

Standing to sue

Asset Purchase Agreement and lawsuit against the administrator

Par Lukaz Samb le 29 December 2021

In the judgement [4A_36/2021](#) intended for publication, the Federal Supreme Court considered the question of the creditor's standing to bring an action for liability ([art. 754 CO](#)). It considered, incidentally, the effects of the assignment of claims and the consequences thereof for the original holder of the claim.

An open-ended investment company, based in the Cayman Islands, holds several sub-funds. These sub-funds are autonomous, but do not have legal personality. One of these sub-funds participates in real estate projects in Africa (hereinafter : the sub-fund).

In 2011, the company entered into an *Administrative Services Agreement* (hereinafter : the agreement) with a Swiss management company. On the basis of this agreement, the management company was appointed administrator and entrusted with the management of the sub-fund.

In the same year, 25 units of the sub-fund were sold to a foreign African national bank for CHF 25,000,000. The foreign national bank carried out the transaction through its Swiss representative.

In October 2015, the Swiss representative requested that the sub-fund reimburse the shares to its client on the basis of an account statement showing a balance of CHF 26,727,154.58. The management company confirmed the reimbursement, but indicated that it would be delayed.

Several months later, the reimbursement had still not been made. The Swiss representative therefore obtained a power of attorney to consult the sub-fund's bank account. To his surprise, the bank informed him that approximately CHF 26,000,000 was missing from the account. The chairman of the board of directors of the management company (hereinafter : the director) is alleged to have misappropriated the funds invested in the sub-fund over a period of several years.

On 7 July 2016, the investment company entered into and signed an asset purchase agreement (*Asset Purchase Agreement* ; hereinafter : APA) with a subsidiary of the management company covering all units of the sub-fund as well as the contracts and rights arising therefrom. The APA is to be executed on 18 July 2016 and is said to be motivated by the fact that the management company fears that the investment company will disassociate itself from it.

On 7 November 2017, the investment company brought an action for liability against the director before the *Commercial Court* of the Canton of Zurich. In his response, the director alleged that the investment company no longer had standing to bring the action. In his view, it had assigned its rights, including the claim for liability against him, by entering into the APA. The investment company refutes this allegation. In its view, the APA only covers the contractual claims arising from the agreement. It also adds that the assignment would not be valid due to the subsidiary's failure to pay the price.

The *Commercial Court* rejected the administrator's objections regarding the investment company's standing to bring an action. In his opinion, the contracts and claims assigned in the APA were not sufficiently determinable. It could not therefore be concluded that all claims had been assigned. The *Commercial Court* then dismissed the investment company's case for lack of an allegation of damage, giving reasons for its appeal to the Federal Court.

In order to rule on the standing to bring an action, the Federal Court isolated the issue of the assignment of claims with a view to delimiting its scope. As a result, it suspended the question of payment of the price as a condition precedent to the execution of the APA.

The proceedings concern a claim for liability based on [art. 754 CO](#) for acts performed by the outgoing administrator outside the scope of the agreement. It is therefore a non-contractual claim.

According to the Federal Court, the transfer of the claim falls under the assignment of receivables ([art. 164 et seq. CO](#)). In order to be validly assigned, this claim must be sufficiently determinable ([art. 165 para. 1 CO](#)).

In the present case, the APA does not expressly mention the contracts and rights that are to be assigned. The main subject of the APA relates to the '*Purchased Assets*', namely the 25,000 units of the sub-fund.

Secondarily, point 2.2 of the APA includes all contracts and rights relating to the units, i.e. '*all contracts [...] and rights thereunder*'. The contractual claims arising from the agreement are thus part of the transfer. At this stage, our High Court does not yet recognise the inclusion of non-contractual claims. To do so, it refers back to paragraph 2.1, according to which '*all of Seller's right*', i.e. all the seller's rights in relation to the sub-fund, are also part of the transferred elements.

In this sense, the APA provides for a price corresponding to the real value of the sub-fund units. It must therefore be assumed that contractual and non-contractual claims are covered. If this were not the case, reservations would have been provided for in the contract with an imputation on the sale price.

Thus, without being expressly mentioned, the contractual claims against the management company and the non-contractual claims against the administrator are sufficiently determinable in the APA and validly transferred to the buyer.

Therefore, the Federal Court has decided to refer the case to the cantonal court so that it can rule on the validity of the suspensive condition of the APA and on the execution of the assignment.

This ruling by our High Court reminds us that the absence of a clear and precise mention of the claims assigned does not, at first glance, make it possible to call into question the validity of the assignment. It is therefore necessary to determine the extent of the claims assigned with regard to the will of the parties ([art. 18 para. 1 CO](#)).

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