursuant to the terms of Article 104(3) of the 2002 Law, as from the time of the judgment ordering liquidation, all proceedings concerning immovable and immovable property, all means of enforcement affecting movable and immovable property may be conducted, brought or exercised only against the liquidators. The judgment placing the undertaking in liquidation terminates all proceedings for attachment brought by unsecured and non-privileged creditors in relation to movable and immovable property.

It follows that the company in liquidation forfeits management of all its property, which is entrusted to the liquidators, who act on behalf both of the company and of the investors and creditors whom they represent and they are vested with the widest powers for achievement of their objective.

In the present case, those powers will be exercised both in the Grand Duchy of Luxembourg and abroad, in so far as the rule as to unity and universality of judicial liquidation of a company having its registered office in Luxembourg in principle extends its effects to all the movable and immovable property of the company in liquidation, even where such property is situated abroad.

The liquidators will be able, to the extent to which they consider it necessary, to have recourse to the services of any representatives, agents or assistants with a view to maintaining and keeping the books, records and archives of the company Luxalpha and with a view to protecting and realising its assets, and to take all measures which appear to them to be in the interests of the liquidation.

The expenses incurred for that purpose by the liquidators, and their fees and costs, shall be charged to the company in liquidation and shall be regarded as administrative costs to be deducted from the assets of the liquidation before any distribution of funds.

As a result of the cessation of debtor's power to deal with his property, it is also appropriate to terminate the accrual of interest, as far as the body of creditors is concerned, as from 2 April 2009, the date on which the liquidation commenced.

In order to obviate difficulties and any danger of contradiction which might result from separate actions by the liquidators, they must act in a collegiate manner, under their joint signature.

Lodging of claims

Pursuant to Article 104(4) of the 2002 Law, after the payment or deposit in court of the sums necessary for payment of the debts, the liquidators shall distribute to the holders of shares the sums or values accruing to them. It must be concluded from this that the holders of shares in the company Luxalpha are not to be regarded as creditors of the insolvent estate but as shareholders who will share the proceeds of liquidation.

In those circumstances they do not need to lodge a proof of claim in order to enforce their rights. They will be convened by the liquidators to a general meeting at least once each year in order to be informed on that occasion of the results of the liquidation and of the causes which have prevented the liquidation from being completed. The first general meeting shall be held before 31 October 2009. At that general meeting, it is possible in particular that the appropriateness of establishing a committee of creditors/investors will be discussed.

The creditors of the investment undertaking will have to lodge a proof of claim at the Registry of the Tribunal d'Arrondissement, Luxembourg, Sixth Chamber, no later than 2 July 2009. Article 508 of the Commercial Code shall apply to any claims lodged after that date.

Admission and disputing of claims

The verification of claims shall be carried out by the liquidators progressively as the proofs of claim are lodged at the Registry: they shall enter on the list of claims those which they consider admissible. Each admissible claim shall be designated by details of the identity of the claimant, the amount and the basis of the claim, and whether it is privileged or unsecured. The liquidators shall in the same way draw up lists on which the disputed claims are entered.

The liquidators shall submit a report to the supervising judge on their verification operations and shall periodically submit to him draft lists of admissible claims and disputed claims.

During the first ten days of the months of February, June and October, the lists of claims periodically declared admissible shall be lodged at the Registry of the Tribunal d'Arrondissement, Luxembourg, Sixth Chamber, where the creditors who have submitted claims, those who are entered on the balance sheet and the shareholders may inspect the same.

During that period, those same persons may lodge objections against the claims entered on the lists. Objections shall take the form of a declaration submitted to the Registry. A reference

thereto shall be made by the Registrar on the list in question, in the margin of the entry of the claim objected to. The reference shall bear the date of the objection and the identity of the objector and, if appropriate, of the agent making the statement of objection. The objection must be repeated – failing which it shall be inadmissible – within three days by registered letter addressed to the liquidators. It must contain – failing which it shall be inadmissible – the precise identification of the objector, an address for service within the municipality of Luxembourg, proof of his standing and the pleas and documents relied on in support of the objection.

The admissibility and merits of the objection shall be verified on a summary basis by the liquidators.

