REPORT FOR THE HEARING

in Case E-17/24

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in the case between

Söderberg & Partners AS

and

Gable Insurance AG in Konkurs,

concerning the interpretation of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

I INTRODUCTION

1. By letter of 11 July 2024, registered at the Court on 18 July 2024, the Princely Court of Appeal requested an Advisory Opinion in the case pending before it between Söderberg & Partners AS ("the applicant") and Gable Insurance AG in Konkurs ("the defendant").

2. The case before the referring court concerns an appeal brought by the defendant against the judgment of the Princely Court (*Fürstliches Landgericht*), by which the Princely Court declared that the applicant's claim constituted a privileged claim in the defendant's insolvency.

II LEGAL BACKGROUND

EEA law

3. Article 36 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are*

established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

2. Annexes IX to XI contain specific provisions on the freedom to provide services.

4. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1) ("the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45) and is referred to at point 1 of Annex IX (Financial services) to the EEA Agreement. Constitutional requirements were indicated and fulfilled by Norway on 23 October 2012, and the decision entered into force on 1 December 2012.

5. Recitals 16, 17, 105, 117, 125 and 127 of the Directive read:

(16) The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries. The term beneficiary is intended to cover any natural or legal person who is entitled to a right under an insurance contract. Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective.

(17) The solvency regime laid down in this Directive is expected to result in even better protection for policy holders. It will require Member States to provide supervisory authorities with the resources to fulfil their obligations as set out in this Directive. This encompasses all necessary capacities, including financial and human resources.

(105) All policy holders and beneficiaries should receive equal treatment regardless of their nationality or place of residence. For this purpose, each Member State should ensure that all measures taken by a supervisory authority on the basis of that supervisory authority's national mandate are not regarded as contrary to the interests of that Member State or of policy holders and beneficiaries in that Member State. In all situations of settling of claims and winding-up, assets should be distributed on an equitable basis to all relevant policy holders, regardless of their nationality or place of residence.

(117) Since national legislation concerning reorganisation measures and winding-up proceedings is not harmonised, it is appropriate, in the framework of the internal market, to ensure the mutual recognition of reorganisation measures and winding-up legislation of the Member States concerning insurance undertakings, as well as the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors.

(125) All the conditions for the opening, conduct and closure of winding-up proceedings should be governed by the law of the home Member State.

(127) It is of utmost importance that insured persons, policy holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings, it being understood that such protection does not include claims which arise not from obligations under insurance contracts or insurance operations but from civil liability caused by an agent in negotiations for which, according to the law applicable to the insurance contract or operation, the agent is not responsible under such insurance contract or operation. In order to achieve that objective, Member States should be provided with a choice between equivalent methods to ensure special treatment for insurance creditors, none of those methods impeding a Member State from establishing a ranking between different categories of insurance claim. Furthermore, an appropriate balance should be ensured between the protection of insurance creditors and other privileged creditors protected under the legislation of the Member State concerned.

6. Article 1 of the Directive, entitled "Subject matter", reads:

This Directive lays down rules concerning the following:

(1) the taking-up and pursuit, within the Community, of the self-employed activities of direct insurance and reinsurance;

(2) the supervision of insurance and reinsurance groups;

(3) the reorganisation and winding-up of direct insurance undertakings.

7. Article 27 of the Directive, entitled "Main objective of supervision, reads:

Member States shall ensure that the supervisory authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of supervision, namely the protection of policy holders and beneficiaries.

8. Article 76(1) of the Directive, entitled "General provisions", reads:

Member States shall ensure that insurance and reinsurance undertakings establish technical provisions with respect to all of their insurance and reinsurance obligations towards policy holders and beneficiaries of insurance or reinsurance contracts.

9. Article 267 of the Directive, entitled "Scope of this Title", reads:

This Title shall apply to reorganisation measures and winding-up proceedings concerning the following:

(a) insurance undertakings;

(b) branches situated in the territory of the Community of third-country insurance undertakings.

10. Article 268(1) of the Directive, entitled "Definitions", reads, in extract:

1. For the purpose of this Title the following definitions shall apply:

...

(d) 'winding-up proceedings' means collective proceedings involving the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the competent authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;

...

(g) 'insurance claim' means an amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 2(3)(b) and (c) in direct insurance business, including an amount set aside for those persons, when some elements of the debt are not yet known.

11. Article 273 of the Directive, entitled "Opening of winding-up proceedings information to the supervisory authorities", reads:

1. Only the competent authorities of the home Member State shall be entitled to take a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States. This decision may be taken in the absence, or following the adoption, of reorganisation measures.

