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[seal:] SUPERIOR COURT OF JUSTICE Grand Duchy of Luxembourg

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Judgment No. 102/24 - IX - COM

Public hearing of December five, two thousand twenty-four

Docket number 39979

Members of the court:
[redacted]

[signature]
[signature]

Between:

the company **HERALD FUND SPC** (in official liquidation), an "exempted segregated portfolio company" established under the laws of the Cayman Islands, established and currently having its registered office at PO Box 31229, Floor 2- Building 3, Governors Square, 23 Lime Tree Bay Avenue, Grand Cayman, KY1-1205 Cayman Islands, represented by its official co-liquidators, Mr. Russel Smith and Mr. Niall Goodsir-Cullen of BDO CRI (Cayman) Ltd, whose address is PO Box 31229, Floor 2- Building 3, Governors Square 23 Lime Tree Bay Avenue, Grand Cayman KY1-1205, Cayman Islands,

appellant under the terms of a writ by the deputy bailiff [redacted], replacing the bailiff [redacted] of Luxembourg, of May 15, 2013,

✓ represented by Mr. Stéphane LATASTE, Court attorney, residing in Luxembourg,

and:

the public limited company **HSBC Securities Services (Luxembourg),** established and having its registered office at L-1821 Luxembourg, 18, boulevard de Kockelscheuer, registered in the Luxembourg Trade and Companies Register under number B28531, represented by its board of directors currently in office,

respondent for the purposes of the aforementioned MULLER writ of May 15, 2013,

represented by the public limited company ARENDT & MEDERNACH, registered in list V of the Table of the Bar Association of the Luxembourg Bar, represented for the purposes hereof by Mr. François KREMER, assisted by Ms. Evelyne LORDONG and Ms. Clara MARA-MARHUENDA, Court attorneys, residing in Luxembourg.

THE COURT OF APPEAL:

Having received from the company HERALD FUND SPC, a "segregated portofolio company" established under the law of the Cayman Islands (hereinafter "HERALD") following the summons of April 3, 2009, claims against the public limited company HSBC SECURITIES SERVICES (Luxembourg) SA (hereinafter "HSSL"), the District Court of and in Luxembourg, by judgment rendered via adversarial proceedings on March 22, 2013:

- admitted the claim on the form;
- rejected the pleas of inadmissibility;
- dismissed the claim for restitution of securities;
- stayed the judgment on the restitution of "cash" to allow the parties to further analyze the issue of the "*termination*" of the custody agreement;
- reserved all other issues.

The dispute mainly concerned the restitution of securities, transferable securities and financial instruments (hereinafter "Securities"), more fully specified in the briefs filed in the first instance, on deposit with HSSL, under penalty of a fine, alternatively to the payment of damages on the basis of contractual liability for violation of a restitution obligation, up to the amount of US$ 2,020,495,724.18, plus legal interest and more alternatively to the payment of damages up to the same amount, for violation by HSSL of its control and supervisory obligations as well as for violation of the professional obligations to which HSSL would be bound under the law of April 5, 1993 relating to the financial sector, mainly on the basis of contractual and alternatively tortious liability.

In judgment as such, **the court** held, as a preliminary matter, that (i) HERALD opened a "*brokerage*" account with "Bernard L. MADOFF INVESTMENT SECURITIES LLC" in New York (hereinafter "BMIS") following a "*circular resolution*" of its "*directors*" of March 29, 2004, (ii) since the establishment of HERALD in March 2004, the "cash" (the Court specifies that this term was used as is in said judgment) was forwarded to the "*broker*" BMIS, which established accounts of purchases of securities and falsified " *securities*", (iii) according to Article 5 of the "*customer agreement*" between HERALD and BMIS of March 29, 2004, the funds or securities do not remain deposited with the "*broker",* (iv) HSSL should have realized that the Securities (allegedly) acquired did not reach it on deposit, v) HSSL entered into a sub-custody agreement with BMIS in September 2004. The court deduced that, in the absence of having entered into this sub-custody agreement, there would have been no justification as to the deposit of assets at BMIS and that this sub-custody agreement would have been entered into by HSSL to protect itself against its liability as custodian.

The court then found that on the day of the introduction of the summons, April 3, 2009, no other proceedings aimed at the restitution of the deposited funds or compensation resulting from a fault committed by the custodian bank were in progress, to conclude that HERALD had a legitimate interest in filing suit. It further rejected (i) the question of non bis in idem, the proceedings in the United States having been brought subsequently against BMIS and no decision having

been rendered (ii) the question of lis pendens with the American proceedings, the Luxembourg proceedings being the oldest and (iii) the theory of estoppel.

As for the deposit and sub-custody agreements, the first instance judges held that the Luxembourg law of December 20, 2002 concerning undertakings for collective investment in transferable securities (hereinafter "UCITS" and "2002 Law") was applicable to the dispute, in particular Articles 19 and 36 thereof, as well as circular IML 91/75, amended by circular CSSF 05/177 concerning the revision and restructuring of the rules to which Luxembourg undertakings that fall under the law of March 20, 1988 on undertakings for collective investment (hereinafter "UCI") are subject. The court concluded that the directive that served as the basis for the 2002 Law, as well as this 2002 Law, does not use the term "restitution" but exclusively that of "liability" and that the Luxembourg regulator concludes that restitution on the basis of Articles 1932 and following of the Civil Code applies to assets for which the custodian itself assumes custody, but not for those that are deposited with third parties. The court therefore limited itself "to *finding that all (fictitious) assets deposited with BMIS are not part of the base of the restitution obligation of the custodian HSSL*" to conclude "*the claim for restitution of assets that are not deposited with HSSL but deposited with BMIS is therefore unfounded*".

The court then limited itself to examining the issue of the restitution of HERALD's "cash" that HSSL admits to having deposited in its accounts as of October 31, 2012, in the amount of €10,535,457.60 and US$ 6,740.08, noting that no exhibit would have been filed. Citing Articles 19.1 and 19.2 of the "*custodian agreement",* the court decided that a restitution was subject to the "*termination*" of the custody agreement: in the absence of exhibits and pleadings made on this subject, the court stayed its judgment on the issue of the restitution of "cash" to "*file additional exhibits concerning the origin, date, quantum of the cash deposited in HSSL's accounts as well as to further analyze the issue of the "termination" of the custody agreement".*

By bailiff's writ of May 15, 2013, HERALD filed an **appeal** against this judgment of March 22, 2013, which, according to the information available to the Court, was not served on it.

HERALD criticizes the judgment rendered for having made a distinction between the assets on deposit with HSSL and those on sub-custody with BMIS as well as for having decided that HSSL would not be bound by an obligation to retain or return the assets on sub-custody. It argues that it is also wrong that the court stayed its judgment on the claim for restitution of the cash, in order to conclude more fully on the allegedly premature nature of this claim.

HERALD therefore argues, by reformation, for HSSL to deliver the Securities, widely described in the operative part of the aforementioned writ of appeal, estimated at the sum of US$ 2,020.495.724.18 and €1,555.881.579.64, all under penalty of a fine of €100,000 per day of delay, from the notification of this judgment.

Alternatively, HERALD asks the Court to rule that HSSL has the obligation to return the cash transferred by it to its sub-custodian BMIS, namely the sum of

US$1,851.380.807.22 and the sum of €603,445,210.24, with interest at the legal rate from the introductory summons of first instance, until the balance is paid.

In any event and in addition, HERALD asked the Court to rule that HSSL be obliged to immediately return the cash mentioned in the summons of April 3, 2009, namely US$ 39,773,894.10 and €9,556,837.99, in addition to legal interest.

HERALD finally claims the payment of a procedural indemnity of €50,000 for the first instance and €30,000 for the appeal instance, as well as the sentencing of HSSL to pay the costs and expenses of both proceedings.

By **judgment of May 6, 2015,** the Court ordered HERALD to provide a "cautio judicatum solvi" of €40,000 and to deposit this sum with the Consignment Fund. The Court reserved its judgment on other matters, pending the deposit of the judicial guarantee. A **judgment** was again issued on **November 11, 2015,** in order to rectify the capacity of HERALD and to replace on page "2" of the first judgment the sentence "*in September 2004 a "sub-custody agreement" was signed between HERALD FUND and Bmis*" with the sentence "*in September 2004 a "sub-custody agreement" was signed between HSSL and Bmis*".

By order of September 2, 2022, the investigation was closed again and the case set at the hearing, for pleadings. At the second pleading hearing, the case was deliberated.

The parties having both filed summary submissions, only the last ones filed by each party will be taken into consideration, namely those filed with the Court registry dated July 9, 2021 by HERALD and those filed with the same registry dated May 16, 2022 by HSSL, pursuant to Article 586 of the New Code of Civil Procedure.

Discussion

HERALD specifies that it currently has three claims:

- claim for restitution and/or issuance of the Securities on the basis of entries in the account of HSSL, in its capacity as custodian, subject to the obligations of the provisions of the Civil Code relating to the obligations of the custodian;

- alternative claim for restitution of cash transferred by HSSL to BMIS on the basis of the same provisions of the Civil Code;

- claim for restitution of cash received by HSSL and not transferred by HSSL to BMIS, again on the basis of the same provisions of the Civil Code.

HERALD also states that it considers that the first instance judges rightly held (i) that it had an interest in filing suit, (ii) that the 2002 Law and the "*custodian agreement*" govern the relationship between it and HSSL and (iii) that assets would be on sub-custody.

In its first long part of its submissions, in which HERALD revisits its version of the facts, it recalls that it was established on March 24, 2004 in the Cayman Islands, declared as an "*exempted segregated portofolio company*", a statute that would have forced it to operate and conduct its business outside of said Islands.

The next day, on March 25, 2004, HSSL opened an account with BMIS in relation to the assets of HERALD *(special custody account* 1-FR109-), an account entitled under the old name of HSSL, namely "*BANK OF BERMUDA (LUXEMBOURG)* SA *SPECIAL CUSTODY ACCOUNT FOR HERALD FUND SPC-HERALD USA*". This title would have corresponded to the pre-existing agreements between HSSL and BMIS since the signing of a "*sub-custody agreement"* dated August 7, 2002, by which HSSL expressly and formally designated BMIS as its sub-custodian.

On March 29, 2004, HERALD and HSSL signed the "*custodian agreement*" by which HSSL was designated as the custodian bank of HERALD, an agreement that would have been subject to Luxembourg law and the jurisdiction of Luxembourg courts. According to clause 6.1 of said *"custodian agreement"*: "(...) *the Custodian shall record and hold in a separate account in its books all Securities received by it from time to time and shall arrange for all Securities deposited in the Custodian's vault or otherwise held by or to the order of the Custodian as it may think proper for the purpose for the safekeeping thereof. (...)".*

Clause 9.1. of this "*custodian agreement*" adds: "(...) *the Custodian shall identify Securities held by it being held as being held for the account of the Fund and shall require each agent, sub-custodian or delegate (referred to in clause 15.2) to identify Securities or other investments held by such agent, sub-custodian or delegate as being held by it, as custodian or fiduciary, for the account of the Fund or the Custodian* (...)".

Clause 9.3 of the C.A. states: "*the Custodian shall keep or cause to be kept such books, records and statements as may be necessary to give a complete record of all cash and Securities held and transactions carried out by it on behalf of the Fund and shall permit the Fund and its duly authorized agent(s) or delegate(s) to inspect such books, records and statements at any time during normal business hours on giving reasonable notice to the Custodian".*

Clause 15.2 of the "*custodian agreement*" is worded as follows: "*In performing its duties hereunder the Custodian may at the expense of the Fund appoint such agents, sub-custodians and delegates (Correspondent) as may be necessary to perform in whole or in part any of the duties and discretions of the Custodian (including such appointment powers of sub-delegation). Subject to the provisions of this sub-clause, the Custodian will remain responsible to the Fund for any acts or omissions of any Correspondent howsoever appointed as if such acts or omissions were those of the Custodian* (...) ".

Clause 15.3 of the "*custodian agreement"* details: "*In the selection, appointment and monitoring of Correspondents pursuant to Clause 15.2, the Custodian will exercise reasonable skill and care but only be liable to the Fund for losses resulting from the liquidation, bankruptcy or insolvency of such Correspondents if*

it has been negligent in the selection and monitoring (...)".

Clause 19.2 of this C.A. finally stipulates: "*The Custodian shall, in the event of termination of this Agreement, deliver or cause to be delivered to any succeeding Custodian all Securities then held hereunder and all monies or other assets of the Fund* (...)".

An "*administration agreement*" was signed on March 29, 2004, by which HSSL was appointed as HERALD's Central Administration Agent (Administrator), with multiple functions, including establishing HERALD's accounts and books.

On March 29, 2004, the first prospectus (Offering Memorandum) for investors was issued, a document that was prepared and reviewed by HSSL, which was indicated as the custodian and central administration agent of HERALD. Ernst & Young (Cayman) was appointed to audit HERALD's annual financial statements, but in fact, this mission was delegated from the outset to the Luxembourg company Ernst & Young SA established in Luxembourg: all the annual and semi-annual financial statements were drawn up by HSSL, according to Luxembourg laws and accounting rules for UCIs in Luxembourg, and were certified by Ernst & Young.

Also on March 29, 2004, one of the three directors of HERALD signed a "circular resolution" approving the opening of the "*special custody account*" dated March 25, 2004 by HSSL with BMIS. On April 1, 2004, HSSL was instructed to transfer an initial amount of US$ 9,999,975 to its sub-custodian, BMIS: this amount was credited by BMIS to HSSL's "*special custody account 1-FR109*" opened with BMIS with the mention "*for HERALD FUND SPC*". From that day on, all other transfers were credited in the same way. Credit notices were always sent by BMIS to HSSL and not HERALD. Only duplicates of these notices were sent to HERALD.

HERALD does not appear in the appendix attached to the "*sub-custody agreement*" signed between HSSL and BMIS on August 7, 2002, HSSL would remedied it by sending a new "*sub-custody agreement"* dated September 8, 2004, for the attention of BMIS, mentioning HERALD in *Annex A*. Clause "2" of this document of September 8, 2004 is written as follows: *"The Bank hereby appoints the Sub-Custodian as sub custodian for the Bank in respect of the property delivered to, to the order of, or otherwise acquired by the sub-custodian pursuant to this agreement to hold in safe custody and/or administer Property upon the terms and conditions hereinafter contained and the Sub- custody hereby accepts such appointment from the date hereof until its appointment shall be terminated as hereafter provided." On January 23, 2008, this second "sub-custody agreement" was replaced by a third, in almost identical terms.*

At the time of the issuance of HERALD's first annual statement, dated March 31, 2005, HSSL certified to Ernst & Young, at the express request of the latter, that it would be the custodian of the securities listed on BMIS' monthly statement in connection with its "*special custody account 1-FR109-*", as of December 31, 2004. For the 2007 fiscal year, again at the formal request of Ernst & Young to HSSL to find out what had on deposit, the latter replied: "*please see Madoff*

statements", by attaching an extract of its account "1-*FR109-*". HSSL would have received a certain amount as "*administration and custody fees*".

The same procedure would have taken place for the annual financial statements as of December 31, 2005, December 31, 2006 and December 31, 2007.

