PRINCIPALITY OF LIECHTENSTEIN
FÜRSTLICHES OBERGERICHT
(PRINCELY COURT OF APPEAL)

Please include the case number in all communications
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Document number 39

ORDER

The First Chamber of the Fürstliches Obergericht (Princely Court of Appeal), composed of the Presiding Judge Wilhelm Ungerank and Associate Judge Konrad Lanser and Deputy Senior Judge Marcello Scarnato as further members of the Chamber, in the

Case

applicant:	Dommages Aréas, 47–49 rue de Miromesnil, FR-75380 Paris Cedex 08 represented by Bruckschweiger Gstoehl König Mumelter Rebholz Wolff Zechberger Rechtsanwälte, Landstrasse 60, 9490 Vaduz
defendant:	Gable Insurance AG in Konkurs, Pflugstrasse 20, 9490 Vaduz represented by Batliner Wanger Batliner Rechtsanwälte AG, Pflugstrasse 20, 9490 Vaduz
concerning:	a declaration

in the applicant's appeal of 10 September 2024 (document number 18) against the judgment of the Princely Court of 7 August 2024 (document number 17) following the hearing of the defendant (document number 31) in closed session on **30 April 2025**, in the presence of court clerk Eva Marte, has

ordered:

The appeal proceedings are stayed and, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), the following questions are referred to the EFTA Court in Luxembourg for an Advisory Opinion:

1. **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, still to be given precedence in accordance with Article 275(1) of that directive even where the claim at issue is the claim of an injured party having a direct right of action against the insurance undertaking which, by way of statutory subrogation, has been subrogated to a fourth party?**

2. **If the answer to the Question 1 is in the affirmative:**

   Must legal costs incurred in the assertion of an insurance claim be regarded as an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC and thus also be given precedence in accordance with Article 275(1) of that directive?

Grounds

1. Facts:

The applicant is an insurance company established under French law with a registered office in France.

The defendant is a joint-stock company under Liechtenstein law with a registered office in Vaduz, Liechtenstein, registered in the Commercial Register of the Principality of Liechtenstein under register number FL-0002.161.375-6, which had been issued with an authorisation as a direct insurance undertaking by the competent Liechtenstein supervisory authority, the Financial Market Authority (Finanzmarktaufsicht) (FMA). By order of the Princely Court, sitting as an insolvency court, of 17 November 2016, 05 KO.2016.672, insolvency proceedings were opened in relation to the defendant and Batliner Wanger Batliner Rechtsanwälte AG, Vaduz, were appointed as insolvency administrator. Legal disputes in connection with the defendant led to references to the EFTA Court for advisory opinions from Liechtenstein courts pursuant to Article 34 SCA which were dealt with in Case E-3/19 *Gable Insurance AG in Konkurs* ("Gable I"), Case E-5/20 *SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics* v *Finanzmarktaufsicht* ("Gable II") and Case E-17/24 *Söderberg & Partners AS* v *Gable Insurance in Konkurs* ("Gable III").

The defendant (Gable) was the liability insurer of the firm NET ETANCHEITE with a registered office in Montpellier, France.

NET ETANCHEITE carried out works on the building of the Direction Départementale d'Incendie et de Secours du Département Hérault in Vailhauquès, France. In the course of those works, on 8 August 2011, NET ETANCHEITE caused a fire to the building as a result of which the building of the Service Départementale d'Incendie et de Secours (SDIS) was damaged.

The SDIS building concerned was covered by construction insurance taken out with the applicant (Dommages Aréas).

As construction insurer, the applicant paid EUR 934 170.46 to SDIS.

Subsequently, the applicant brought an action before Montpellier Administrative Court against NET ETANCHEITE. By judgment of 8 February 2018, NET ETANCHEITE was ordered to pay to SDIS EUR 934 170.46, which is the amount of the damage caused by the fire.

However, the applicant did not receive any payment from NET ETANCHEITE as this firm was liquidated without assets.

Thereupon, the applicant brought legal proceedings against the defendant (Gable) in France. By judgment of 12 September 2019, the Tribunal de Grande Instance de Paris held that, as a result of the damage event of 8 August 2011, the applicant has a claim against the defendant for EUR 562 682.40 and, in addition, is entitled to costs of EUR 3 000.

The applicant lodged these claims in the insolvency proceedings relating to the defendant before the Princely Court, case 05 KO.2016.672, as insurance claims, to which precedence was to be given, and requested that they be entered as privileged claims.

The defendant (the insolvency estate administrator) denied that the claim for EUR 562 682.40 constituted an insurance claim (privileged claim) so that it was only recognised in the fourth category (and thus not privileged). The claim for EUR 3 000 was contested both in substance and in terms of the amount.

Thereupon the applicant brought an action before the Princely Court (Fürstliches Landgericht) in Vaduz against the defendant, requesting a declaration that the claims lodged for EUR 562 682.40 and EUR 3 000 constitute privileged claims (insurance claims).

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

By judgment of the Princely Court of 7 August 2024, the action was dismissed.

The applicant brought an appeal against that judgment, requesting that the judgment contested be amended such as to declare that the claims lodged constitute insurance claims and thus privileged claims.

In its reply in the appeal, the defendant opposes the appeal and requests that it should not be allowed.