2. A decision concerning the opening of winding-up proceedings of an insurance undertaking, including its branches in other Member States, adopted in accordance with the legislation of the home Member State shall be recognised without further formality throughout the Community and shall be effective there as soon as the decision is effective in the Member State in which the proceedings are opened.

3. The competent authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of that Member State of the decision to open winding-up proceedings, where possible before the proceedings are opened and failing that immediately thereafter.

The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to open winding-up proceedings including the possible practical effects of such proceedings.

12. Article 274 of the Directive, entitled "Applicable law", reads:

1. The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects shall be governed by the law applicable in the home Member State unless otherwise provided in Articles 285 to 292.

2. The law of the home Member State shall determine at least the following:

(a) the assets which form part of the estate and the treatment of assets acquired by, or devolving to, the insurance undertaking after the opening of the winding-up proceedings;

(b) the respective powers of the insurance undertaking and the liquidator;

(c) the conditions under which set-off may be invoked;

(d) the effects of the winding-up proceedings on current contracts to which the insurance undertaking is party;

(e) the effects of the winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending referred to in Article 292;

(f) the claims which are to be lodged against the estate of the insurance undertaking and the treatment of claims arising after the opening of winding-up proceedings;

(g) the rules governing the lodging, verification and admission of claims;

(h) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims, and the rights of creditors who have obtained partial satisfaction after the opening of winding-up proceedings by virtue of a right in rem or through a set-off;

(i) the conditions for and the effects of closure of winding-up proceedings, in particular by composition;

(j) rights of the creditors after the closure of winding-up proceedings;

(k) the party who is to bear the cost and expenses incurred in the winding-up proceedings; and

(l) the rules relating to the nullity, voidability or unenforceability of legal acts detrimental to all the creditors.

13. Article 275 of the Directive, entitled "Treatment of insurance claims", reads:

1. Member States shall ensure that insurance claims take precedence over other claims against the insurance undertaking in one or both of the following ways:

(a) with regard to assets representing the technical provisions, insurance claims shall take absolute precedence over any other claim on the insurance undertaking; or

(b) with regard to the whole of the assets of the insurance undertaking, insurance claims shall take precedence over any other claim on the insurance undertaking with the only possible exception of the following:

(i) claims by employees arising from employment contracts and employment relationships;

(ii) claims by public bodies on taxes;

(iii) claims by social security systems;

(iv) claims on assets subject to rights in rem.

2. Without prejudice to paragraph 1, Member States may provide that the whole or part of the expenses arising from the winding-up procedure, as determined by their national law, shall take precedence over insurance claims.

3. Member States which have chosen the option provided for in paragraph 1(a) shall require insurance undertakings to establish and keep up to date a special register in accordance with Article 276.

14. Article 277 of the Directive, entitled "Subrogation to a guarantee scheme", reads:

The home Member State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that Member State, claims by that scheme shall not benefit from the provisions of Article 275(1).

National law[1]

15. According to the request, the Directive was transposed into national law in the Principality of Liechtenstein by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz*) (LGBl. 2015 No 231) ("the Insurance Supervision Act").

16. Article 10 of the Insurance Supervision Act, entitled "Definitions and terminology", reads, in extract:

> *1) For the purposes of this Act:*
>
> ...
>
> *52. "insurance claim" means any amount which is owed by a direct insurance undertaking to policy holders, insured persons, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation to which this Act applies in direct insurance business. This includes amounts set aside for those persons, when some elements of the debt are not yet known, as well as premiums which an insurance undertaking has to repay because a legal transaction was not concluded or was cancelled under the law applicable to it before the opening of bankruptcy or winding-up proceedings;*

17. Article 161 of the Insurance Supervision Act, entitled "Satisfaction of insurance claims", reads:

> *1) The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Code to satisfy insurance claims. The court shall order that the register of assets allocated to the separate estate be established immediately and submitted to the FMA. The FMA shall determine the separate estate for the time when bankruptcy proceedings are opened. Reflows and income from the assets dedicated to the separate estate and premiums for the insurance contracts included in the separate estate that are received after bankruptcy proceedings have been opened shall fall into this separate estate.*
>
> *2) The list submitted pursuant to paragraph 1 may no longer be changed once bankruptcy proceedings have been opened. The insolvency estate administrator may make technical corrections to the listed asset values with the approval of the Court of Justice.*
>
> *3) If the proceeds from the realisation of the assets are lower than their valuation in the list submitted pursuant to paragraph 1, then the insolvency estate*

[1] All translations of national law are unofficial.

administrator must communicate this to the Court of Justice and justify the variation.