As of November 30, 2008, HERALD's assets on deposit with HSSL, respectively held by HSSL in account for HERALD, appeared, according to the "*statements of assets"* drawn up by HSSL from the *"special custody account*" with BMIS, for a value of US$ 1,897,740,342.85 and were comprised by the Securities listed on pages 46 to 48 of HERALD's summary submissions, for a total value of US$ 2,020,495,724.18, an amount that would have been valued at the time at €1,555,881,579.64. HERALD specifies that all these Securities are currently still listed on the stock markets.

Also on November 30, 2008, the cumulative amount of cash that was transferred and credited to HSSL's "special custody account 1-FR109-" with BMIS was US$ 1,533,741,975. According to the information that was given by HSSL in its various first instance submissions, the cumulative total cash that HSSL transferred to BMIS between April 1, 2004 and December 12, 2008 was US$ 2,055.660.324.08 and the cumulative amount of cash that was withdrawn from BMIS by HSSL was US$ 567,800,000: a balance of US$ 1,487,860,324.08 was misappropriated by BMIS.

HERALD then comes to the doubts that HSSL expressed about the reliability of BMIS, doubts that were never shared with HERALD. Three years before the establishment of HERALD, i.e. on July 25, 2001, a certain Stephen Smith of BANK OF BERMUDA (Luxembourg) S.A. (hereinafter "BOB") wrote to Michael May, director of HSSL, to inform him that he had received a fax from a certain "*Emer*" containing the "*sub-custody agreement*" between the "*Bank*" and "*Madoff*", in which "*Emer*" noted that there was no evidence of "*due diligence*" in relation to the designation of "*Madoff",* a designation that would date back to 1996. He asks the following question: "How *should this absence of due diligence be addressed at this point, particularly given the somewhat unusual structure in this case, and what procedures are in place now to avoid this kind of situation arising again?"*
On September 30, 2002, Paul Smith responded to a message from Brian Wilkinson, Head of HSBC Securities Services (Ireland) Limited, to all members of BOB Group's "Global Fund Services": "*I am very worried about Madoff and I think we should seek independent confirmation. (...) It's too big for us to ignore the warning signs."*

On October 1, 2002, Paul Smith wrote again: "*I don't think we should mislead Madoff. We have a problem with him. He is the manager, the broker and custodian to his accounts. In today's world this is a red flag. We need to address it. Let's tell him so and get on with it with his support*."

On February 8, 2005, after the acquisition of the BOB group by the HSBC group, a certain Nigel Fielding of the Global Fund Services (GFS) division sent an email to the "AFS (Alternative Fund Services) Country Heads", with a copy to Christine

Coe, Chief Risk Manager at "HSBC Securities Services" and to Chris J. Wilcockson, director of HSSL: "*All, please advise any sub-custodian your location has appointed outside the standard network, i.e. like Madoff."*

On February 18, 2005, Nigel Fielding reportedly sent an email to Saverio Fiorino, head of AFS division at HSSL, Chris Wilcockson and Brian Pettitt of the HSS division of HSBC Bank pic as well as Christine Coe: "*All, Brian Pettitt who looks after sub-custodian for HSS has been asked by Chris Coe to review Madoff, and possibly some other agents* we *use (globally)."*

On February 21, 2005, Saverio Fiorino reportedly wrote to Nigel Fielding. "*Germain and I just had a meeting with E&Y, Mr. Fergusson and Kerry. Can I speak to you when you have five minutes. They have a transparency issue with Madoff."*

On May 23, 2005, Christine Coe issued a "*Discussion paper"* in which she raised the issue of funds with which the bank had a relationship and which used BMIS as part of a sub-custody agreement. The transaction statement was sent by BMIS to the custodians HSS to update their books. She asks the following question: "*The real issue is we are satisfied with the integrity of Madoff operations such that* we *are comfortable with a lack of real independent evidence of the trading of clients assets. Further, given our duty as custodian, are* we *potentially at risk from any regulatory obligations which* we have (...) *However there is a substantial risk, in the event there is any question over the integrity of the process. The financial cost of appointing a sub-custodian that* we *cannot exercise a level of due care over, could be significant; equally so would be the reputational risk. The key to this in my view, is the need for an independent control review. If* we *had the equivalent of a SAS70 carried out by a major firm, I think* we *could get comfortable* (...)".

On May 30, 2005, John Gubert of the HSS division of HSBC Bank pic sent an email to Christine Coe, Brian Pettitt and Paul Smith, with the following themes:

"It strikes me that the firm (i.e Madoff) has a reasonable capital (450 million US$ for BMIS), has a solid reputation but that we have flawed process. (...) We do not have full control of assets or real time sight of transaction flows. The transactions are all internal to the family firms and there is no proof of best execution or even actual execution. The audit is undertaken by a firm that is not on our recognized list of auditors. (...) The reality is that if we had concems, we would need to call BMIS to deliver the appropriate value to us. I cannot countenance this process- and appreciate it is a major money earner-unless we can adopt the process common in banking in the US. Under that process we-or our delegate-could arrives unannounced at the client office to access that all security was in place as advised. I appreciate Madoff does not like externat "intrusion" and am willing for this to be undertaken by our auditors (at our cost). If this cannot be done, then we should exit the relationship."

On September 8, 2005, KPMG was appointed by HSSL's parent company, HSBC Bank pic. This report was finalized on February 16, 2006 (2006 KPMG Report)

and it stated that BMIS acted as a "*sub-custodian*" for eight HSBC clients, including HERALD, for which HSBC was the principal custodian. In particular, KPMG wrote the following recommendations: *"(i) review the sub-custody contracts between HSBC and Madoff LLC to ensure that they reflect the current requirements and agreed obligations of Madoff LLC. (ii) establish the legal chain: review sub-custody agreements and underlying contracts/documentation to ensure that HSBC has primary custodian rights over the underlying assets held within the funds."* KPMG states that it has not conducted an audit in the course of its work, whether legally or otherwise on HSSL, BMIS or the information provided. KPMG further recommends "*undertake a review of HSBC's custody centers (Luxembourg and Dublin) in order to ensure that appropriate procedures are in place to independently confirm, where possible, the accuracy of transactions, identify possible risks and issues and record any error, missing information or other operational issues*". KPMG also recommends: "*undertake a periodic basis, independent confirmation of faxed client trading activity information as provided by Madoff LLC, as faxes can be easily replicated or falsified in order to commit fraud; request Madoff LLC to provide compliance, Internal Audit and other review reports on a periodic basis; ensure the HSBC locations (e.g. Luxembourg, Dublin, Hong Kong) have in place a risk and compliance based program and that they actively test transaction information by Madoff LLC*." In summary, KMPG described the risks of misappropriation of funds by BMIS, the risk that the cash was not housed in separate accounts and even the risk that the transaction statements were false to allow the cash to be misappropriated, expressly advising to obtain the extracts from BMIS bank accounts opened with JP Morgan Chase Bank.

Nothing was undertaken by HSSL as a result of this report.

On August 12, 2008, Christine Coe wrote an email to Chris Wilcockson, with a copy to Brian Pettitt indicating: "*As you know, we have appointed Bernard Madoff as a sub-custodian for specific clients. As part of our control routines, we engage KPMG to undertake a detailed control review on a regular basis.* The reality is that overall controls is Madoff centric and there are opportunities for misleading or misappropriation to take place if he were so inclined. The fraud risk to us custodian is huge. Accordingly, it is likely that we will need to increase the level of controls that we have over the Madoff relationship. There is no doubt that this will be resisted by Madoff but frankly if it is, that speaks volumes. History has shown us that Madoff tries to play us off against clients, but my proposal would be to engage clients first. The aggregate income to HSS is large, but the risks are much greater if we do nothing."

On March 19, 2008, HSSL's parent company commissioned a second study from KPMG, resulting in the report of September 8, 2008 (2008 KPMG Report) which included the same recommendations as those included in the 2006 report.

On December 11, 2008 Bernard L. Madoff was arrested: on December 12, 2008 HSSL instructed BMIS to (i) transfer all cash on account in its "*special custody account 1-FR109-*" opened with BMIS to its account MIDLBG22 58767712 opened with HSBC Bank pic London and (ii) deliver to it all securities registered for it in account in this "*special custody account 1-FR109-*" by transfer to an

account of the bank Brown Brothers Harriman & Co opened with the central custodian (DTC). The latter instructions were never executed by BMIS.

Subsequently, on December 12, 2008, a man named Russell Ford of HSBC Bank pic wrote to Michael May, director of HSSL: *Anothercase where all ur suspicions were right (...) Indeed, the beauty of the hindsight."* Michael May replies: "*Worse-we suspected but never pinned it down. Not ever hindsight, just not enough courage to walk away from what was not understood..."* For this lack of courage, HSSL nevertheless pocketed the sum of US$ 2,122,197.- as "*administration and custody fees*", in less than four years.

On December 15, 2008, Irving H. Picard was appointed trustee for the liquidation of BMIS (hereinafter "Trustee"), sending "*customer claim"* forms to those who had an account opened with BMIS. This was the case for HSSL, which received such a form for each of its clients for which it had a sub-custody account with BMIS. On February 3, 2009, HSSL forwarded such form to HERALD, not wishing to file a "*customer claim*" with the Trustee itself. The Trustee sent a reminder to HSSL to warn it that the deadline for filing complaints was July 2, 2009. In a letter dated June 5, 2009, HSSL recalled its letter dated February 3, 2009 to HERALD. On June 22, 2009, HERALD had no choice but to file a "*customer claim*" with the Trustee, that is, after these proceedings initiated on April 3, 2009 by HERALD with regard to HSSL.

On December 8, 2009, the Trustee notified HERALD that its "*customer claim"* was rejected, due to the fact that HERALD did not have an account opened with BMIS and could not be considered a customer.

On July 16, 2013, HERALD was placed in court-ordered liquidation by decision of the "*Grand Court of the Cayman Islands, Financial Services Division*" and on July 23, 2013, the professional liquidators, current court-ordered liquidators, Russel Smith and Niall Goodsir-Cullen, were appointed by the same Court.

On June 5, 2014, HSSL terminated the "*custodian agreement*" with 90 days' notice.

On November 12, 2014, a settlement was concluded between HERALD and the Trustee, an arrangement approved by both the Grand Court of the Cayman Islands, Financial Services Division and by the United States Bankruptcy Court Southern District of New York, which stated that "*HERALD maintained an account with BMIS through its Luxembourg-based custodian HSSL designated account no. 1-FR109-*" and which awarded a theoretical amount of US$ 1,639,896,943 to HERALD, an amount reduced by the sum of US$ 467,701,943 following the cash withdrawn by HSSL from its "*special custody account 1-FR109-*" opened with BMIS. If the Trustee could make 100% repayments, which would be highly unlikely, HERALD could receive from the Trustee the sum of US$ 1,172,695,000. In execution of this arrangement, HERALD states that it has already received the amount of US$ 678,233,273.77, between January 7, 2015 and April 14, 2021.

HERALD comes, after this exhaustive presentation of the facts and supporting documents, to its legal arguments:

1) Admissibility

· HERALD considers that it has an interest in filing suit, an interest that would be assessed on the day of the claim, respectively of the appeal: there are grounds to reject HSSL's arguments regarding HERALD's interest in filing suit, arguments that would be based on elements subsequent to the filing of HERALD's suit. In addition, the proceedings brought in Luxembourg and the United States do not have an identical subject matter.

· HERALD considers that HSSL's cross-appeal concerning the application of the 2002 Law is inadmissible, whereas the provisions not included in the operative part should not be taken into account to assess the admissibility of a claim; moreover, HSSL itself alleged that the application of this 2002 Law is not relevant to the outcome of the part of the dispute currently pending before the Court.

2) The merits

· HERALD's main appeal concerning the claim for the issuance of Securities

HERALD first focuses on the contractual and legal framework of this claim for restitution, namely the "*custodian agreement*" of March 29, 2004 by which HERALD designated HSSL as its custodian, which the latter accepted. It was a contract for the custody and holding of assets on account, subject to the rules of the custody agreement pursuant to Articles 1915 and following of the Civil Code. HSSL had, under this "*custodian agreement*", the obligation to register and hold on account the Securities issued in exchange for the cash entrusted by HERALD. (clauses 5, 6.1, 9.1 and 9.3). Clause 15.2 of this "*agreement*" allowed HSSL to designate "agents, sub-custodians and delegates", i.e. correspondents.

The functions and obligations of a custodian bank would consist of (i) the custody of the cash entrusted, (ii) the issuance and receipt of the financial instruments against the agreed payment and (iii) the holding and custody of the Securities in question, while ensuring that the number of securities owned by the client (HERALD) as recorded on the books of the custodian bank (HSSL), could be issued at any time. These obligations also arise from Article 34 § 3 of the 2002 Law. Since the dematerialization of the securities, the registration in account would be equivalent to the material delivery of the thing pursuant to the provisions of the Civil Code. The custodial obligation, referred to in Article 1915 of the Civil Code, would have as a corollary the obligation of restitution, which would be a performance obligation ("Pierre Van Ommeslaghe" T2, p1663, Bruylant edition).

The Law of August 1, 2001 on the circulation of securities and other fungible instruments (hereinafter the "2001 Law") would be a perfect illustration of these principles, in its Articles 1, 4, 5 and 11.

HERALD then raises the question of whether the registrations in the Securities account would subject HSSL, as the holder of securities as custodian, to the

obligations of the Civil Code relating to the custody agreement.

HERALD replies that the registrations in account and the holding in account of the Securities listed in parallel on the monthly statements of the "*special custody account 1-FR109-*" sent to it by BMIS, were made by HSSL, as would appear from the exhibits filed by HERALD under number "115", the annual HERALD statements prepared by HSSL and the successive certifications made by HSSL to the auditors Ernst & Young Luxembourg. These documents would be considered as extrajudicial admissions on the part of HSSL. Indeed, to the question asked by Ernst & Young Luxembourg to HSSL to certify what it would have on deposit (securities, precious metals, deposit certificates... in your custody), HSSL replied: "*Please see Madoff statements*" and referred to the extracts of account 1-FR109- opened on its behalf with BMIS. These certifications presupposed that the assets listed on these BMIS statements were recorded in account by and with HSSL. HERALD objects to any retraction of this admission by HSSL. Even if HSSL were not to have made these registrations in its accounts, HSSL would undoubtedly have taken over the registrations in BMIS's account, which would be considered as its own, in view of the fact that HSSL had declared itself custodian of the Securities listed therein.

It would be inadmissible for HSSL to argue to the contrary, as otherwise it would take a position in court contrary to its assertions and declarations prior to December 12, 2008, which would be contrary to Article 1134, paragraph 3, otherwise 6-1 of the Civil Code and the theory of estoppel.

HERALD further replies that the existence of registration in account by and with HSSL, otherwise this takeover on its behalf, of account registrations operated by BMIS, was perfectly consistent with the ownership of "*special custody account 1-FR109-*" on behalf of HSSL. HSSL opened this account on March 25, 2004, and in the "*account information verification"* of the same day, HSSL, formerly BOB, appeared as the account holder. This statement again emerged from the asset statements regularly drawn up by HSSL, consistent with the statements of "*special custody account 1-FR109-".* Everything BMIS received or held in its possession would have been at HSSL's sole orders and control. Unlike HSSL, HERALD never ordered BMIS to withdraw money. The circular resolution of March 29, 2004 did not change this. The three "*sub-custody agreements*" of August 7, 2002, September 8, 2004 and January 23, 2008 were executed and all subject to Luxembourg law, in particular the 2001 Law: consequently, by registering fungible securities in the "*special custody account 1-FR109-*", BMIS became the custodian of these securities with regard to HSSL and sub-custodians of HSSL of these fungible securities with regard to HERALD.