After expiry of the period of ten days for lodging an objection, the claims declared admissible and not objected to shall be definitively admitted in the records signed by the liquidators and the supervising judge.

The liquidators shall duly inform the creditors whose lodged claims have been disputed, or have been the subject of an admissible objection which does not lack any foundation, of the fact that their claim has been challenged or that there is an objection to it, by registered letter sent to the address of the person providing an address for service, or else to the address of the foreign agent, or else to the address indicated in the lodged claim, or else to their last known address.

If the creditors do not proceed to issue a summons within a period of 40 (forty) days as from the date of dispatch by post of the said registered letter, the lodged claim in question shall be regarded as definitively rejected.

The liquidators shall similarly inform objectors whose objection appears to them to be inadmissible or lacking any basis, of the fact that their objection has been challenged, by registered letter sent to the address for service given by them.

If the objectors fail to proceed to issue a summons within a period of 40 (forty) days as from the date of dispatch by post of the said registered letter, their objections shall be definitively regarded as non-existent and the claims shall be declared admitted.

A creditor who issues a summons against the liquidators and, in the case of an objection, also against the objector, and any objector who issues a summons against the creditor and the liquidators must without fail indicate an address for service within the municipality of Luxembourg in the writ of summons. In the event of failure to maintain that address for service throughout the duration of the procedure or failure to notify a change of the elected address for service to the liquidators, all further information and all documents may be validly given to him or served at the Registry of the Tribunal d'Arrondissement, Luxembourg, sitting as a commercial court, Sixth Chamber, as provided for by Article 499(2) of the Commercial Code.

Objections on which it is not possible to give an immediate decision shall be dealt with separately. Those which are not within the jurisdiction of the Tribunal d'Arrondissement, Luxembourg, sitting as a commercial court, shall be referred to the competent court.

No appeal shall be available against judgments giving a decision on challenges and objections.

Creditors whose claims have been admitted shall be individually informed of that fact by ordinary letter from the liquidators.

Conversion of claims denominated in a currency other than the euro

Claims denominated in a currency other than the euro shall be converted into that currency at the rate of exchange ruling on the date of the present judgment ordering liquidation, as published by the European Central Bank, and the payment of all admitted claims shall be made in euro.

Supervising Judge

The liquidation shall be overseen by a supervising judge, who shall enjoy rights of inspection and access to information in the widest terms and he may give the liquidators all directions which appear to him to be in the interests of the creditors and investors.

For the rest, pursuant to Article 104(1), second subparagraph, last sentence, of the 2002 Law, it is appropriate to declare to be applicable the rules governing the liquidation of insolvent companies, subject to the derogating provisions outlined above and subject to any changes to the method of liquidation that it may become necessary to make subsequently.

Pursuant to Article 104(1), third subparagraph, last sentence, of the 2002 Law, the present judgment shall be enforceable on a provisional basis.

ON THOSE GROUNDS:

The Tribunal d'Arrondissement, Luxembourg, Sixth Chamber, sitting as a Commercial Court, giving judgment *inter partes*, the views of the Public Prosecutor's Office having been heard,

admits the application as regards its form;

declares the investment company with variable capital in the form of a public limited company Luxalpha to be dissolved;

orders liquidation thereof;

appoints as supervising judge Mrs Christiane JUNCK, Vice-President of the Tribunal d'Arrondissement, Luxembourg, and as liquidators Maître Alain RUKAVINA, lawyer with right audience before the Court, residing in Luxembourg, and Mr Paul LAPLUME, company auditor, residing in Junglinster;

states that the liquidators shall represent both the company and its investors and creditors and that they shall be vested with the widest powers for the purpose of attaining their objective, whether those powers are exercised in the Grand Duchy of Luxembourg or abroad;

states that interest ceased to accrue on 2 April 2009;

orders the creditors to lodge their claim with the amount thereof at the Registry of the Tribunal de Commerce [Commercial Court] of this locality before 2 July 2009;

declares to be applicable the legal provisions concerning liquidation of insolvent companies, subject to the following derogating provisions:

the verification of claims shall be carried out by the liquidators progressively as the proofs of claim are lodged at the Registry: they shall enter on the list of claims those which they consider admissible; each admissible claim shall be designated by details of the identity of the claimant, the amount and the basis of the claim, and whether it is privileged or unsecured; the liquidators shall in the same way draw up lists on which the disputed claims are entered,