4) Repealed

5) The insurance claims to be found in the account books of the insurance undertaking shall be deemed lodged. The right of the creditor to lodge these claims as well shall not be affected. The lodgement of claims need not include an indication of ranking.

18. Article 161a of the Insurance Supervision Act, entitled "Hierarchy of claims", reads:

1) Insurance claims shall take precedence over other bankruptcy claims. This shall be without prejudice to Article 161(1).

2) Claims to insurance compensation take precedence over all other insurance claims. Within the same rank, the claims shall be satisfied in proportion to their amounts.

3) In derogation from Article 62(1) of the Insolvency Code, the lodgement of claims need not include an indication of ranking.

19. According to the request, certain provisions of the Act of 17 July 1973 on Bankruptcy Proceedings (*Gesetz vom 17.07.1973 über das Konkursverfahren (Konkursordnung)*) (applicable in the version before the amendment effected by LGBl. 2020 No 365) ("the Bankruptcy Code") are also of significance.

20. Article 45 of the Bankruptcy Code, entitled "Right to separation", reads:

1) Creditors entitled to separate satisfaction from specific assets of the debtor (creditors entitled to separate satisfaction) shall exclude, to the extent of their claims, the payment of insolvency creditors from these assets (special class of assets).

2) What remains of the special class of assets following the satisfaction of the creditors entitled to separate satisfaction shall accrue to the common insolvency estate. If the claim at issue is secured by several assets, then the proceeds therefrom shall be used in proportion to their amounts to cover the claim.

3) Creditors entitled to separate satisfaction who also have a personal right against the debtor may also assert their claim as an insolvency creditor.

21. Article 47 of the Bankruptcy Code, entitled "Hierarchy of claims", reads:

To the extent that the insolvency assets are not used to satisfy the claims of the insolvency estate and the rights of the creditors entitled to separate satisfaction

(Article 45), they constitute the common insolvency estate from which the insolvency claims within the same category shall be satisfied in proportion to their amounts.

22. Articles 48 to 51 of the Bankruptcy Code then specify the claims which belong to each category.

23. Finally, the referring court notes that also the Civil Code (*Allgemeines bürgerliches Gesetzbuch*) of 1 June 1811 (ABGB; LR No 210.0) is relevant.

24. Section 1392 of the Civil Code, entitled "Cession", reads:

If a claim is transferred from one person to another and the latter accepts this, then the transformation of the right results with the entry of a new creditor. Such an action shall be known as assignment (cession) and may be effected with or without remuneration.

25. Section 1393 of the Civil Code, entitled "Subject-matter of the cession", reads:

All alienable rights shall constitute the subject-matter of an assignment. Rights adhering to the person, consequently extinguished with the person, may not be assigned. Debt certificates issued to the bearer are assigned simply by way of the transfer and do not require in addition to possession any other proof of the assignment.

26. Section 1394 of the Civil Code, entitled "Effect", reads:

The rights of the transferee shall be precisely the same as the rights of the transferor with respect to the ceded claim.

27. Section 1395 of the Civil Code reads:

As a result of the contract of assignment a new obligation shall arise only between the transferor (cedens) and the transferee of the claim (cessionarius) and not between the latter and the debtor of the claim thereby transferred (cessus). Therefore, as long as he has no knowledge of the transferee, the debtor shall be authorised to pay the first creditor or to settle the matter in another manner with him.

III FACTS AND PROCEDURE

28. The applicant is an insurance intermediary and a joint-stock company under Norwegian law with a registered office in Lysaker, Norway.

29. The defendant is a joint-stock company under Liechtenstein law with a registered office in Vaduz, Liechtenstein. It had been issued with an authorisation as a direct

insurance undertaking by the competent Liechtenstein supervisory authority, the Financial Market Authority (*Finanzmarktaufsicht*) (FMA).

30. On 17 November 2016, by order of the Princely Court, sitting as an insolvency court, insolvency proceedings were opened concerning the defendant. Legal disputes in connection with the defendant led to references from Liechtenstein courts to the Court seeking advisory opinions pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") which were dealt with in Case E-3/19 *Gable Insurance AG in Konkurs* and Case E-5/20 *SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics* v *Finanzmarktaufsicht*.