To be complete, HERALD adds that by signing an "*account pledge agreement"* on September 20, 2006, it pledged all the assets that were in the possession of HSSL to HSBC Bank Pic.

HERALD then insists on the non-application of American law, since Luxembourg law would govern relations between parties. But these two laws would have the exact same effect. To assert this, HERALD relies on the opinions issued on June 9, 2017, September 24, 2019 and July 2, 2021 by a judge named Walker: the

latter concluded that under federal securities laws, HSSL was the holder and owner of the "*special custody account 1-FR109-*": all monthly statements of said account, all debit/credit notices as well as all transaction slips (more than 700) were sent by BMIS to HSSL. Judge Walker further indicated that the fact that a beneficial owner of securities such as HERALD was entitled to recover on the basis of a "*SIPA*" (Securities Investor Protection Act) claim would not make the latter a "*customer"* and would not retroactively cancel the client contractual relationship between BMIS and HSSL, which would have been effective between 2004 and 2008. This opinion of Judge Walker would not be called into question by the opinion of Professor Gordon, submitted by HSSL, who based his opinion on insufficient information and false arguments. Judge Walker added: *"Nothing in United States Law - and nothing to which professor Gordon has pointed - forecloses or prevents a broker-dealer like BMIS from acting as a sub-custodian for an entity like HSSL, who in turn owes duties to a beneficial customer like HERALD.* Exchange Act Rule 15c3-3 contains no such limitation (...) BMIS was obligated as a sub-custodian to its customer, HSSL, and owed HSSL custodian duties as set forth in the several agreements between the parties. HSSL, in turn, owed custodial duties to its customer, HERALD, via a separate "custodian agreement". This sort of arrangement is consistent with United States law." HSSL's arguments that HERALD had two custodians should be rejected.

HERALD therefore argues for the issued judgment to be amended, in that it considered that "special custody account 1-FR109-" was an account of HERALD and also that there were no account registrations likely to subject HSSL, as holder of securities as "custodian", to the obligations of the Civil Code relating to these custodial obligations.

HERALD subsequently responds to the alleged annulable nature of the account registrations subjecting HSSL, as custodian, to the obligations relating thereto of the Civil Code: the fact that BMIS did not carry out the stock market transactions for the acquisition of the securities registered in the account, carried out by and with HSSL, would be irrelevant and unenforceable against HERALD, for eight reasons:

- the securities that HSSL registered in the account existed: they were dematerialized and therefore fungible securities;

- the registration in the account would be the security: starting from the dematerialization, the securities moved from tangible to intangible assets, simply represented by an account registration. The consequence would be that the account registration of dematerialized securities would be independent of the existence of an underlying transaction;

- pursuant to clause 15.2 of the "*custodian agreement*", the acts and actions of BMIS would be deemed to be those of HSSL. Thus, the fact that BMIS made registrations that were not the result of underlying transactions would be unenforceable against HERALD;

- under the 2001 Law, the account registration would amount to a promise to deliver and the failure of HSSL's sub-custodian, BMIS, would not render HSSL

unable to perform its restitution obligation. It could obtain these securities on the stock markets;

- by confirming the deposits with the auditors Ernst & Young, HSSL made clear and unequivocal declarations constituting irrevocable admissions, having absolute probative force pursuant to Articles 1954 and following of the Civil Code. HSSL could not hide behind an "excusable error" when it was its responsibility to verify that the account registrations and certificates of deposit or account holding were based on actual acquisitions;

- it would be inconceivable for a Luxembourg bank to issue confirmations of deposit with it, of securities, to corporate auditors for more than three years and up to a value of nearly two billion U.S. dollars, and then retract, under the guise that these transactions were not carried out by the broker. HERALD would have been entitled to place legitimate trust in the confirmations of a Luxembourg bank;

- it would not be permissible to invoke an alleged invalidity for which it would itself be responsible. HSSL never, despite its doubts, carried out an appropriate "due diligence" with BMIS, never even verified whether the securities appearing on BMIS's statements existed, nor implemented any recommendation from KPMG. HSSL registered, in full knowledge of the facts of a possible non-existence of underlying transactions, securities in the account. In addition, under the Financial Sector Law of April 5, 1993, HSSL had the obligation to take all appropriate measures to ensure that HERALD's securities, including cash, were protected, in the best interests of HERALD and the integrity of the market. HSSL did not carry out any checks. The CSSF shared this position in its press release of February 25, 2009, precisely in connection with the Madoff case;

- contrary to HSSL's allegations, these account registrations would not be without cause: it would be sufficient to refer to the "*custodian agreement*" and HSSL's position as custodian. HERALD did not have a direct link with BMIS, only HSSL allowed BMIS to act as it did.

Therefore, no account registration or deposit confirmation would be voidable.

HERALD then dwells on the theory of the alleged non-existence, drawn from the 2002 Law, of the "*custodian agreement*" and HERALD's prospectuses, of an obligation to return/deliver securities on behalf of HSSL, drawn from its delegation of asset custody to BMIS:

HERALD criticizes the first instance judges for having held both under the 2002 Law as well as the "*custodian agreement*" that in the event of delegation of the custody of assets to a sub-custodian third party, HSSL was not required to return the "sub-custody" assets, respectively held on account for HSSL by BMIS, due to the term "liability" used therein and the absence of the term "restitution". HERALD believes that precisely by application of the 2002 Law, the custody function would have two distinct but complementary aspects, namely the conservation of the assets of the UCI and supervision. The primary mission of the custodian would be to fulfill the role of custodian vis-à-vis said institution insofar as it would be responsible for the mission of custody, or material custody of assets. This custody

obligation would have very clearly existed in the previous law relating to undertakings for collective investment, namely that of August 25, 1983 (hereinafter the "1983 UCI Law"). The bill that led to this law specified that legislation had to be enacted for the purpose of protecting savings and maintaining the reputation of the Luxembourg financial market: the custodian's custody obligation arose from public policy. The same would have been true for the law that repealed and replaced the 1983 UCI Law, namely that of March 30, 1988, as well as the 2002 Law, which would follow: none of these laws would have ruled out the application of Articles 1915 and following of the Civil Code and the 2001 Law, but would have in reality strengthened the custodian's obligation to supervise the UCI. This position would also be that of the CSSF, as observed from a press release of May 27, 2009 still in connection with the Madoff case: "*the bank's liability is not affected by the fact of entrusting to a third party all or part of the assets of a UCI whose custody it holds*" adding "*the general principle of civil law according to which the custodian bank is bound vis-à-vis its depositor clients, in this case, the UCIs, by an obligation to return the assets whose custody it holds."* With this statement, the regulator would have considered that the restitution would apply not only to assets for which the custodian itself held custody, but also to those that would be in custody or sub-custody with a third party. The custodian would therefore clearly have the obligation of custody and the obligation of restitution even in the event of a sub-custody agreement.

HERALD then develops the immediate nature of the obligation to return/deliver the Securities on behalf of HSSL: invoking Article 1944 of the Civil Code and its application made by the Court of Appeal of Paris on April 8, 2009 in the Lehman Brothers case as well as the French Court of Cassation in its judgments of May 4, 2010 in the same case, the deposit was to be delivered to the depositor as soon as it requested it. It would therefore be wrong for the first instance judges to have decided to stay their ruling on the claim for restitution of cash whose custody was not delegated to a third party. In addition, HSSL in the meantime terminated the *"custodian agreement*" dated June 5, 2014. This question of termination would not have to be asked, since the obligation of restitution/delivery would be immediate.

As for the alleged enrichment to the detriment of HSSL resulting from the settlement agreement between HERALD and the Trustee, HERALD counters that it would be inadmissible for HSSL to invoke this settlement agreement of November 12, 2014, for the following reasons:

- HSSL could not avail itself of an agreement to which it was not a party (Article 1165 of the Civil Code) and because Article 20 of the settlement expressly provided that the settlement would not benefit third parties;

- HSSL itself could have filed a "*customer claim*" with the Trustee, which it would have rejected for obvious tactical reasons, to deny the relationship of custodian to sub-custodian. Only its fault could be at the origin of a possible unjust enrichment;

- HERALD could never receive the amount recognized by the Trustee (US$ 1,172,695,000), since to do this, it would be necessary for the latter to be able to distribute 100% of the "*customer claim*", which would be impossible, due to

misappropriations by Madoff. As of July 9, 2021, HERALD admits to having received the sum of US$ 678,233,273.77. HSSL would be unable to prove with certainty the alleged enrichment;

- there would be no enrichment to the detriment of HSSL, since its cause, if it exists, would be the "*custodian agreement*" that HSSL would did not apply, by not filing a "*customer claim*", which would have been the right and duty of HSSL.

Therefore, in view of the foregoing, with regard to the claim for restitution/delivery of securities, HERALD argued primarily that HSSL must return to it otherwise issue the Securities listed in its appeal brief, alternatively the same Securities listed in the annex to the confirmation of filing sent by HSSL to Ernst & Young on February 13, 2008 and primarily order HSSL to deliver to it these Securities under penalty of a fine of €1,000,000 per day of delay from the notification of this judgment, alternatively to order HSSL to pay it their monetary equivalent, at the value set on the date of this judgment, otherwise as of November 30, 2008 (US$ 2,02,495,724.18 [sic]) otherwise as of December 31, 2017 (US$ 1,849,150,117), each time with the legal interest from the summons initiating proceedings and ordering the capitalization of interest due for an entire year.

Alternatively, in the event that the Court considers a possible enrichment on the part of HERALD, it claims that it be acknowledged:

- in the event that its claims are granted for the delivery of the Securities as set out above, HERALD proposes to proceed with one or more sales of these Securities up to the total value of the amounts it has received from the Trustee and to forward these amounts to HSSL, or currently the sum of US$ 678,233,273.77, without waiver of its claim for restitution of the amount of US$ 521,918,349.08 of cash that HSSL claimed to have transferred to BMIS and that was not transferred, as well as its claims for damages, claims pending in the first instance;

- in the event that the Court states that HSSL is obliged to deliver to HERALD the Securities in question, but only orders HSSL to pay it their monetary equivalent plus legal interest from when the claim was filed in court, HERALD proposes to forward to HSSL the amount received from the Trustee, without the same waivers as above;

- in each of these two scenarios, HERALD proposes to forward to HSSL any sum that it receives from the Trustee beyond the sum of US$ 678,233,273.77.

· HERALD's <u>alternative</u> appeal, namely its claim for restitution of the cash transferred to BMIS

* The contractual and legal framework of this claim would be constituted by the "*custodian agreement*" of March 29, 2004 subject to Luxembourg law, as well as the Civil Code.

The "*custodian agreement*" would be a contract for the custody and holding on account of assets and, as such, HSSL should have ensured that the cash and/or investments were used wisely, that the cash was only exchanged for Securities.

Said agreement authorized HSSL to designate a sub-custodian (clause 15.2): the contract by which the custodian would entrust the assets of the UCI to a sub-custodian would be analyzed as a sub-contract in which the sub-custodian would act as a substitute for the custodian for the custody; the relationship between the custodian and the sub-custodian would be governed by the provisions of the Civil Code relating to custody (The missions of the custodian of undertakings for collective investment, Schneider and Lacroix, Edition Larcier, 2014 § 14). The sub-custody agreement would thus be unenforceable against the UCI.

* HERALD asks whether HSSL would have released itself from its obligations to hold and return the cash received by HERALD investors by transferring such cash to BMIS, even if these transfers were made on HERALD's instructions. HERALD responds in the negative, BMIS having been at the sole orders of HSSL, even if HERALD had given its consent: all transfers were credited to the "*special custody account 1-FR109-*", opened by HSSL with BMIS in its capacity as custodian of HERALD. The developments on the "Chase Manhattan Bank" would be of no relevance to the outcome of the dispute, as no document relating to a transfer instruction from HERALD mentions this bank, cited by HSSL in its submissions. HSSL could not have released itself by transferring cash to BMIS, because it still told HERALD that BMIS was its sub-custodian, which would be reported in exhibits (in particular exhibits 7, 17, 18, 20, 23, 36, 37, 38, 39, 40 and 50 filed by HERALD). It could not now contradict itself. HERALD concludes that the cash transferred by HSSL to BMIS did not fall within the scope of the "*custodian agreement*" and HSSL's holding obligation. Pursuant to clause 15.2 of said "*Agreement*", the acts and omissions of the sub-custodian, BMIS, would be those of HSSL. Thus, it would be necessary, primarily, to order HSSL to pay HERALD the sum of US$ 1,433,643,918 plus legal interest; alternatively, in the event that a possible enrichment of HERALD to the detriment of HSSL is found, to order HSSL to pay HERALD the sum of US$ 755,410,644.23 in principal with legal interest, as well as interest accrued on the sum of US$ 678,233,273.77.

· The claim for restitution of the sum of US$ 521,918,349.08 received by HSSL from HERALD and/or its investors, still in the possession of HSSL and/or on its accounts opened with HSBC Bank pic.

The contractual framework of this restitution would still be constituted by the "*custodian agreement*", subject to Luxembourg law and therefore to the Civil Code. At the end of these bases, HSSL would be required to hold and return the sum of US$ 521,918,349.08. Since the beginning of this lawsuit, HSSL has admitted, over 10 years of proceedings, constituting a judicial admission, to having received from HERALD, then forwarded to BMIS, the sum of US$ 2,055.660,324.08. HSSL has also constantly stated that it withdrew the sum of US$ 567,800,000, which would bring the balance of cash transferred to US$ 1,487,860,324.08. However, HSSL also falsely claimed that it, on HERALD's "*proper instructions*", transferred funds to a BMIS bank account opened with Chase Manhatten Bank NY. Indeed, HSSL followed no instructions from HERALD for eight transfers in the total amount of US$ 638,618,349.08 made between June 1, 2006 and January 2, 2008. None of the transfers made by HSSL to BMIS can constitute restitutions made by HSSL to HERALD. It would also be

unthinkable for HSSL to have misplaced supporting documents for these eight transfers, given the large amounts at stake. It must be inferred that exhibit "16" submitted by HSSL, namely a summary table of cash transfers, is false. HERALD insists that the cash that was received by HSSL from HERALD investors was not received in a HERALD account opened with HSSL, but in an internal HSSL account, namely in two HSSL *nostro* accounts (the IBAN number of which would begin with "LU"). It would be logical if HERALD did not have a classic account with HSSL, since the latter was its custodian. It would be false to claim that HERALD opened accounts with HSBC Bank pic London: the accounts included in a letter dated November 30, 2012 from the litigant HSSL were HSSL accounts with this bank. These were accounts whose IBAN number started with "GB", that is, British and not Luxembourg accounts.

Consequently, HSSL's admission that it received the sum of US$ 2,055,660,324.08 would be irrevocable and would have absolute probative force. This admission would not be the consequence of a factual error, let alone an excusable error. Moreover, HSSL could not contradict itself, given the theory of estoppel.

