Registered at the EFTA Court under N°E-17/24-07 on 8 day of October 2024.

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E17/24

Applicant in the main proceedings:	**Söderberg & Partners** Lysakertorg 15 1326 Lysaker represented by: (**Power of attorney granted (Art 8 Abs 2 RAG) as in initial proceedings**)
Defendant in the main proceedings:	**Gable Insurance AG in liquidation** (FL-0002.161.375-6) Alvierweg 2 9490 Vaduz represented by the Trustee in Bankruptcy: **Batliner Wanger Batliner Rechtsanwälte AG** Am Schrägen Weg 2 9490 Vaduz
concerning:	Determination of an insolvency claim (value of the action for costs purposes: CHF 73,267.00)
Referring Court:	Fürstliches Obergericht Liechtenstein (Liechtenstein Princely Court of Appeal)

WRITTEN OBSERVATIONS

6fold (original hard copies)

Table of contents

The main proceedings 3

A. Parties 3

B. Lodgement and contestation of claims 4

Arguments relating to the questions referred 8

C. Qualification of the claims which are the subject matter of the present dispute 8

a. The claims are insurance claims and thus privileged within the meaning of Art. 161 et seq. of the Insurance Supervision Act (VersAG) 9

b. Assignment 12

c. EFTA Court 5/20 15

d. No general application to all "assignments" 19

e. Distinction 21

Conclusion 25

By order of 11 July 2024, in the proceedings of the Princely Courts under case number 17 CG.2023.219, the Princely Court of Appeal, Liechtenstein, referred to the EFTA Court the following question pursuant to Art. 34 of the *Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice* (SCA), Liechtenstein law gazette 1995/72, with the request to issue an advisory opinion:

> *"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?"*

The background to the referred question is the legal dispute below / the legal and factual situation in the Liechtenstein main proceedings 17 CG.2023.219 below:

THE MAIN PROCEEDINGS

A. Parties

1 The Applicant **Söderberg & Partners** ("**S&P**") is an insurance intermediary based in Oslo, Norway. Up until the end of 2018, the Applicant's corporate name was Norwegian Brokers SA ("**NBAS**"). NBAS, today S&P, maintained business relationships with **Gable Insurance AG in liquidation** ("**Gable**") and, with regard to various insurance products of Gable Insurance AG, provided intermediary services to its customers (those of S&P), it being understood that the insurance contracts were entered into between the Applicant's customers

on the one hand and between Gable Insurance AG in liquidation as the insurer on the other hand.

2 Insolvency proceedings were opened concerning the assets of Gable Insurance AG in liquidation on 17 November 2016 (with legal effects from 19 November 2016).

3 For the customers whose broker S&P was, S&P was immediately looking for alternative and equivalent insurance solutions for the Gable products in default, and S&P was looking for such solutions in part as early as prior to the opening of the insolvency proceedings.

S&P organised corresponding insurance products for its customers in replacement of the policies in default at Gable, and the Applicant assumed the premiums incurred in this regard. In addition, the Applicant also made compensation payments and other payments to its customers which payments were owed by the bankrupt company under the insurance contracts entered into between the bankrupt company and its customers.

In return for such performance (payments), the insured persons (customers of Gable) assigned their claims against Gable under the relevant insurance contracts with Gable (claims payments and premium reimbursements) to S&P.

B. Lodgement and contestation of claims

4 The Applicant lodged its claims in the total amount of **NOK 53,401,333** (as of 8 October 2024, this amounts to **CHF 4'277'356** or **EUR 4'562'839**) with the Trustee in Bankruptcy in the Defendant's insolvency proceedings (05 KO 2016.672). During a review hearing held on 26 May 2023, the Trustee in Bankruptcy initially included only a partial claim of the Applicant in the amount of NOK 623,600.00 in the review.

This partial claim was contested by the Trustee in Bankruptcy not only with regard to the amount asserted but also, in particular, with regard to the category claimed "1" / right to separation or the claimed status as a privileged insurance claim within the meaning of Art. 161 of the Insurance Supervision Act (VersAG). The claim (the amount of which is contested as above) was "admitted" only as a claim of the category 4.

Subsequently, the Applicant brought what is called an "order action" pursuant to Art. 67 of the Insolvency Act (KO) by which the request is made to declare that the claim in question exists rightfully and that it must in particular be admitted as a privileged claim within the meaning of Art. 161 of the Insurance Supervision Act (VersAG).