31. An insurance contract relationship existed between policy holders and the defendant. Subsequently, by way of legal transaction, policy holders assigned to the applicant their claims against the defendant arising from the insurance contracts mentioned, also including the claims for the repayment of premiums for the remaining period of insurance. The applicant made payments to the defendant's policy holders on the basis of the policies mentioned amounting in total to NOK 623 600.00 which corresponds to the amount claimed of CHF 73 267.00.

32. The applicant lodged this claim in the insolvency proceedings concerning the defendant before the Princely Court as an insurance claim, to which precedence was to be given, and requested that it be entered as a privileged claim. The defendant (the insolvency estate administrator) contested the claim in full, in terms of the amount, and also in relation to the category claimed "1/Right to separation".

33. Thereupon, the applicant brought an action against the defendant before the Princely Court, seeking a declaration that, in the defendant's insolvency, the applicant is entitled to an insolvency claim amounting to NOK 623 600.00 (= CHF 73 267.00) and, in that regard, that the claim constitutes a claim in the first category, that is to say, a privileged insurance claim within the meaning of Article 161 of the Insurance Supervision Act.

34. This was denied by the defendant and dismissal of the action was requested.

35. By judgment of the Princely Court of 14 March 2024, it was declared that the applicant's claim in the present case, the quantum of which remains to be determined, constitutes an insurance claim under Article 161 of the Insurance Supervision Act (privileged claim) in the defendant's insolvency.

36. The defendant brought an appeal against that judgment requesting that the judgment contested be amended such as to declare that the applicant's claim in the present case does not constitute an insurance claim in the defendant's insolvency.

37. According to the request, the rights of the transferee are precisely the same as the rights of the transferor with respect to ceded claims under Liechtenstein law. The referring court observes, however, that since the applicant is neither an insured person

nor a policy holder, beneficiary or an injured party having a direct right of action against the insurance undertaking, it is possible that the claim does not constitute an "insurance claim" within the meaning of the Directive.

38. Against this background, the Princely Court of Appeal decided to stay the proceedings and referred the following question to the Court:

> **Is an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335, p. 1, incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, LGBl 2012/384, to be given precedence in accordance with Article 275(1) of that directive even where the claim was assigned to a third party by way of a legal transaction and, under national law, assignment of the claim entails no change in the content of the claim?**

IV WRITTEN OBSERVATIONS

39. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- Söderberg & Partners AS, represented by Paragraph 7 Bruckschweiger Gstoehl König Mumelter Rebholz Wolff Zechberger Rechtsanwälte, advocates;

- Gable Insurance AG in Konkurs, represented by Batliner Wanger Batliner Rechtsanwälte AG, insolvency estate administrator;

- the Liechtenstein Government, represented by Dr Andrea Entner-Koch, Romina Schobel and Dr Claudia Bösch, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Claire Simpson, Daniel Vasbeck and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Gaëtane Goddin, Bruno Stromsky and Nicola Yerrell, acting as Agents.

V PROPOSED ANSWERS SUBMITTED

Söderberg & Partners AS

40. The applicant submits that the question referred should be answered as follows:

> *An insurance claim within the meaning of Art. 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) is to be given precedence in accordance with Article 275(1) of that*

Directive even where the claim was assigned to a third party by way of a legal transaction and, under national law, assignment of the claim entails no change in the content of the claim.

Gable Insurance AG in Konkurs

41. The defendant submits that the question referred should be answered as follows:

Article 275(1) in conjunction with Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) must be interpreted to the effect that a claim originally qualifying as an insurance claim within the meaning of Article 268(1)(g) is no longer to be given precedence in accordance with Article 275(1) if it is assigned to an economic operator.

Liechtenstein Government

42. The Liechtenstein Government submits that the question referred should be answered as follows:

An insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L 335, p. 1, incorporated in the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, LGBl 2012/384, is not to be given precedence in accordance with Article 275(1) of that directive where the claim was assigned to a third party by way of a legal transaction even though, under national law, assignment of the claim entails no change in the content of the claim.

ESA

43. ESA submits that the question referred should be answered as follows:

An insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) is to be given precedence in accordance with Article 275(1) of that directive, in circumstances where the claim was assigned to a third party by way of a legal transaction. The fact that, under national law, assignment of the claim entails no change in the content of the claim, is not determinative in this regard.

European Commission

44. The Commission submits that the question referred should be answered as follows:

In the case of a legal assignment, under national law, of an insurance claim within the meaning of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Articles 268(1)(g), 275(1) and 277 of that Directive should be interpreted as precluding the removal of the privileged status of that claim, unless the circumstances set out in Article 277 apply.

Michael Reiertsen

Judge-Rapporteur