For this question, HERALD argues, in a second order of ideas, that as it lacked a classic account with HSSL, the latter did not issue statements of a cash bank account. There could be no stopping a challenge, whether by application of Article 189 of the Commercial Code or HSSL's general conditions. The notion invented by HSSL of "*transfer from an economic point of view*" did not exist. The documents that HSSL submitted to prove HERALD'*s "proper instructions*" would in fact not be circular resolutions pursuant to the "*custodian agreement*", but decisions by which HERALD's directors would approved the potential subscriptions in kind of third-party UCI's and did not contain instructions for transfer to HSSL or transfers of any assets from HERALD to BMIS "*from an economic point of view*". All the arguments put forward by HSSL in an attempt to release itself from its obligation to return the sum of US$ 2,055,660,324.08 by it received from HERALD investors, claiming to have transferred the entire amount to BMIS, whereas it transferred only the sum of US$ 1,533,741,975 to BMIS, would be neither convincing nor have probative value. It should therefore be stated that HSSL was the custodian of the sum of US$ 521,918,349.08 not transferred by the latter to BMIS.

· HSSL's <u>cross-appeal</u> against the application of the 2002 Law to contractual relations between parties

In this context, HERALD intends to emphasize:

- that the first instance judges only stated, applying the principle of autonomy of will, that the parties had wanted, by entering into the "*custodian agreement"* and the appointment of HSSL as the custodian bank of HERALD, for the obligations incumbent on Luxembourg custodian banks of UCIs prescribed by the 2002 Law to govern their relations, together with those to which HSSL was committed under the *"custodian agreement";*

- contrary to HSSL's allegations, the "*custodian agreement*" would have placed on

HSSL not only the obligations included in Article 1915 and following of the Civil Code governing the custodian agreement, but also obligations not provided for by common civil law and which would be provided for by the 2002 Law and which were included in circular IML 91/75 (for example, the "selection" of its correspondents by HSSL);

- since the 2002 Law would have the objective of protecting investors and the obligations included therein would be public policy, it would be unacceptable for a Luxembourg bank to be able to escape these rules under the pretext that the UCI of which it is the custodian bank has its registered office abroad;

- the first instance judges similarly held that by choosing a Luxembourg custodian bank and by subjecting the "*custodian agreement*" to Luxembourg law, the parties provided investors with an "image" of a UCI regulated in accordance with European rules. In addition, HERALD's annual financial statements were prepared by HSSL, then certified by Ernst & Young Luxembourg, as drawn up according to Luxembourg laws and regulations.

The cross-appeal would therefore be unfounded. This conclusion cannot also be questioned by the legal opinions of André Prüm of January 31, 2019 and July 9, 2020, filed by HSSL. With regard to opinions on national law, these "consultations" would violate the separation of the roles of the parties and judges, the latter being the sole guarantors of the proper application of the law. HERALD refers to judicial caution for the admissibility of these "opinions" before analyzing them:

- the opinion of Mr André Prüm of January 31, 2019: to answer the question that was asked of him, namely whether the "*custodian agreement*" of March 29, 2004 is governed by the 2002 Law, as in force on the signature date of said agreement, the latter stated on page "3" that HERALD appointed HSSL as its custodian and administrative agent. His presentation of the factual and procedural context is biased, (i) stating that the directors delegated "*certain administrative tasks and functions, accounting and support*" to a manager, when in reality, the entire central administration of HERALD was covered, (ii) citing only partially the reasons for the judgment, leaving aside the passages that admitted that the "*custodian agreement*" did not exclude the provisions of the 2002 Law.

The analysis then made by Mr. André Prüm, aiming to assess whether the conclusions drawn by the first instance judges are accurate, was erroneous, as it was based on false premises: (i) Mr. André Prüm concluded that the judges of the court requalified the "*custodian agreement*" as a "*named agreement*". The 2002 Law, which would be a transposition of Council Directive 85/611/EEC of December 20, 1985, would not give any name to the contract by which an investment company entrusts the custody of its assets to a custodian, nor any definition of such a contract. On the contrary, and Mr. André Prüm finally acknowledges it later, "*if the 2002 UCI Law provides that the custodian performs missions beyond the custody of assets, this clearly means that said 2002 UCI Law did not create a special "custody agreement", respectively a "custody agreement of the law of December 20, 2002 on undertakings for collective investments".* The thesis of the so-called *"*named agreement*"* would not hold,

such that the first instance judges could not have proceeded with a qualification or requalification of the *"custodian agreement".*

Mr. André Prüm still accused the first instance judges of an "inversion of approach" because they would have had to qualify before interpreting: HERALD disputes this order, the opposite would be true: the interpretation would appear as a necessary prerequisite for qualification.

Mr. André Prüm still started from the assumption that from the moment the "*custodian agreement*" does not expressly contain certain obligations that he describes as "*key obligations"* imposed by the 2002 Law, it could not apply. This would be false according to HERALD, which considers that from the moment the law sets obligations on the Luxembourg UCI custodian, it would not be necessary to include these obligations in the written document materializing the designation of the custodian and the acceptance of this function by the latter. In reality, the "*custodian agreement*" includes a key provision of the 2002 Law, namely the strict liability of the UCI custodian in the event of a sub-custodian appointment (clause 15.2).

Mr. André Prüm also failed to note, as the issued judgment noted, that no provision of Luxembourg law was excluded under the terms of the "*custodian agreement*", a fortiori the 2002 Law, which would even be the law to apply naturally to the "*custodian agreement*". The judges did not limit themselves to taking into account clause "8" of said "*agreement*", as the reference to Article 1161 of the Civil Code proves.

It is wrong for Mr. André Prüm to argue that the first instance judges had assumed a hypothetical will of the parties or that they had proceeded by divining the will of the parties.

- the opinion of Mr. André Prüm of July 9, 2020: the submissions included therein are staggering and untrue. The alleged contradiction of the "*custodian agreement"* with the 2002 Law alleged in this supplementary opinion is contradicted by the mere reading of clause 15.2. HERALD asserts that the "*custodian agreement"* is even stricter than the 2002 Law, since the acts of the agents or sub-custodians of the custodian would be deemed to be those of the custodian.

  HERALD adds that Mr. André Prüm based his opinion only on the provisions of the 2002 Law relating to UCIs in contractual form, while HERALD was in statutory form, such that it would have been necessary to refer to Article 34(1) of the 2002 Law and not to its Articles 17(4) and 18(2).

  Finally, HERALD is of the opinion that it should be concluded that the first instance judges fully implemented their sovereign power of interpretation, recalling that this power of interpretation of contracts would be beyond the control of the Court of Cassation.

It should be concluded that HSSL's cross-appeal is unfounded.

To these long and exhaustive submissions, **HSSL** replies with no less long and complete summary and expansive submissions, filed with the Court registry on May 15, 2022, going back first to the supporting documents, before referring to judicial caution as to the admissibility of the appeal in pure form, as well as the appeal relating to the part of the judgment relating to the stay pronounced by the first instance judges, with regard to the claim for cash restitution.

HSSL secondly develops its version of the facts, starting with its presentation of the parties and stakeholders in the dispute; it insists that HERALD is a company incorporated under the laws of the Cayman Islands in the form of an SPC (Segregated Portofolio Company), subject as such to the Cayman Islands Monetary Authority ("CIMA").

HSSL pleads that it is the custodian and administrative agent of HERALD, according to the "*custodian agreement*" of March 29, 2004, respectively of an "*administration agreement*" of the same day: it was therefore only a "*service provider*" of HERALD. HSSL continues by stating that "*the custodian of an investment fund may be responsible for receiving the property of others, for having the cash and securities, and for keeping and returning it in kind in accordance with Article 1915 of the Civil Code*".

HSSL defines BMIS as a "*broker-dealer*", acting as broker/commissioner making investments for clients and as "*dealer*" making investments for itself. On March 29, 2004 HERALD thus signed (i) a "*custodian agreement*" with BMIS for the opening of a "*brokerage*" account No. 1-FR-109 (trading account), naming BMIS as "*broker dealer*", (ii) an "option agreement", (iii) a "*trading authorization"* and (iv) a "*certificate of foreign status of beneficial owner for United States tax withholding*": these four documents would subsequently be designated by HSSL as "*brokerage agreements*". HSSL contests being a party to these contracts: it merely transferred to the broker-dealer BMIS cash from subscriptions paid by investors to the HERALD cash account opened with HSSL. HSSL opened a managed account with BMIS initially called "*BOB special custody act for HERALD*", on the express instruction of HERALD. BMIS then purchased securities in return for the cash transferred by HERALD.

HSSL also specifies that HERALD ASSET MANAGEMENT LIMITED is HERALD's investment manager, who delegated certain tasks to HSSL (page 14 of HERALD's "*Offering memorandum*").
It also claims that funds from "*the HERALD cash account opened with HSSL were transferred for investment to the cash account opened with Chase Manhattan Bank NY by BMIS on behalf of HERALD*".

After the presentation of the parties, HSSL summarizes its version of the dispute: it thus claims not to be the custodian of the Securities subject to the claim for restitution, because there was no sub-custody by HSSL, HERALD having deposited them directly with BMIS, under the "*brokerage agreements*". The custodian could not be held liable for investment errors committed by HERALD or its "*investment manager".* For the ash, HSSL transferred to BMIS cash from subscriptions that was been paid by investors to the HERALD cash account opened with HSSL, pursuant to clause 5 of the "*custodian agreement*". This cash

was registered on behalf of HERALD, in an account opened by BMIS with Chase Manhattan Bank NY, to allow BMIS to trade in the U.S. market. The securities thus purchased were allegedly registered in an account opened by BMIS on behalf of HERALD with the DTC (Depository Trust & Clearing Corporation).

HSSL disputes that documents entitled "*sub-custody agreement*" signed between it and BMIS were effective, in view of the fact that the Securities, after their alleged acquisition by BMIS, were never delivered to HSSL but kept by BMIS, which was considered second custodian. HERALD did not even have a securities account with HSSL, such that it could not return the Securities. The same would apply to cash, whereas HSSL already fulfilled its obligation of restitution, by debiting the amounts transferred on its express instructions from the HERALD account. A request for the return of the available balance of cash accounts opened on HSSL's books must be rejected because currently the HERALD accounts with HSSL are closed.

Any allegation as to a fault committed by HSSL during the "due diligence" phase on BMIS is refuted, this request relating to the restitution and not the liability of HSSL.

Third, HSSL finally comes to what it calls the "*contractual and legal context*":

· The contractual framework between HERALD and HSSL: on March 29, 2004, HERALD entered into an "*administration agreement*" with HSSL that would define HSSL's obligations as administrative agent, governed by Luxembourg law, as well as a "*custodian agreement*" that would define HSSL's obligations as custodian, also governed by Luxembourg law. In this context, a cash account was opened by HERALD with HSSL, the latter always limited itself to executing the instructions received from its client HERALD or its "*investment manager*" by transferring the cash received from investors to BMIS. In the opposite direction, HSSL received from BMIS the price of cash redemptions to forward them to investors. No security acquired by BMIS on behalf of HERALD was ever deposited with HSSL, but held by BMIS in two accounts opened for HERALD, not for HSSL, namely 1-FR109-3 and 1-FR109-4. BMIS sent the securities account statements to HERALD, for HSSL address, as was required by HERALD. If HSSL were sent the account statements by BMIS, it would only have been because of its position as HERALD's administrative agent, which would not result in HSSL being considered as the account holder. To be complete, HSSL indicates that the "*administration agreement*" and "*custodian agreement*" have been terminated in the meantime.

HSSL disputes the adversary's claim that HERALD could not have two custodians. The fact that the BOB appeared as "*custodian*" in HERALD's "offering memorandum" did not imply that it was "the" custodian. Even under the 2002 Law, the general mission of "custody" would be to be taken pursuant to "supervision" and not "custody" and the material deposit of all or part of the assets could be carried out either with the custodian itself or with any professional designated by the UCI. In addition, without receipt of the Securities, HSSL could not be considered as custodian of the Securities, pursuant to the Civil Code.

· The contractual framework between HERALD and BMIS: HERALD signed the *"brokerage agreements*" directly with BMIS. On March 29, 2004, HERALD signed the "*custodian agreement*" with BMIS for the opening of account 1-FR109. The "*customer*" was HERALD and HSSL was a third party to said contract. Only HERALD was entitled to claim the restitution of the assets registered in the account with BMIS. HSSL does not dispute having signed three "*sub-custody agreements*". The same day, HERALD and BMIS signed an "option agreement", a "*trading authorization limited to purchases and sales of securities and options*" and a "*certificate of foreign status of beneficial owner for United States tax withholding*", resulting in a direct relationship from depositor to custodian. BMIS was chosen by HERALD alone; Bernard Madoff had a long-standing personal relationship with the HERALD sponsor, namely Bank Medici and Sonja Kohn. It should be concluded that not only was HERALD the only entity able to claim the restitution of assets, but also only and directly from BMIS. HSSL insists that the original wording of the "*brokerage agreements*", namely "*BOB special custody account for HERALD*", was chosen by the "*directors*" of HERALD. These "*brokerage agreements*" were subject to U.S. law, which is why HSSL submitted three expert reports, namely from Professor Jeffrey N. Gordon of January 20, 2017, March 14, 2018 and June 4, 2020. This professor concluded that BMIS was subject to custodial obligations on behalf of HERALD, that this fund was a client of BMIS, on which all custodial obligations were incumbent. Professor Gordon also concludes that HERALD had the right to assert its claims as a client against BMIS, in its capacity as custodian. The fact that the custody agreement between HERALD and HSSL is governed by Luxembourg law and the "*brokerage agreements*" between HERALD and BMIS are subject to US law would not be likely to call into question Professor Gordon's conclusions.

To be complete, HSSL formally disputes that any documents concerning other investment funds are related to this dispute, which concerns exclusively HERALD.

· The contractual framework between HSSL and BMIS: HSSL does not dispute having signed three *sub-custody agreements* in 2002, 2004 and 2008 with BMIS, but this was a framework document, which was never used in this case, with HERALD. The first document, of 2002, did not concern HERALD, which had not yet been established, nor referred to in Annex "A".

The contract signed in 2004 was governed by Luxembourg law and HERALD was one of the clients listed in Annex "A".

These various "*sub-custody agreements*" were never consummated, however, due to the lack of effective delivery of the Securities: no sub-custody relationship could thus have emerged. HERALD never deposited Securities with HSSL, but directly with BMIS, by the effect of the "*brokerage agreements".* The transfer of cash was not made under the "*sub-custody agreement*" and an external contractual relationship cannot create obligations incumbent on HSSL.

· For the legal context, HSSL develops three arguments:

- the relationship between HERALD and HSSL does not fall within the scope of the

2002 Law: HERALD is not a fund subject to this 2002 Law since it is an "off-shore" fund. The 2002 Law distinguishes between three types of UCI: UCITS located in Luxembourg, namely those subject to Directive 85/611/EEC (according to Part I), according to Part II, UCITS established in Luxembourg and which do not fall under Part I, and Part III would deal with foreign UCIs. Part III is made up of Article "76" alone. Therefore, the 2002 Law does not determine any regime for a foreign fund such as HERALD. The first instance judges mistakenly held that this 2002 Law was applicable.