the liquidators shall submit a report to the supervising judge on their verification operations and shall periodically submit to him draft lists of admissible claims and disputed claims,

during the first ten days of the months of February, June and October, the lists of claims periodically declared admissible shall be lodged at the Registry of the Tribunal d'Arrondissement, Luxembourg, Sixth Chamber, where the creditors who have submitted claims, those who are entered on the balance sheet and the shareholders may inspect the same,

during that period, those same persons may lodge objections against the claims entered on the lists. Objections shall take the form of a declaration submitted to the Registry; a reference thereto shall be made by the Registrar on the list in question, in the margin of the entry of the claim objected to; the reference shall bear the date of the objection and the identity of the objector and, if appropriate, of the agent making the statement of objection; the objection must be repeated – failing which it shall be inadmissible – within three days by registered letter addressed to the liquidators; it must contain – failing which it shall be inadmissible – the precise identification of the objector, an address for service within the municipality of Luxembourg, proof of his standing and the pleas and documents relied on in support of the objection,

the admissibility and merits of the objection shall be verified on a summary basis by the liquidators,

after expiry of the period of ten days for lodging an objection, the claims declared admissible and not objected to shall be definitively admitted in the records signed by the liquidators and the supervising judge,

the liquidators shall duly inform the creditors whose lodged claims have been disputed, or have been the subject of an admissible objection which does not lack any foundation, of the fact that their claim has been challenged or that there is an objection to it, by registered letter sent to the address of the person providing an address for service, or else to the address of the foreign agent, or else to the address indicated in lodged claim, or else to their last known address,

if the creditors do not proceed to issue a summons within a period of 40 (forty) days as from the date of dispatch by post of the said registered letter, the lodged claim in question shall be regarded as definitively rejected,

the liquidators shall similarly inform objectors whose objection appears to them to be inadmissible or lacking any basis, of the fact that their objection has been challenged, by registered letter sent to the address for service given by them,

if the objectors fail to proceed to issue a summons within a period of 40 (forty) days as from the date of dispatch by post of the said registered letter, their objections shall be definitively regarded as non-existent and the claims shall be declared admitted,

a creditor who issues a summons against the liquidators and, in the case of an objection, also against the objector, and any objector who issues a summons against the creditor and the liquidators must without fail indicate an address for service within the municipality of Luxembourg in the writ of summons; in the event of failure to maintain that address for service throughout the duration of the procedure or failure to notify a change of the elected address for service to the liquidators, all further information and all documents may be validly given to him or served at the Registry of the Tribunal d'Arrondissement, Luxembourg, sitting as a commercial court, Sixth Chamber, as provided for by Article 499(2) of the Commercial Code,

objections on which it is not possible to give an immediate decision shall be dealt with separately,

those which are not within the jurisdiction of the Tribunal d'Arrondissement, Luxembourg, sitting as a commercial court, shall be referred to the competent court,

no appeal shall be available against judgments giving a decision on challenges and objections,

creditors whose claims have been admitted shall be individually informed of that fact by ordinary letter from the liquidators,

states that claims denominated in a currency other than the euro shall be converted into that currency at the rate of exchange ruling on the date of the liquidation judgment, as published by the European Central Bank, and payment of all admitted claims shall be made in euro;

orders that seals are to be affixed at the registered office of the company and at all other places where they may be necessary, unless the inventory can be completed in a single day, in which case it shall be carried out without the prior affixing of seals;

orders publication of the present judgment in its entirety in the *Mémorial* [Official Gazette] and of an extract thereof in the newspapers *Luxemburger Wort*, *L'Echo de la Bourse*, *Börsenzeitung* and the *Financial Times*;

states that the present judgment shall be enforceable on a provisional basis;

orders that the costs are to be borne by the investment company with variable capital in the form of public limited company Luxalpha Sicav.

[Signatures]

CERTIFIED TRUE TRANSLATION
CLAUDINE ADAMS
SWORN TRANSLATOR ACCORDING TO
MINISTERIAL DECREE OF 15 DECEMBER 1998
UXEMBOURG, 6.4.2009

C. Adams