5 The Court of first instance granted the order action and held that amounts asserted by the Applicant were privileged claims within the meaning of Art. 161 of the Insurance Supervision Act (VersAG):

> *"The Applicant accepted the assignment of the claims against the Defendant under the insurance contracts. Pursuant to Art. 168(2)(g) of the Insurance Supervision Act (VersAG), the rules governing the lodging, verification and admission of claims shall be determined by the law of the State in which proceedings are opened, and thus by national law, it being understood that account must be taken of the related Directive and the European case-law in this regard. With regard to the assignment, this means that the case-law and the literature regarding §§ 1392 et seqq. of the General Civil Code (ABGB) are of primary relevance. Pursuant to § 1394 et seq. of the General Civil Code (ABGB), with regard to the assigned claim, the rights of the assignee and the rights of the assignor are exactly the same. The assignment contract thus creates a new liability between the assignor (cedens) and the assignee (cessionarius) of the claim, but not between the latter and the debtor (cessus) of the claim so assigned. The content of the assigned claim is determined on the basis of the content of*

the claim to which the assignor is entitled against the debtor. The assignment may not, however, result in any deterioration of the position of the debtor (cessus) (see, in detail, in this regard Ertl *in* Rummel, *ABGB[3] § 1394 marginal note 1 et seqq).*

On this basis, the assignment has not changed anything with regard to the content of the claim against the Defendant, and all rights of the assignor have been subrogated to the Applicant. Therefore, the Applicant may assert the same claims against the Defendant which the policyholders themselves could have asserted against the Defendant prior to the assignment. The fact that, due to the Defendant's insolvency, it is questionable as to whether and, in general, to what extent payments can still be made, is not of any further relevance, given that the Applicant had the claims assigned to it after the opening of the insolvency proceedings and given that the Applicant thus accepted the risk of a satisfaction which may not be full. The Defendant as an insurance undertaking does not suffer any detriment in any case, because the assignment does not change the extent of the obligation to perform. However, it can be derived neither from the Directive mentioned above nor from any national provisions that any such assignment is not permissible and that it would annihilate the privilege that a policyholder with an insurance claim has in the insolvency proceedings, i.e. that only the original policyholder in a highly personal capacity can enjoy this privilege and that any legal successor is excluded therefrom. Any such strict interpretation which entails the loss of benefits should at least to some extent have been written down, if it had been intended in this manner. Nor does the referenced decision of the EFTA Court (E 5/20) offer any basis for the assumption made by the Defendant with regard to the loss of the privilege, for, in that decision, the EFTA Court was indeed faced with a different set of facts. The conclusions drawn by the EFTA Court are thus not readily applicable to the facts in the present matter. The applicant parties there were obliged to provide benefits to

injured customers (constructors) and the damage suffered by them was caused by enterprises which were policyholders of the defendant, and the parties there wanted to assert these claims against the defendant. The applicants there thus derived their claims against the defendant, quite in contrast to the present matter, not directly from a policyholder of the defendant.

*A look to the neighbouring countries additionally shows that the circle of beneficiaries of an insurance claim is to be defined broadly. Pursuant to commentary regarding § 308 of the Austrian Insurance Supervision Act (öVAG), the legal successors of the holders of the insurance claims (e.g. as a result of inheritance, assignment, merger) are also covered creditors, provided that the legal predecessor had a direct right of action against the insurance undertaking. In this regard, reference is made to Art. 277 of the Directive (*Korinek/Reiner *in* Korinek/G./Saria/S.Saria, *VAG § 308 marginal note). This interpretation is consistent and plausible, which is why, with regard to the provisions of European law, it cannot be assumed that a voluntary assignment of an insurance claim by way of a legal transaction annihilates a privilege in insolvency proceedings. Nor are there any objective reasons for any such distinction, all the more so because an assignment does not deteriorate the position for the insurance undertaking. In this context, it cannot be of any relevance to whom the insurance undertaking ultimately has to pay (justified) insurance claims. Rather, the legal position would be objectionable that the insurance undertaking would not have to provide a benefit in such a case, because a policyholder assigned their claim to a third party by way of a legal transaction or because the claims passed to legal successors for another reason (such as the death of the policyholder).*

Against this background, however, it had to held that the assignment by way of legal transaction did not annihilate the privilege and that the

Applicant's claim in the present matter, the amount of which remains to be determined, thus represents an insurance claim pursuant to Art. 161 of the Insurance Supervision Act (VersAG) (privileged claim) in the Defendant's insolvency. The declaration of the categorisation of the claim in the Defendant's insolvency proceedings as part of a judgment is permissible (see, for example, Frauenberger/Pfeiler *in* Fasching/Konecny[3] *III/1 § 228 ZPO marginal note 63) and both the Applicant and the Defendant also have a legal interest in the declaration."*[1]

6 By way of appeal lodged by the Defendant, the Princely Court of Appeal dealt with the legal question relevant in this matter and referred it to the EFTA Court with the present request for an advisory opinion.

ARGUMENTS RELATING TO THE QUESTIONS REFERRED

C. Qualification of the claims which are the subject matter of the present dispute

7 The claims in the present dispute are based on what is called "NHO Property" insurance contracts between Gable Insurance AG and various policyholders. These are non-life insurance policies with regard to buildings and companies which are insured against damage caused by theft, burglary, water and fire etc. The insurer, as set out above, was Gable Insurance AG, as per the intermediary services provided by the Applicant.