- the "*custodian agreement*" did not include the regime of a custody agreement governed by the 2002 Law: the first instance judges wrongly qualified this "*agreement*" as a named agreement subject to the specific regime of custody agreements governed by the 2002 Law: HSSL files a cross-appeal on this point. Whether or not this appeal is admissible to relate to a provision not included in the operative part of the issued judgment, HSSL considers that it could still criticize the application of the 2002 Law on appeal. HSSL is of the opinion that (i) the choice of a service provider of a certain nationality would have no impact on the qualification of a fund and on the law governing it, all the more so since the "*custodian agreement*" was silent on the 2002 Law and its terms left no room for interpretation pursuant to Articles 1156 and following of the Civil Code, (ii) under the guise of interpretation, the first instance judges wrongly qualified the "*custodian agreement*" as a custody agreement governed by the 2002 Law, whereas qualifying and interpreting are two distinct concepts. In addition, this "*agreement*" did not incorporate some of the mandatory obligations of the 2002 Law, and it even incorporated some that were contrary to said law, such as the limitation of liability of section 15.3. This would demonstrate that HSSL was appointed as an ordinary custodian pursuant to Article 1915 of the Civil Code, without ever having had the role of custodian pursuant to the 2002 Law.

- in any event, the question of whether or not the 2002 Law is applicable would not be relevant to the application for the restitution of Securities and cash: the application of this law would only be relevant for the analysis of a possible civil liability and a claim for damages against HSSL, a component that has not yet been settled by the first instance and which would therefore still be pending before it.

Again in this legal context, HSSL provides an overview of the issues that would need to be resolved for this dispute:

- the Securities for which HERALD claims restitution from HSSL, were they deposited with HSSL and sub-deposited by HSSL with BMIS (HERALD's theory) or were they directly deposited by HERALD with BMIS (HSSL's theory)? As a preliminary matter, HSSL argues that it could not have issued an extrajudicial admission on elements of law. It then disputes the existence of a sub-custody, HERALD having entrusted the holding of the Securities to a third party, its "broker" BMIS. As for the letters sent by HSSL to the corporate auditors Ernst & Young, HSSL disputes that it admitted to owning the assets referred to in the BMIS account statement, but returned them for the sole purpose of allowing Ernst & Young to conduct its audit. As for the KPMG London reports, HSSL states that "*the fact that BMIS is referred to therein as 'sub-custodian', or the fact that HSSL*

employees referred to BMIS as 'sub-custodian', has no legal consequences as to the precise legal characterization of the relationship between HSSL, HERALD and BMIS". The CICA judgment of June 13, 2019 cited by HERALD does not allow for arguing that HERALD and Primeo Fund, also subject to Cayman Islands law, are comparable. As for the position statements sent by BMIS to HSSL, the latter disputes that they made it appear as account holder: these statements only proved its role as a HERALD banker. With regard to the email from Paul Smith of March 15, 2008, who was only a global executive of HSSL and not one of its attorneys, this email could not provide evidence of a sub-custody, even if BMIS was described as "*sub-custodian*". For the letter dated January 12, 2007 sent by HSSL to one of HERALD's "*directors*", which merely described certain provisions of the "*sub-custody agreement",* it would not be sufficient to assert that this "*agreement*" was actually implemented and that a sub-custody was undoubtedly formed. As for the title of the "*account information verification"* sent on March 29, 2004, it is not proof that HSSL was a "*customer"* of BMIS, nor that it held account 1-FR.109. Only the "*customer agreement",* which was signed by HERALD, could serve as evidence. The same conclusions would be drawn from the document entitled "*verification of address*". The email dated February 9, 2007 sent by HSSL to one of HERALD's directors would only confirm the existence of a "*sub-custody agreement"* without confirming the effective implementation of this agreement. The conclusion to be drawn from HSSL's online screen shots on December 18, 2008 is still not proof of HSSL's status as an account holder. As for HERALD's annual financial statements, prepared by HSSL's accountants, it should not be forgotten that the English term "sub-custodian" could cover legal concepts different from the sub-custody provided for in the Luxembourg Civil Code. HSSL reiterates once again that the "*sub-custody agreement*" was signed, but never took effect due to the lack of delivery of the Securities. As for the plea that was drawn from the calculation of HSSL's compensation based on HERALD's net asset value, HSSL explains that this value was calculated by dividing the value of all HERALD's assets, regardless of who they were held by, by the number of shares in circulation: HSSL's compensation was thus not proportional to the assets effectively deposited with it. Finally, as to the plea based on the reliability of the information sent by BMIS, HSSL states that the Court was not tasked with deciding on its liability, which is still pending in the first instance. However, it disputes being liable for management failures of the HERALD directors.

- would the fact that BMIS was the broker of HERALD and that BMIS had sent the securities transactions on behalf of HERALD render possible the simultaneous existence of a sub-custody relationship on the same securities between HSSL and BMIS, as alleged by HERALD? HSSL replies that the assets that were entrusted to BMIS by HERALD could not be part of the base of the restitution obligation incumbent on HSSL under Article 1915 of the Civil Code. To make this conclusion, it analyzed a broker's custody obligations in relation to clients' securities under U.S. laws during the period 2004-2008, based on the report written by Professor Gordon of January 20, 2017: according to him, the "*customer agreement*" between HERALD and BMIS defined HERALD as the "*customer*" and designated BMIS as a qualified custodian agent with regard to HERALD's securities and other assets, which was the subject matter of the "*trading authorization agreement*". Professor Gordon concluded that BMIS was subject to

custody obligations vis-a-vis HERALD, its client, and that the latter was entitled to receive, at its request, the delivery of the Securities held in its account: this right of HERALD would exist against BMIS and not with regard to HSSL. Professor Gordon ultimately deduces that BMIS was a direct custodian of HERALD and not a sub-custodian of HSSL.

- what would be the impact of the U.S. SIPA proceeding and the settlement agreement of November 12, 2014 entered into between the Trustee, HERALD and Primeo Fund, on the claims currently filed by HERALD? On December 15, 2008, the *United States Court for the southern district of New York* appointed a Trustee (Irving H. Picard) for the liquidation of BMIS, who sent a *"customer claim*" form to HSSL, which sent it to HERALD. The latter filed the completed form on June 22, 2009, for the return of the assets held in account 1-FR109. As an appendix to the form, HERALD attached an "addendum" where it claimed that it, HSSL, in its capacity as custodian, was the appropriate party to file the "*customer claim*". HERALD claimed that the Trustee rejected this request, which is inaccurate: (i) the Trustee initially rejected HERALD's claim, but reversed this decision on May 19, 2010, through a "*notice of Trustee withdrawal of determination*", (ii) a settlement agreement of November 12, 2014 between the Trustee, HERALD and Primeo Fund that the Trustee ultimately accepted HERALD's "*customer claim*" in the amount of US$ 1,639,896,943, (iii) the Trustee acknowledged that *feeder funds* such as HERALD were entitled to file a "*customer claim*" if they fulfilled the five factors required to be considered a "customer" (the existence of a direct financial relationship with BMIS, the fact that HERALD invested its own assets and had a "*property interest in the assets it invested with BMIS*", the existence of a HERALD "*brokerage*" account with BMIS, the fact that HERALD had control over the placement of its assets with BMIS, the *"brokerage*" account held by HERALD appeared on the books of BMIS). HSSL never filed a "*customer claim*". HSSL adds that following the settlement agreement, the Trustee, on the day of the submissions, paid 70.452% of each "*allowed claim*", acknowledging that it is the custodian of the Securities claimed by HERALD. By accepting these payments, HERALD recognized BMIS as the sole custodian of the Securities. Its claim against HSSL would be inadmissible, for lack of interest in filing suit, otherwise unfounded. In addition, recoveries already made should reduce, if not satisfy, HERALD's claim. If HERALD were to win the case before the Luxembourg courts and in the context of the American proceedings, there would be unjust enrichment. Its claim would still be inadmissible for lack of legitimate interest in filing suit, otherwise unfounded. These developments are part of HSSL's cross-appeal. In any event, HERALD's claims for recovery of assets are inadmissible, otherwise unfounded for lack of purpose, otherwise absence of harm (in the context of alternative claims for damages).

As for the claim <u>for restitution of the Securities, HSSL recalls</u> that this is currently the only component submitted to the Court, which would lead to examining:

1) The conditions of the existence of custody and sub-custody relating to the Securities

Both the "*custody agreement*" of March 29, 2004 between HERALD and HSSL

and the "*sub custody agreement*" of September 2004 between HSSL and BMIS designated Luxembourg law as the applicable law. The qualification of custody and sub-custody would require the following conditions to be met: (i) flawless consent of the parties, (ii) an effective delivery of the property to the custodian, which would result in the property entrusted to the custodian being deposited in only one place: if the Securities were fungible pursuant to the 2001 Law, their delivery would involve their registration in a securities account of the custodian or sub-custodian; (iii) a custody obligation, which would not apply to the cash transferred to BMIS on the basis of HERALD's instructions to HSSL, as part of the "*brokerage agreements*"; (iv) the obligation to return the property under custody or sub-custody: with regard to fungible property, as in this case, an equivalent property must be returned.

2) The existence or inexistence of a deposit with HSSL

HSSL again argues that HERALD never delivered the Securities to it for which it claims restitution. It would be inappropriate for HERALD to ask the custodian HSSL to return the cash that HERALD previously asked it to transfer to the "broker", nor a fortiori the Securities that the "broker" acquired with the cash entrusted to it by HERALD. Even if HSSL had opened the account with BMIS, quod non, Article 6.2 of the "*custodian agreement*" would dismiss its liability in the event of a default by BMIS. HERALD's claim for restitution of the Securities must be dismissed. The Securities were never registered with HSSL and HERALD never held a securities account opened with HSSL. The assets were fictitious, respectively the alleged registrations must be voided due to lack of cause: the securities appearing on the BMIS statements were fictitious, did not appear to have been acquired by BMIS and even if they existed on the stock market, HSSL could not be required to return them by obtaining them on the stock market to give them to HERALD, whereas this dispute would be a consequence of a fraud committed by BMIS. HSSL further insists on the lack of relevance of the adversary's argument on the "custody of assets" in this context. Starting from the premise that the 2002 Law does not apply to the case in point, HSSL analyses it, as regards the concept of "custody", to deduce that even the 2002 Law does not provide for the existence of an obligation of restitution under all circumstances, because it distinguishes between an intellectual custody of assets, with an obligation of supervision, and a material custody of assets pursuant to Articles 1915 and following of the Civil Code, with an obligation of holding. In the "*custodian agreement*" entered into between HERALD and HSSL, several hypotheses were considered: (i) its Article 6.1 considered the case where HERALD delivered the Securities to HSSL, in which case HSSL would have to open a securities account on behalf of HERALD. In this case, HERALD never opened a securities account on HSSL's books and no Securities could have been deposited there. Without depositing Securities, no restitution can be considered; (ii) its Article 6.2 treated the case where the custodian HSSL, on the instructions of HERALD, opened a securities account with a third party for and on behalf of HERALD, in which case HSSL would be exempt from any liability, for not having chosen the third party. Here, HERALD did not give such instructions to HSSL,

since HERALD itself opened this account with BMIS; (iii) its Article 15.2 provided for the case in which the custodian HSSL had opened, on its own initiative, a securities account with a third party for and on behalf of HERALD: in view of the resolution of the HERALD "*directors*" of March 29, 2004, only HERALD chose and appointed BMIS as "broker", such that BMIS was not a "*correspondent"* pursuant to the aforementioned Article 15.2; (iv) the last case was not governed by the "*custodian agreement"* but by the contract directly entered into between HERALD and the third party, BMIS, who was another custodian. It is clear that the Securities comprising HERALD's main claim would not form part of the basis of HSSL's obligation of restitution.

3) The absence of sub-custody of Securities by HSSL with BMIS

The adversary's argument is inoperative, because without the delivery of the Securities to HSSL, there could not have been a sub-custody of these securities with BMIS. The position statements (statements of assets) sent by BMIS were sent to HSSL, only as a postal address and in its capacity as administrative agent of HERALD, to calculate the net asset value, but not as custodian.

After these developments on the absence of custody and sub-custody relating to the Securities, HSSL sets out its theory according to which BMIS was the direct custodian of HERALD. As BMIS is a broker-dealer whose business was governed by New York law, transactions executed by the broker would be subject to U.S. law. This view was shared by Professor Gordon, in his opinions of January 20, 2017 and March 14, 2018: this would mean that BMIS had Securities in custody that it should have acquired and resold for HERALD and that only HERALD, as "*customer"* of BMIS, had the right to return the assets deposited therein (preamble and Article 5 of the "*customer agreement".*

HSSL concludes that such an obligation was incompatible with that which BMIS had vis-a-vis HSSL under a sub-custody agreement: the function of broker assumed by BMIS directly on behalf of HERALD included the duties of custodian (*custodial duties).* It is inconceivable that BMIS was simultaneously bound by the same obligations of custody and restitution on the same assets vis-a-vis HERALD and HSSL.

HSSL takes a position on the three judgments of the French Court of Cassation of May 4, 2010, handed down in the Lehman Brothers case, cited by HERALD: these decisions would not be transposable to the present case, because HERALD was not a UCITS under French law, which would not be subject to Directive 85/611/EEC of December 20, 1985 and because HSSL did not entrust the sub-custody of HERALD's assets to a third party, as HERALD entrusted them directly to BMIS.

As for the claim for restitution of cash, HSSL gives its arguments superfluous consideration in view of the fact that the subject matter of this dispute is limited to the claim for restitution of the Securities, since the first instance judges stayed their judgment on this part of the dispute, which is therefore still be pending in the first instance.

1) As for the cash transferred to BMIS: HSSL disputes transferring cash to BMIS on its own initiative, such that BMIS was the broker or custodian of HERALD. HSSL acted only on the instructions of HERALD or its investment manager, in particular by transferring the amount of HERALD subscriptions to BMIS, to an account opened by BMIS with Chase Manhattan Bank, New York. HSSL considers that it thus fulfilled its obligation of restitution, by transferring these sums to that indicated by HERALD to receive them, namely BMIS. HSSL acted only on HERALD's "*proper instructions*". In addition, HERALD could not dispute the cash debits on its account with HSSL, several years after the facts: it would necessarily have been aware of the transfers and would be forced to do so, by application of HSSL's general conditions (objection to be made within 14 days from the documents sent, Article 8). This behavior of HERALD would still run counter to the principle of estoppel as well as the ten-year statute of limitations, under the terms of Article 189 of the Commercial Code. HSSL specifies that only HERALD and its manager had the power to dispose of the assets deposited with BMIS. HSSL had nothing to return.

2) As for the request for the return of the available balance of cash accounts opened on HSSL's books: HSSL recalls that currently HERALD's accounts on its books are closed. Pursuant to Article 19.2 of the "*custodian agreement*", HSSL would not be entitled to release itself from the cash in its possession at the end of the contract, in view of the fact that following the suspension of HERALD's net asset value since December 12, 2008, requests for redemptions from HERALD investors have not yet been honored. The request for the return of the available balance of cash accounts opened with HSSL would therefore be premature, if not inadmissible.

   HSSL is finally seeking a procedural indemnity of €200,000, based on Article 240 of the New Code of Civil Procedure, and is opposed to the granting of a procedural indemnity to HERALD.