In the appeal, the question disputed as a matter of law is whether the applicant's claims constitute insurance claims or not.

2. As the relevant EEA law and national (Liechtenstein) law provisions applicable in this case correspond precisely with those underlying Case E-17/24 *Söderberg*, reference is made in that regard to the EFTA Court judgment of 5 February 2025.

Relevant French law:

Pursuant to Article L121-12 of the French Insurance Code, an insurer who has paid insurance compensation shall be subrogated, within the amount of this compensation, to the rights and actions of the insured against any third parties which, by their conduct, have caused the damage which has given rise to the insurer's liability. Pursuant to Article L124-3 of the French Insurance Code, an injured party shall have a direct right of action against the insurer who guarantees the civil liability of the person responsible.

The provisions of French law are contained in the judgment of the Tribunal de Grande Instance de Paris, 5ème chambre, 2ème section, N° RG: 15/13071 of 12 September 2019 and not in dispute in the appeal.

3. By judgment of the EFTA Court of 5 February 2025, Case E-17/24, *Söderberg*, it was clarified that an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC is to be given precedence in accordance with Article 275(1) of that directive, even where the claim has been assigned to a third party by way of a legal transaction.

At issue in the present case is not an assignment by way of a legal transaction but a statutory subrogation on the basis of Article L121-12 of

the French Insurance Code. As the applicant as insurer paid the insurance compensation to SDIS, it was subrogated, within the amount of this compensation, to the rights and actions of the insured (SDIS) against the third party (here NET ETANCHEITE) which, by its conduct, caused the damage which gave rise to the insurer's liability. As, pursuant to Article L124-3 of the French Insurance Code, SDIS as injured party has a direct right of action against the insurer (Gable) which guarantees the civil liability of the person responsible (NET ETANCHEITE), and the applicant in the present case (Dommages Aréas), by reason of the aforementioned statutory subrogation (Article L121-12 of the French Insurance Code), is subrogated to the rights of SDIS, the claim of EUR 562 682.40 asserted by the applicant (Dommages Aréas) would constitute an insurance claim if, as a result of the statutory subrogation, nothing has changed with regard to its legal nature as an insurance claim. In that case, the applicant (Dommages Aréas) would have been subrogated to the position of the injured party (SDIS), which has a direct right of action (Article L124-3 of the French Insurance Code) because the amount of EUR 562 682.40 is owed on the basis of an insurance contract (the insurance contract between NET ETANCHEITE and Gable).

For this reason, an answer to the first question is requested.

For the sake of completeness, it must be mentioned that the defendant relies on the argument that, in what the defendant describes as an "almost identical situation, namely, in *Gable II*", the EFTA Court held that the claim does not constitute an insurance claim.

From the perspective of the referring court, it must be observed that, in that case (E-5/20), it was merely stated by the referring court (Princely Supreme Court (Fürstlicher Oberster Gerichtshof)) that the insurer there (a construction insurer) had "recourse" within the limits of the compensation paid (paragraphs 21 and 23 of the EFTA Court judgment of 25 February 2021, E-5/20). That this is a case of a statutory subrogation was, at least according to that judgment, not stated by the referring court (Princely Supreme Court). To that extent, in the assessment of the referring court in the present case, the factual situation here has not already been dealt with in Case E-5/20.

4. If the EFTA Court answers the first question in the affirmative, the question arises whether the procedural costs of EUR 3 000 awarded to the

applicant (Dommages Aréas) by the mentioned judgment of the Tribunal de Grande Instance de Paris of 12 September 2019 also constitute an insurance claim and thus take precedence. Although the awarded claim to procedural costs is not owed "[arising] from an insurance contract", the view is taken by certain writers in the legal literature that legal costs also constitute insurance claims as these are recognised consequential costs resulting from compensation by an insurance undertaking not effected in due time or in a due manner, and the satisfaction of insurance claims due is the primary objective of insurance supervision (S. Korinek and M. Reiner in S. Korinek, G. Saria and S. Saria (eds), *Kommentar zum Versicherungsaufsichtsgesetz*, § 308, paragraph 11, and S. Korinek in W. Buchegger (ed.), *Österreichisches Insolvenzrecht*, First Additional Volume, VAG § 88, paragraph 5; a different view is offered by U. Lipowsky in E. Prölss, *Versicherungsaufsichtsgesetz*, 12th edn, § 77a, paragraph 4). Thus it is necessary that the EFTA Court also answer the second question.

[**5.** Only relevant for the national proceedings

Any reference in the questions to the wording contained in Article 10(1)(52) of the Insurance Supervision Act (Versicherungsaufsichtsgesetz; VersAG) ("...or from any operation"), as requested by the applicant, is pointless as this wording is not included in the corresponding Directive and the EFTA Court only interprets EEA law. Also, the suggestion of the defendant to include specifically in the questions a request to the EFTA Court to examine the judgment in Case E-5/20 had to be declined, as in a reference for an advisory opinion pursuant to Article 34 SCA only an interpretation of EEA law can be requested and nothing else.

Until the Advisory Opinion of the EFTA Court is received, pursuant to Article 62(1) of the Organisation of the Courts Act (Gerichtsorganisationsgesetz; GOG), the national proceedings must be stayed.]

Presiding Judge
Wilhelm Ungerank

The accuracy of this copy is confirmed by

Eva Marte