   As a final word, HSSL resumes its conclusions:

- it refers to judicial caution as to the admissibility in the pure form of the appeal brief and as to the admissibility of the appeal relating to the part of the judgment on the stay pronounced by the court, namely the restitution of cash;

- it requests acknowledgment of its partial cross-appeal, insofar as the judgment rendered rejected the plea of inadmissibility resulting from HERALD's lack of interest in filing suit in view of SIPA, and insofar as it held in its reasoning that the 2002 Law was applicable to the dispute;

- in the latter context, it should be stated that Article 28 of the "*custodian agreement"* leaves no room for interpretation and that as a whole, this "*agreement"* does not fall under the regime of the 2002 Law and that it was thus wrongly qualified as a "named agreement subject to the specific regime of the 2002 Law";

- to state that by signing the settlement agreement with the Trustee dated November 12, 2014, HERALD recognized BMIS as the (sole) custodian of the

Securities and to declare its claim for restitution of the Securities inadmissible for lack of interest in filing suit;

- otherwise, to reject the main appeal;

- to state that there is a direct custody relationship between HERALD and BMIS, that the Securities cannot be deposited with BMIS and HSSL, that HERALD recognized BMIS' role as custodian by signing the settlement agreement and accepting the Trustee's money, that the Securities were fictitious and that the claim for restitution is inadmissible;

- to state that HSSL never transferred cash to BMIS on its own initiative, but on HERALD's "*proper instructions*", to reject HERALD's allegations regarding a judicial admission by HSSL concerning HSSL exhibit "16" and if in the unlikely event the Court should see it as such, to acknowledge to HSSL that it revokes this admission, pursuant to Articles 1355 and following of the Civil Code;

- to state that HERALD violated the principle of estoppel, by contesting for the first time on appeal the transfer instructions of BMIS;

- to find that the available balance of cash accounts opened with HSSL by HERALD could not be returned, by virtue of the existence of a sequestrator (retained monies);

- to declare inadmissible, otherwise unfounded, claims for cash restitution;

- to dismiss HERALD's claim for a procedural indemnity and order it to pay such indemnity, on the basis of Article 240 of the New Code of Civil Procedure, to HSSL, in the amount of €200,000;

- to order HERALD to pay the costs and expenses of both proceedings.

Assessment of the Court

I- Admissibility of the main and cross-appeals

HSSL raised, as in the first instance, HERALD's lack of interest in filing suit against it, in view of the existence of proceedings in the United States of America (hereinafter the "U.S.").

HERALD raised the inadmissibility of HSSL's cross-appeal, in that it relates to the application of the 2002 Law, to concern a provision not included in the operative part of the appealed judgment.

A) <u>The lack of interest in filing suit</u>

It is accepted that in order to file suit in court, a person must have an interest in filing suit, that he invokes a legitimate interest born and current (see DALLOZ, Encyclopedia of Civil Procedure, see action No. 60; GIVERDON, Standing: condition of admissibility of the legal action D. 1952, Chron. 85). It is therefore

necessary to justify a personal and direct interest; that standing is therefore the title that allows the litigant to demand that the judge rule on the merits of the dispute (...): it realizes the junction between the action, on the one hand, and the merits of the dispute, on the other hand (see GIVERDON op. cit; SOLUS and PERROT, Volume 1, No. 26).

The lack of interest and the lack of standing, the first of which is moreover only a species, constitute pleas of invalidity, which, although relating to the merits, are not public policy, nor consequently to be assessed ex officio (see Dalloz, Encyclopedia of Civil Procedure ed. 1955, verbo Action, no. 99).

The standing to file suit is the title by which one appears in a trial. Only the owner or holder of the disputed right, natural or legal person, or his legal or contractual agent, or his creditors (see GARÇONNET and BRU, Treatise on Theoretical and Practical Procedure, T.l, no. 363) have that standing: Interest is in principle a sufficient condition to be vested with the right to file suit. The use of the justice system must only be attempted if its plaintiff can hope to gain a certain advantage, in order to avoid unnecessary congestion of the courts. If it appears that the filing of a legal action is of no use to a litigant, the judge may declare the claim inadmissible, thereby exempting himself from ruling on the merits. Interest is a general condition of the existence of the suit, it is required of any party to the trial.

The interest in filing suit must be assessed at the suit is filed (see Court of Cassation, 3rd Civil Chamber, 12/08/2010, Lexisnexis No. Jurisdata 2010-023242).

The question of whether this person is actually the holder of the right that he invokes, is substantive and therefore does not arise at the admissibility stage. Anyone who claims to hold a disputed right has the standing to file suit, in other words, the legal title allowing him to refer the matter to the judge so that he can rule on the existence and extent of this right.

As HERALD asserts that HSSL is its custodian bank, that BMIS is the sub-custodian of HSSL, that it can turn against its custodian bank to obtain restitution of the Securities acquired by it from BMIS, it has the standing to file suit. The Court notes, like the tribunal, that this dispute was initiated by summons of April 3, 2009 from HERALD against HSSL, that is, at a time when no other proceedings for the restitution of Securities or funds were ongoing. The Court adds that the first "*customer claim*" was filed with the Trustee on June 22, 2009 (HERALD Exhibit No. "12"). The other elements invoked by HSSL are even largely subsequent to this date and therefore subsequent to the beginning of this dispute: this is the case with the "*settlement agreement*" entered into on November 12, 2014 between the Trustee on the one hand and Primeo Fund and HERALD on the other hand, which is even subsequent to this appeal, which dates to May 15, 2013.

Both on the day of the first instance introductory brief and the appeal brief, HERALD's interest in filing suit was not affected by the proceedings brought in the U.S.

The question of whether HERALD actually holds the rights invoked is substantive.

The plea of inadmissibility must be rejected.

Since the main appeal was lodged within the legal forms and deadlines, it is admissible.

B) The inadmissibility of the cross-appeal

A cross-appeal cannot be filed unless the respondent in turn seeks the amendment of the judgment. This remedy is not necessary when, as in this case, HSSL limits itself, in order to postpone the appeal calling into question the entire claim, to taking up a defense plea rejected by the first instance judges.

Indeed, it is true that the cross-appeal, like the main appeal, can only relate to the operative part of the judgment rendered. However, if the respondent wishes to rediscuss the grounds by which the first instance court rejected any of its pleas, it is sufficient to reproduce them in appeal proceedings, without having to file a cross-appeal ("Private judicial law in the Grand Duchy of Luxembourg", Thierry HOSCHEIT, no. 1472).

It follows that the cross-appeal is inadmissible.

II- The merits

As a reminder, HERALD's main claim is the delivery of the Securities more fully specified on pages 25 and 26 of its appeal brief, otherwise on pages 192 to 194 of its summary submissions.

It is only alternatively that HERALD requests the restitution of the cash that was transferred to BMIS.

HERALD also requests the restitution of the sum of US$ 521,918,349.08 which is still in HSSL's possession.

A) The claim for delivery of the Securities

Pursuant to Article 58 of the New Code of Civil Procedure, "*it is the responsibility of each party to prove in accordance with the law the facts necessary for the success of its claim*". In accordance with Article 1315 of the Civil Code, "*he who claims the performance of an obligation must prove it. Reciprocally, he who claims to be released must justify the payment or the fact that produced the dissolution of his obligation*."

Indeed, the plaintiff must demonstrate the existence of the fact or legal act on which he bases his claim: actori incumbit probatio. He who has proved the elements necessary for the birth of the right he invokes must not, moreover, prove that this right has been maintained without being modified. The defendant turns into a plaintiff insofar as he invokes an objection: reus in excipiendo fit actor. It is

therefore up to him to prove the facts that he invokes as an objection (R. Mougenot, Law of Obligations, Evidence, ed. Larcier, 1997).

Pursuant to the guiding principles provided for by these texts, in order to be able to prosper in its claim, it is HERALD's responsibility to provide proof both of the fact that HSSL is its custodian bank and that BMIS is to be considered its sub-custodian, while respectively HSSL must prove that it has discharged its obligations by having performed, as it claims, HERALD's own instructions to BMIS, who would be, in this case, considered as the second custodian bank.

1) Review of the links between the parties

The Court notes from the outset that the parties remain, pending an appeal, in profound disagreement as to the classification of the triangular relationship between HERALD, HSSL and BMIS, it being specified that BMIS is not a party to the proceedings.

HERALD bases its claim and appeal both on the "*custodian agreement*", the 2001 Law and also on the Civil Code.

The Court will first analyze the terms of the "custodian agreement". Indeed, under the terms of Article 1134 of the Civil Code "*legally formed agreements take the place of law to those who have made them. They can only be revoked by mutual consent, or for the causes that the law authorizes. They must be executed in good faith*."

It is apparent from the exhibits submitted in the case that HERALD and BOB (the predecessor of HSSL) signed a "*custodian agreement*" dated March 29, 2004. It is specified in its preamble that the HERALD Board of Directors selected, on behalf of HERALD, HSSL as custodian and that HSSL agreed to provide the custodian services under the terms and conditions set out in said agreement.

This agreement was subject (clause 28) to the laws of Luxembourg and to the jurisdiction of the Luxembourg courts. HSSL undertakes to:

- register and keep a separate account on its books of all Securities received as they were received, and ensure that these Securities are deposited in its "vault", or otherwise held by it or on its orders, as it deems appropriate for the custody of the Securities (...) (clause 6.1): "*the Custodian shall record and hold in a separate account in its books all Securities received by it from time to time and shall arrange for all Securities to be deposited in the Custodian's vault or otherwise held by or to the order of the Custodian as it may think proper for the purpose for the safekeeping thereof";*

- to identify the Securities held by it on behalf of HERALD and require each agent, sub-custodian or delegate (referred to in clause 15.2) to identify the Securities or other investments held by such agent, sub-custodian or delegate as being held by the latter, as custodian or trustee, on behalf of HERALD or HSSL (...) (clause 9.1). The Court specifies that reference should be made to the "discussion" section above, for the original English version of the clauses cited here mostly in French,

as a measure of simplification.

- to keep or obtain the keeping of books, registers and records that may be necessary to give a complete statement of all the cash and Securities held by it (HSSL) and the transactions executed by it on behalf of HERALD (...) (clause 9.3);

- in the event of termination of the agreement, to issue or have issued to the successor custodian all Securities held under the agreement, and all cash or other assets that it would possess of HERALD (clause 19.2).

This "*custodian agreement*" authorized HSSL to designate agents, sub-custodians and delegates (all together referred to as "Correspondents"), as it will be necessary for the exercise of all or part of HSSL's duties and prerogatives (including the powers to designate sub-custodians) (...) HSSL shall remain liable with respect to HERALD for any acts or omissions of any Correspondent, in any manner whatsoever, as if these acts or omissions were those of HSSL (clause 15.2).

Clause 15.3, in this context, imposed the following on HSSL: in the context of the selection, designation and supervision of the Correspondents, in accordance with clause 15.2, HSSL shall exercise competence and caution, but shall only be liable to HERALD for losses resulting from the liquidation, bankruptcy or insolvency of such Correspondent, if it has been negligent in their selection and supervision. However, in establishing this negligence of HSSL, the choice of the Correspondent on a contract, the lack of experience or expertise of such Correspondent as well as the insufficiency and lack of seriousness of the information ("financial or otherwise") concerning such Correspondents shall be taken into account.

From the foregoing, it is clear that HSSL was appointed as a custodian bank by HERALD and that it accepted this under the conditions set out above. It acknowledged that it had registered the Securities in an account with it under the aforementioned conditions.

The Court must now endeavor to ascertain whether there are contractual links between HSSL and BMIS and whether these links are exclusive or whether there are also direct contractual links between HERALD and BMIS.

It follows from the exhibits available to the Court that BOB signed various documents to and with BMIS, which demonstrate that BOB, currently HSSL, is a client of BMIS: they are therefore the "*trading authorization limited to purchases and sales of securities*" of November 30, 1994 and two "*customer agreements"* of December 6, 1994 and April 25, 1997. These documents indicate that they are governed by the laws of Luxembourg and give jurisdiction to the courts of Luxembourg.

One more step is taken through the signing of a "*sub-custody agreement*" between BOB and BMIS on August 7, 2002, by which the bank (currently HSSL) <u>is authorized to open and maintain deposit accounts</u> (the Court underlined this

passage) with the "*sub-custody*" (BMIS) which will be for the exclusive benefit of HSSL customers, as listed in Annex "A" of said agreement, and which will be entitled *"BOB special custody account for Customer (name of Customer to appear)"* (Article 4). This will is already included in the preamble of said agreement in point (A): *"The Bank wishes to establish custody accounts with the sub-custodian to hold, maintain and/or administer certain property which the Bank holds as custodian for certain customers, that are listed in Annex « A » to this agreement, which accounts may each be designated as being held for a particular customer."* This agreement is governed by the laws of Luxembourg and BMIS is subject to the non-exclusive jurisdiction of Luxembourg courts.

It follows that there was a sub-custodian relationship between HSSL and BMIS since this agreement of August 7, 2002. However, the Court must ensure that this relationship applies to HERALD.

The Court notes that through BOB's "*Memorandum*" of March 30, 2004, the subject of which is "Herald Fund SPC (Cayman)", the incorporation of which was planned for March 24, 2004, in the form of a Cayman Islands Company (SPC), that BOB would be the custodian bank and that this new fund would be a copy of "Primeo Select Fund", in the sense that there would be investments made with BMIS. This "*Memorandum*" specifies in its point "7" that BMIS will be the sub-custodian of HSSL for HERALD and that an account will be opened with BMIS for HERALD, by application of the already existing "*sub-custody agreement*", which would have to be modified to include HERALD.

In accordance with the provisions of this HSSL Memorandum, (i) HERALD was incorporated on March 24, 2004, as shown in the "*Memorandum of association*" and the "*Certificate of incorporation" of the "Registrar of Companies", Cayman Islands*" (HERALD Exhibits 145 and 146), (ii) an account on behalf of HERALD was opened by BOB (HSSL) on March 25, 2004, and under the name "BOB Luxembourg, special custody account for HERALD, 13, rue Goethe L-1637 Luxembourg" (that is, the address of BOB) and under the number "1FR109", (iii) HERALD's name was added to Annex "A" of the new "*sub-custody agreement"* between BOB and BMIS dated September 8, 2004, which resumes the terms of the first "*sub-custody agreement*" of 2002.

The Court points out that this account was used starting on April 21, 2004, with the above designation, as is deduced from the BMIS account statements, except that as of November 2004, the name of BOB is replaced by that of HSSL: all remaining BMIS account statements in relation to this account "1- FR109" remained unchanged, however, namely the reference to the "special custody account for HERALD" and the address of HSSL in Luxembourg.

The Court certainly did not overlook that it was only on March 29, 2004 that HSSL and HERALD jointly signed the "*custodiam agreement",* designating HSSL as the custodian bank of HERALD. Nevertheless, HSSL acted, before that date, in accordance with the aforementioned "Memorandum", according to the common will of the parties, clearly expressed at the time and having never been the subject of an ounce of dispute in 2004, but rather of confirmation. This is logically

explained, moreover, by the fact that HERALD was not operational until March 26, 2004, when its three directors were appointed, in the persons of Friedrich Pfeffer, Hannes Saleta and Franco Mugnai.

On the same day as the "custodian agreement", that is, on March 29, 2004, BOB and HERALD signed an "*Administration agreement",* by which HSSL, which accepts it, was appointed "administrator" (central administration agent) of the fund (HERALD), granting it numerous functions and duties, including preparing HERALD's financial statements and books, in accordance with the law.

Also on March 29, 2009, the directors of HERALD, appointed three days earlier, signed, each from another country, a "*circular resolution of the board of directors*" (hereinafter "circular resolution"), of which it is not disputed that the document was prepared by HSSL, by which they approved the opening of a "*bank account*" with BMIS "*in the name of BOB, special custody account for HERALD*", that is, precisely the terms used four days earlier by HSSL, when it opened the account for HERALD with BMIS. The directors only adhered to what was already executed by HSSL.

From all of the foregoing, it is established that the sub-custodian relationship between HSSL and BMIS applies to HERALD, as further confirmed, if necessary, by the "*sub-custody agreement*" of September 8, 2004.

HSSL disputes that this relationship should be taken into consideration, since it never would have applied (it would not have been consummated).

The Court must verify this assertion.

It appears from the exhibits submitted in the case that the account opened by HSSL for HERALD with BMIS, namely "*special custody account 1-FR 109*" was, contrary to the theory advanced by HSSL, active, as already stated above: as evidenced by the account statements, respectively the credit notices, relating to this account, again sent by BMIS to HSSL, since 2004 (see in particular HERALD's summary submissions of July 9, 2021, pages 25 to 30, where credit notices, notices of operation as well as the first monthly statement of said account are scanned) until 2008 (as shown in HERALD Exhibit "9").

The various annual financial statements of HERALD, all prepared by HSSL, also confirm that the latter was HERALD's custodian bank and that BMIS was its sub-custodian: it is sufficient to refer to the first annual financial statements covering the period from March 24 to December 31, 2004, which were audited by Ernst & Young, according to the laws and regulations in force in Luxembourg, to find that HSSL appears as "*custodian and administrative agent*" and that HSSL appointed investment brokerage firms as its sub-custodian ("*the custodian bank has appointed these broker/dealer investment firms as their sub-custodians to hold and maintain the assets of Segregated Portfolios*"), which explicitly referred to BMIS.

The content of HERALD's second annual financial statements, issued as of

December 31, 2005, includes the same stipulations, as do the annual financial statements issued as of December 31, 2006 and December 31, 2007: the Court highlights that for this year there is a letter from HSSL to Ernst & Young Luxembourg, dated February 13, 2007, by which it clearly takes a position in relation to questions previously asked by Ernst & Young Luxembourg: HSSL expressly puts in the attached document the statement sent to it by BMIS, in relation to the "*special custody account for HERALD, number 1-FR 109*" to refer to it with regard to the questions concerning " *securities, precious metals, deposit certificates, ... in your custody ...":* it thus explicitly replies *"please see attached Madoff statements*". HSSL therefore certifies to the auditor Ernst & Young that it has on deposit the Securities found on a statement serving as an extract from the account "1- FR 109" with BMIS.

It follows from HERALD Exhibit "4", "*Other assets and liabilities report HERALD*" that on November 30, 2008, HERALD's assets on deposit in the "*HSBC Madoff Account",* that is, according to the "*HSBC Office screenshot of December 18, 2008*", the same "*special custody account*", amounted to US$ 1,897,736,818.66, constituted by the Securities included in said exhibit, but also on pages 46 to 48 of HERALD's summary submissions of July 9, 2021.

It follows from all of the foregoing that the transactions for the purchase and sale of Securities did indeed pass through the account opened by HSSL with BMIS on behalf of HERALD, namely the account now known under the name and number "*special custody account 1-FR 109".*

To all these operations and certifications, HSSL opposes the signature by HERALD of what it calls the "*brokerage agreements*" with BMIS. The Court perceives that the latter consist of the following documents:

- an undated "*customer agreement*" (but whose date of March 29, 2004 appears as the date of transmission by fax);

- an "*option agreement*" dated March 29, 2004;

- an undated "*trading authorization limited to purchases and sales of securities and options"* (but whose date of March 29, 2004 appears as the date of transmission by fax);

- an undated "*certificate of foreign status of beneficial owner for United States Tax Withholding*" (but whose date of March 29, 2004 appears as the date of transmission by fax).

HSSL concludes that by signing these documents, to which it would be a third party, HERALD become a direct customer of BMIS.

The Court cannot follow this reasoning, since, on the very poor copy submitted to it in exhibit "6" by HSSL, of said "*customer agreement*", nowhere is there any reference to the slightest account number, a fortiori to that bearing the number "1-FR 109". This pre-printed agreement has also not been fully completed, in particular as regards applicable law and disclosure authorizations. The same

remarks apply to the other three documents, which cannot be linked to the "*special custody account 1- Fr 109*" or any other account, since no number appears there.

Nor is this finding weakened by Professor Gordon's conclusions (which are based solely on these documents and the laws in force in the United States, without taking into account the general context of the dispute) nor by the production of documents intended to clarify the existence of one or more accounts opened directly by HERALD, following the signature of these documents.

The Court therefore confirms, like the first instance judges, the existence of a sub-custodian relationship between HSSL and BMIS, while specifying that this relationship indeed applies to HERALD for all transactions executed by the "*special custody account 1- FR 109".*

As it is now established that (i) HERALD designated HSSL as the custodian bank and that the latter entered into a sub-custody agreement with BMIS, from which HERALD benefited and (ii) not that HERALD appointed a second custodian, the path is clear to analyze HERALD's claim for restitution/delivery of the Securities.

2) The rights and duties of HSSL as custodian bank

As the "*custodian agreement*" between HERALD and HSSL stipulated that it was subject to Luxembourg law, the Court reiterates once again that under the terms of Article 1134 of the Civil Code "*the legally formed agreements take the place of law for those who made them. They can only be revoked by mutual consent, or for the causes that the law authorizes. They must be executed in good faith*."

It is therefore first necessary to refer to this law of the parties.

This "*custodian agreement*", of which most of the clauses invoked below have been cited above in their original text in English, specified in its clause 9.1: the custodian (HSSL) must identify the Securities held by it hereunder as held on behalf of the fund (HERALD) and must require each agent, sub-custodian or delegate (referred to in clause 15.2) (BMIS) to identify the Securities or other investments held by said agent, sub-custodian or delegate, as being held by it, as custodian or trustee, on behalf of the fund or custodian. Any expenses of any kind incurred by the custodian, in the context of these registrations, will be borne by the fund.

This clause is to be read together with clause 9.3 of the same "*custodian agreement*", which stipulates that the custodian must keep or obtain the keeping of books, registers and records that may be necessary to give a complete statement of all the cash and Securities held by it and the transactions executed by it on behalf of the fund.
It follows that it was the responsibility of HSSL (custodian) not only to know which Securities and investments were made for HERALD (the fund), but also that it had to identify and record them on its books and registers in order to be able to give a complete statement of all such cash and Securities, and for this purpose it also had to inquire with the sub-custodians of the Securities or other investments held

by them.

As for the designation of these sub-custodians, it was seen and considered above that under clause 15.2 of the "*custodian agreement*", HSSL could name them. This clause specifies "the custodian (HSSL) will remain liable with respect to the fund (HERALD) for the actions or omissions of any Correspondent, regardless of how it was designated, as if said actions or omissions were those of the custodian".

The following clause, namely 15.3, seems to limit this liability, by stipulating "*in the context of the selection, designation and supervision of the Correspondents, in accordance with clause 15.2, the custodian will demonstrate competence and reasonable care, but will only be liable with regard to the fund for losses resulting from liquidations, bankruptcies or insolvencies of said Correspondents if it has been negligent during the selection and supervision of the latter*". This limit is given only in the absence of frivolity and negligence both in the choice and in the supervision of the sub-custodian.

Here again, the parties remain at odds, with HSSL challenging any negligence and HERALD pleading the existence of numerous doubts of HSSL with regard to BMIS, which would lead to the conclusion that there was negligence.

The Court recalls first of all that it is apparent from the developments made in Part ll-A)1) that the registration in account and the holding on account of the Securities listed on the statements of the "*special custody account 1-FR 109*" sent by BMIS to HSSL is established by HERALD's annual statements, drawn up by HSSL and certified by Ernst & Young Luxembourg. This existence on deposit with HSSL of said Securities is further attested by the content of certain email exchanges submitted in exhibit "105" by HERALD.

From this, it must be concluded that HSSL recorded these Securities, which were in custody on its accounts, held by it, on behalf of HERALD. These Securities came back to it from BMIS.

In order to be complete, the Court qualifies the documents on which it relies to arrive at this result, as an extrajudicial admission, contrary to HSSL's submissions.

Indeed, admission as evidence is governed by Articles 1354 to 1356 of the Civil Code. It is stated there on the subject of extrajudicial admissions (Article 1354) that "*the admission that is opposed to a party is either extrajudicial or judicial*".

The admission can be defined generally as the declaration by which a person recognizes as true a fact likely to produce legal consequences against him. There can only be an admission if the person in question is aware of the consequences favorable to his opponent. The subject matter of the admission must relate to a fact and not to a rule of law because it does not have to be proven. The probative force of the admission varies depending on whether it is judicial or extrajudicial. In the presence of a judicial admission, qualified as perfect evidence, the judge must

admit that the evidence of the alleged fact is reported on the sole basis of this mode of evidence, regardless of his personal conviction. It is then incumbent upon the parties, where applicable, to provide evidence to the contrary, also organized by law. The extrajudicial admission, as imperfect evidence, is, conversely, part of the system of free evidence: its probative force is left to the sovereign discretion of the first instance judges (Dalloz, Civil Law Directory, Evidence: modes of evidence - Gwendoline Lardeux - October 2019, No. 147, 221 and following, 279 and following).

In this case, the responses provided by HSSL, an official bank in the Luxembourg market, on special requests from Ernst & Young Luxembourg, one of the “big four” audit and consulting companies, to the latter, can only be used as a declaration by which HSSL acknowledged as truthful, as having to be considered proven against it, the fact in question, namely that it has the disputed Securities on deposit. This admission is likely to cause consequences, both for it and for its client, but also to produce legal consequences against it, of which it was supposed to be aware.

The judges may declare themselves fully convinced by an extrajudicial admission, they may conversely reject it, find there a clue or a beginning of proof in writing (Jurisclasseur Civil Art. 1354-1356 File 20 nos. 49-50).

It is accepted that the records made in the company books of a merchant who kept them constitute an extrajudicial admission. A merchant is bound by the records mentioned on his books, unless he reports evidence that these mentions result from a factual error (Van Ryn and Heenen, principles of commercial law, Volume III, 2nd edition Bxl, Bruylant, 1981, p. 65, numbers 65 and 68; Court November 14, 2001, number 25516 of the docket).

In view of the foregoing, that HSSL forwarded information while knowing that this information would be used for the audit of HERALD’s annual statements, it should be considered that this information is valid as an extrajudicial admission, of which the Court is convinced. The Court states that this is more information, therefore factual elements and not rules of law, as HSSL tried to argue.

HSSL opposes, in this case, the retraction of such extrajudicial admissions, citing the article on the revocation of judicial admissions. It also does not invoke any legal or factual error on the basis of this claim or provide evidence thereof; a retraction, which is left to the sovereign discretion of the judges, is not possible in this case.

A retraction would be even less possible in this case, as the information forwarded to Ernst & Young was included in HERALD’s annual statements. The Court has no information and even less evidence of the existence of proceedings for the retraction or even annulment of these statements.

It is therefore established that HSSL took over the registrations in the “Securities” account on the “*special custody account 1-FR 109*” opened with BMIS, namely it admitted that it had the Securities registered there on deposit. The Court specifies that HSSL is therefore still unjustified in attempting to plead the non-existence of

these Securities, because the majority of them were probably never acquired by BMIS, given what we now know of the “Madoff scandal”. Indeed, this argument is unenforceable against HERALD: as a result of HSSL’s admission to hold said Securities, it implicitly and necessarily admits that it assured that the investments were used wisely, that the cash sent by it to BMIS was exchanged for Securities.

This being clarified, it is up to the Court to verify whether HSSL behaved in accordance with the stipulations, in particular included in clause 15.3 of the “*custodian agreement*”.

It was established above that HSSL was in a business relationship with BMIS from before the creation of HERALD and that it was indeed HSSL that opened the disputed account for HERALD with BMIS.

However, it was during that period before the creation of HERALD, in 2001 and 2002, the year of the first “sub-custody agreement”, that HSSL expressed its first doubts about the seriousness of BMIS. This is observed from various emails sent between BOB staff, respectively from HSSL. It thus emerges from the reading of an email of July 25, 2001 sent by a certain Stephen Smith of BOB to a director of BOB, then of HSSL, Michael May, that no “due diligence” procedure could be found in connection with “Madoff” (BMIS). This same Paul Smith writes on September 30, 2002 to Brian Wilkinson, head of HSBC Securities Services (Ireland) that he is very worried about “Madoff” and that he thinks that an independent confirmation, such as by KPMG, should be sought, which could be paid by “GFS” (Global Fund Services). He states “*It’s too big for us to ignore the warning signs*. On October 1, 2002, Paul Smith replied to Nigel Fielding of “GFS”, that “I don’t think we should mislead Madoff. We have a problem with him: he is the manager, the broker and the custodian of his accounts. In today’s world, that is a red flag. We have to address that (...) if we don’t get wet, we won’t go anywhere.”

A few years later, the questions about “Madoff” still do not seem to have been resolved, whereas it appears from an email from Nigel Fielding dated February 18, 2005 to the attention of Saverio Fiorino, Head of the “AFS” (Alternative Fund Services) division, Chris Wilcockson, director of HSSL and others, that he suggested to Brian Pettitt, in charge of sub-custodians for HSS, to go to Luxembourg “to review the history, operations, reports, etc, to have a good feeling of the arrangements before visiting “Madoff”.

The same year, on May 23, Christine Coe, who is none other than the Chief Risk Officer of HSBC Bank pic, even wrote a “*discussion paper*” on the subject of “Madoff”: “(...) HSS has relationships with a number of funds (in Annex “1”) that use BMIS: essentially assets are placed with BMIS in the context of a sub-custody agreement. Transaction statements are sent, by customer, by BMIS to the custodian HSS, to allow us to update our books and statements. This is NOT a real-time procedure. The real question is whether we are satisfied with the integrity of Madoff’s transactions, as we are comfortable with a lack of truly independent evidence in transactions with clients’ assets. In addition, in view of our role as custodian, are we in danger with regard to the legal obligations that we

may have? (...) However, there is a substantial risk if there is a question about the integrity of the process. The financial cost of appointing a sub-custodian on whom we cannot exercise the desired level of oversight may be considerable. The same will be true of the risk to our reputation. The solution, in my opinion, lies in the need for an independent audit. (...) We need to make a business decision on how to proceed with Madoff's managed customer accounts, urgently, to enable us to deal with the issue of unpaid sums for our customers listed in the attached appendix."

A few days later, John Gubert of HSBC Bank pic responded to Christine Coe, on May 30, 2005, to share her vision: "We do not have full control of assets or a real-time view of the transaction flow. The transactions are all executed internally in the (Madoff) family companies and there is no evidence of proper execution or even actual execution. The audit is carried out by a company that is not on our lists of recognized auditors (...) I cannot approve this process, and I understand that it is a major profit maker, unless we can adopt the process common to the banking sector in the United States (...). If this cannot be done, we must withdraw." (HERALD Exhibits 110 to 118).

Following all these exchanges of documented emails, KPMG is finally mandated by HSSL's parent company, HSBC Bank pic, on September 8, 2005, to draw up a report, which was drawn up on February 16, 2006. Eight of the Bank's clients are included in Annex "G", including HERALD. In the "major findings" section, the report indicates in relation to what it found and its recommendations, that 25 instances of fraud and operational risk have been detected, (...) that there is strong trust placed by HSSL in BMIS. The major recommendations are to: conduct an audit of the HSBC centers in Luxembourg and Dublin to ensure that appropriate procedures are put in place to independently confirm, where possible, the accuracy of transactions, identify possible risks and problems and record any errors, missing information or other operational problems.

KPMG recommends in particular that HSBC should conduct a periodic audit on BMIS, which should provide for: (...) the control of the internal audit and compliance reports (...), independent confirmation, on a periodic basis, of faxes of information concerning customer transactions provided by BMIS, insofar as a fax can be easily duplicated or falsified for fraud, call on BMIS to provide compliance reports, internal audit and any other periodic audit (...)

On March 19, 2008, HSBC Bank pic ordered a second report from KPMG, on the risks that BMIS's role as sub-custodian would entail for it and its subsidiaries. This second report was filed on September 8, 2008. The findings, if not recommendations, are almost identical to those already included in the 2006 KPMG Report.

Between the two reports, Christine Coe sends an email, among others, to Cris Wilckocson, on March 19, 2007, in which she returns to the issues with BMIS, in its role as sub-custodian for specific customers. She states: "Reality shows that Madoff's control of everything is central and that opportunities for falsification or misappropriation exist, if he is inclined to do so. The risk of fraud for us, as custodian, is enormous. Therefore, it is likely that we need to increase the level of

control we have over Madoff. There is no doubt that there will be resistance from Madoff, but frankly, if that is the case, it says a lot. History has shown us that Madoff tries to play us off against clients, but my proposal would be to engage clients first. The overall income for HSS is huge but the risks are much greater if we do nothing (...) ".

It emerges from all these exchanges between high-level HSSL employees, if not its parent company, for risks concerning HSSL, to which it is expressly referred, that even before the appointment of BMIS as sub-custodian of HERALD and throughout the duration of performance of the sub-custody agreement, at least until the arrest of Bernard L. Madoff, serious doubts were formulated within the group of which HSSL is part as regards its relationship with BMIS. These doubts concern, almost presciently, the risks incurred by HSSL as custodian bank and by some of its clients, including HERALD.

These concerns led to the ordering of two reports from KPMG, which confirmed the effective existence of risks for HSSL and its customers, because of BMIS. KPMG made recommendations to address this.

It is not apparent from any exhibit submitted that (i) these questions were shared with HERALD, (ii) measures were taken by HSSL to implement KPMG's recommendations.

The Court deduces that HSSL acted in violation of Article 15.3 of the "*custodian agreement*", namely that it was negligent not only during the selection but even more so during the supervision of the sub-custodian (Correspondents), whereby it is liable with regard to HERALD, following the "*liquidation, bankruptcy or insolvency*" of BMIS. The end of this clause, which namely will be taken into account, when establishing the custodian's negligence, the choice of correspondents on a market, the lack of experience or expertise of such Correspondents and the inadequacy and unreliability of the information (financial or other) concerning these Correspondents, does not in any way relativize the negligence of HSSL: on the contrary, BMIS was a long-established company, in the 1960s, with which HSSL had links prior to the establishment of HERALD on March 24, 2004. BMIS was therefore known on the New York, respectively American or even global market. A lack of experience or the quality of the information that could have been obtained are vain arguments. It would have been sufficient for HSSL to dig deeper into its doubts raised in the emails partially transcribed above, to reserve follow-up actions and especially to require evidence of the investments alleged by BMIS, in short to carry out regular checks by natural or legal persons outside the Madoff galaxy, in order to behave prudently.

As this was clearly not the case, HSSL is, by application of the contract between the parties, namely, in the wishes of clause 15.3 of the "*custodian agreement*", liable with regard to HERALD for the losses caused by BMIS.

3) Restitution

It was held above that HERALD's main claim should be considered founded in principle, by application of the provisions of the "*custodian agreement*". It is

therefore unnecessary to analyze the expansive arguments of the parties in connection with the application of various Luxembourg laws and/or European directives.

It is still true (i) that the Trustee for the liquidation of BMIS was appointed on December 15, 2008, (ii) that it sent a "*customer claim*" form to HSSL with the reference of "*account number 1FR109*", (iii) that HSSL forwarded this form to HERALD on February 3, 2009, with the information that it had to complete it and return it to the Trustee by March 4, 2009 at the latest, (iv) that the Trustee reminded HSSL by letter dated May 22, 2009, not having received any feedback from it, but that it had to be done by July 2, 2009, (v) that HSSL sent a reminder of its letter of February 3, 2009 on June 5, 2009, to HERALD, (vi) that HERALD finally completed this form, which it resent to the Trustee on June 22, 2009, with an addendum, (vii) that on December 8, 2009, the Trustee sent a "*Notice of Trustee's determination of claim*" to HERALD by which it rejected its "claim *No. 011307*", on the grounds that it did not have an account opened at BMIS and thus was not a customer of BMIS, according to the U.S. law in question for liquidation.

It is established by the exhibits at the disposal of the Court that on May 19, 2010, the Trustee sent a "*notice of Trustee's withdrawal of determination*" to HERALD in connection with complaints No. 011307 and No. 010817, which were duplicates, to inform it that the two complaints would be dealt with together and that complaint No. 011307 was rejected by mistake (HERALD exhibit "14").

It follows from HERALD Exhibit "179" that an agreement was signed on November 12, 2014 between the Trustee on the one hand and the liquidators of Primeo Fund and HERALD on the other hand. It is specified that HERALD had an account opened with BMIS, through its Luxembourg custodian, HSSL, designated under the number "1FR109" and that its complaint is awarded in the amount of US$ 1,639,896,943. In enforcement of this settlement, the initial sum of US$ 755,320,133 would be payable by the Trustee to HERALD. Exhibits 138 to 143 and HERALD exhibits 182 and 183 show that other payments have since taken place.

After examining these documents, it is wrong to claim, as HSSL does, by taking unjustified shortcuts, that this means that HERALD was a direct customer of BMIS, that there was a direct financial relationship between BMIS and HERALD or that the "*brokerage agreement*" was the basis.

In view of these undisputed elements, otherwise reported in evidence, the Court cannot, however, grant the claim filed by HERALD for the issuance of the Securities: it itself agreed to receive them in the form of their cash equivalent. In addition, it would be impossible to determine which Securities should currently be remitted after the occurrence of the payment of multiple sums of money. The Court notes that HERALD has never given it a statement in this sense, namely a mixed statement between Securities and their cash equivalent.

The Court notes that the parties still disagree on the impact of the settlement agreement with the Trustee:

* HSSL sees it as the recognition by BMIS, via the Trustee, of its role as custodian of the Securities claimed by HERALD. By accepting the payments, HERALD accepted that BMIS was the sole custodian of the Securities. HERALD would be "partially" unjustified in claiming restitution of these same Securities: this claim would be inadmissible for lack of interest in filing suit, otherwise unfounded.

The recoveries thus made would necessarily reduce, if not entirely satisfy, HERALD's claim. If HERALD were to obtain payment from both BMIS and HSSL, this would constitute unjust enrichment. As a result, HSSL reiterates its cross-appeal. In any event, HERALD's claims would be inadmissible if not unfounded for lack of purpose (claim for restitution) or lack of harm (claim for damages).

* HERALD contests these theories as a whole, which would disregard HSSL's status as a customer with regard to BMIS.

The Court notes upon reading the "*agreement*" signed on November 12, 2014 between the Trustee and HERALD's official liquidators, in particular, that it is well established that HERALD had an account opened with BMIS, through its Luxembourg-based deposit bank (HSSL), an account designated under the number "1FR109, which was opened in or around April 2004".

It was therefore not HERALD that had a direct link with BMIS. HSSL's submissions on this subject are thus not established. Judge Vaughn R. Walker interprets, if necessary, in his third report dated July 2, 2021, this "*SIPA Agreement*" (Securities Investor Protection Act of 1970 as amended) according to the provisions of American law relating to the definition of "*customer*": "the fact that a beneficial owner of Securities such as HERALD was authorized to recover on the basis of a SIPA complaint, does not, by definition, make this beneficial owner a "customer" for the purposes of Exchange Act Rule 15c3-3. Nor does the fact that HERALD obtained a SIPA complaint in its settlement with the Madoff Trustee, as beneficial owner of the account of which HSSL was the legal owner, cancel the contractual customer relationship between BMIS and HSSL" (HERALD Exhibit "179, point 6").

The Court deduces that in the face of HSSL's inaction, HERALD was obliged to complete the form, however sent by the Trustee to HSSL, instead of the latter: by doing so, HERALD suffered an initial failure, before the Trustee reversed his position of refusal: The Trustee did not, however, purely and simply accept said "*customer claim*" thereafter: it was necessary to go through a "*settlement agreement" to* allow HERALD to collect sums from the Trustee, sums that the latter was able to recover as part of his mission. In addition, this transaction was approved by the Grand Court of the Cayman Islands and the United States Bankruptcy Court, Southern District of New York. It follows that nothing allows for arguing a change in the contractual relations established before the liquidation of BMIS: HSSL opened the "1FR109" account with BMIS in its capacity as custodian of HERALD: in doing so, BMIS became the sub-custodian of HERALD. It was therefore BMIS that registered the Securities, that is, fungible assets, on its accounts, in its capacity as custodian of HSSL and sub-custodian of HERALD, before sending them to HSSL, as confirmed by the latter. HSSL therefore cannot

claim that no Security was delivered to it and that it did not deliver it to BMIS: the opposite is true.

As it has been decided above that HSSL acknowledged having in its accounts the Securities included in the statements sent by BMIS and that HSSL proved to be negligent, it is still incumbent upon the latter to pay the losses caused by BMIS. The signature with the Trustee of the aforementioned settlement agreement does not change anything.

HSSL is effectively a custodian pursuant to Article 1915 of the Civil Code.

This article states: "*custody, in general, is an act by which one receives another's property, at the expense of holding it and returning it in kind*". With regard, as in this case, to dematerialized assets, no longer movable assets deposited, but fungible assets, the custodian must be able to respond to a request from his client to transfer, by wire transfer from account to account, the securities registered in its account (Law of financial markets, Hubert De Vauplane and Jean-Pierre Bornet, éditions Litec, 1998, number 982).

By application of the contract between the parties (*custodian agreement)* and the Luxembourg Civil Code, it is incumbent upon HSSL to return, by equivalent, the Securities requested by HERALD. As the latter has already received, through transfers from the Trustee, part of the sums claimed by it, it can only claim the surplus from HSSL, namely the part not yet reimbursed by the Trustee. It cannot receive twice the price of the Securities claimed.
The Court recalls that many months have elapsed between HERALD's last summary submissions and the pronouncement of this judgment: HERALD should be asked not only to draw up an updated statement of the sums already received by it but also to draw up a new statement of its claim, which takes into account the latter statement and the price of interest claimed. The Court does not object to HERALD submitting to it two versions of said statement: one based on the principle that only the balance not yet received remains due by HSSL; the other, which is based on the scenario proposed by HERALD, to forward all the sums paid to it by the Trustee to HSSL, which will owe the entire sum claimed by HERALD, without any deduction, but with increased interest. The Court invites it to do so and, pursuant to Article 225 of the New Code of Civil Procedure, revokes the closing order.

In the meantime, it is appropriate to reserve the rights of the parties with regard to this component to this final clarification of statements as well as the costs. It appears, however, that it is superfluous to dwell on the questions raised by HSSL, concerning the unjust enrichment or the absence of purpose of HERALD's claim.

Since HERALD's main claim has been successful in principle, it is therefore not necessary to analyze the claim filed alternatively with regard to the restitution of the funds forwarded to BMIS, and all arguments of the parties in connection with this alternative claim.

B) The restitution of cash in the amount of US$ 521,918,349.08.

HERALD argues that the first instance judges wrongly stayed their ruling on the restitution of funds whose custody had not been delegated to a third party, in view of the principle of immediate restitution of the restitution obligation incumbent upon HSSL.

HSSL opposes this claim, which, in its view, is within the jurisdiction of the first instance, before which the parties were invited to put forth arguments on the term "*termination*" contained in the "*custodian agreement*". It disputes any recognition on its part of the amount claimed and further explains that following the closure of HERALD's accounts on its books, the funds were under sequestration, which it calls "retained monies": indeed, following the suspension of the VNI December 12, 2008, HERALD has not seen its redemption claims honored. This claim for restitution remains premature.

The Court recalls that under the terms of Article 1944 of the Civil Code: "*the deposit must be given to the depositor as soon as he claims it, even when the contract has set a fixed period for restitution; unless there is, in the possession of the custodian, an attachment or opposition to the restitution and displacement of the deposited property*".

It follows from this article, which applies to relations between the parties, on the basis of their "*custodian agreement*", that regardless of the "*termination*" provided for in its clause 19.2, HERALD could obtain the immediate restitution of its assets that are still with HSSL, if no "attachment or opposition" opposes it.

HSSL puts forward such opposition. Since HERALD did not take a position on this opposition, developed in HSSL's latest submissions, subsequent to HERALD's latest submissions, it should be invited to do so. At the same time, HSSL will be asked to specify by whom and on the basis of which proceeding this sequestration that it pleads has been imposed on it. The Court here again proceeds, by application of Article 225 of the New Code of Civil Procedure, with the revocation of the closing order.

In view of the foregoing, ancillary claims should be reserved.

FOR THESE REASONS

the Court of Appeal, ninth chamber, sitting on commercial matters, ruling in adversarial proceedings,

in view of the judgments rendered in the case on May 6, 2015 and November 11, 2015;

declares the main appeal admissible;

declares the cross-appeal inadmissible;

declares the main appeal founded;

reforming;

declares founded in principle the main claim of HERALD FUND SPS (in official liquidation), an “exempted segregated portofolio company” incorporated under the laws of the Cayman Islands with regard to the public limited company HSBC Securities Services SA seeking the equivalent of the Securities claimed in restitution;

declares founded in principle the main claim of HERALD FUND SPS (in official liquidation), an “exempted segregated portofolio company” incorporated under the laws of the Cayman Islands with regard to the public limited company HSBC Securities Services SA seeking the restitution of cash in the amount of US$ 521,918,349.08;

before any other progress in the case, revokes the closing order of September 2, 2022 to allow the parties to file the required exhibits and documents as well as to provide submissions as to the points raised in the reasoning for this judgment, namely;

- not only to draw up an updated statement of the sums already received by HERALD FUND SPS (in official liquidation) but also to draw up a new statement of its claim, which takes into account the latter statement and the interest rate claimed. The Court does not object to HERALD FUND SPS (in official liquidation) submitting to it two versions of said statement: one which starts from the principle that only the balance not yet received remains due by the public limited company HSBC Securities Services SA; the other based on the scenario proposed by HERALD FUND SPS (in official liquidation), to forward all sums paid by the Trustee to the public limited company HSBC Securities Services SA, which will owe the full sum claimed by HERALD FUND SPS (in official liquidation), without any deduction, but with increased interest:

- to specify the plaintiff and the proceeding at the origin of an existing sequestration (retained monies) on the accounts of HERALD FUND SPS (in official liquidation) with the public limited company HSBC Securities Services SA, in connection with clause “19.2” of the “*custodian agreement*”;

stays a ruling on the remaining matters and costs;

refers the case to the procedural magistrate.

This judgment was read at the aforementioned public hearing by [redacted]

[signature]
[signature]