8 On the basis of these insurance contracts, the bankrupt company owes to various policyholders payments for damage actually suffered (prior to the opening of the insolvency).

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[1] Fürstliches Landgericht, *Söderberg & Partner AS ./. Gable Insurance AG in Konkurs*, 17 CG 2023.219-15, judgment dated 14 March 2024, p. 34 et seqq.

As a result of Gable's insolvency, the policyholders would have had to lodge their claims and wait for the compensation of their damage until the final distribution (or any interim payment, if any). In light of the fact that the persons concerned were customers which the Applicant had introduced (intermediary services), the Applicant (without being obliged by law or a contract) made corresponding payments to the policyholders concerned for compensation of damage covered by insurance. These payments were owed by the bankrupt company under the insurance contracts.

In return, the policyholders concerned assigned their claims against the bankrupt company to the Applicant (such claims resulting from the *NHO Property insurance contracts*).

9 The claims asserted in the total amount of NOK 623,600.00 are **thus based directly on insurance contracts between individual policyholders and the bankrupt company and are thus owed directly in an enforceable manner by the latter under insurance contracts entered into between the bankrupt company and policyholders**.

They are thus claims which are privileged within the meaning of Art. 161 of the Liechtenstein Insurance Supervision Act (Act of 12 June 2015 concerning the Supervision of Insurance Undertakings, "**VersAG**", Liechtenstein law gazette 2015.231):

a) The claims are insurance claims and thus privileged within the meaning of Art. 161 et seq. of the Insurance Supervision Act (VersAG)

10 Pursuant to Art. 161 et seq. of the Insurance Supervision Act (VersAG), **insurance claims** must take precedence and be paid exclusively from the bankrupt company's actuarial reserves created for insurance claims.

11 **Art. 10(52) of the Insurance Supervision Act (VersAG)** defines the term "**insurance claim**" as follows:

"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;[2]

12 This is exactly the definition of an insurance claim **in Art. 268(1)(g) of Directive 2009/138/EC**:

(For the purpose of this Title the following definitions shall apply)

"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 [...].[3]

13 In its decisions E-3/19 of 10 March 2020 and E-5/20 of 25 February 2021, the EFTA Court also further defined the term "insurance claim" and held that there is an insurance claim if it is the **claim of an insured person, a policyholder, an insurance beneficiary or an injured person** against an insurer **on the basis of an insurance contract**, if these claims create **directly enforceable**

[2] Art 10(52) of the Insurance Supervision Act (VersAG).
[3] Art 268(1)(g) of Directive 2009/138/EC.

claims against the insurer and if they came into existence **during the existence of the insurance contract.**[4]

14 In the specific case, it must therefore be noted that the asserted claims which are contested by the Trustee in Bankruptcy are **claims of a policyholder / an insured person**, which claims result directly from **(property) insurance contracts** between the policyholder and the bankrupt company, and that the insured damage in question which thus has to be paid was suffered during the existence of the insurance contracts (thus prior to the opening of the insolvency proceedings). On the basis of the insurance contracts, the policyholders have a direct claim against the bankrupt company with regard to the insurance benefit.

15 If this is the case, *i.e.* if a claim is thus to be qualified as an "insurance claim", any such claim must take precedence pursuant to Art. 161 of the Insurance Supervision Act (VersAG) in the event of the insurer's insolvency. In Liechtenstein insolvency proceedings, any such claims are thus regarded as claims of the category 1 or must be paid, even before other claims of the category 1, in the sense of rights of separation exclusively from the separate estate of actuarial reserves of the insurer.

16 The provisions on the privilege of any such insurance claims are set out in **Art. 161 et seq. of the Insurance Supervision Act (VersAG)** which incorporates the provision of **Art. 275 of Directive 2009/138/EC.**

The latter provides that the Member States shall ensure that insurance claims take precedence, at the option of the Member State by inter alia making sure that "*with regard to assets representing the technical provisions, insurance*

[4] EFTA Court, case E-3/19, judgment of 10 March 2023, *Gable Insurance AG in Konkurs*, marginal note 38; EFTA Court, case E-5/20, judgment of 25 February 2021, *SMA SA und Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics vs Finanzmarktaufsicht Liechtenstein, marginal note 44.*

claims shall take precedence over any other claim on the insurance undertaking"[5].

Accordingly, **Art. 161(1) of the Insurance Supervision Act (VersAG)** provides as follows:

> "*The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Act to satisfy insurance claims. [...]*"[6]

b) Assignment

17 In the specific case, it is not the policyholders themselves but rather the Applicant that asserts the claims, which are to be qualified undoubtedly, in line with the principles above, as privileged insurance claims within the meaning of Art. 10(5)(52) in conjunction with Art. 161 of the Insurance Supervision Act (VersAG) (equally, Art. 268(1)(g) in conjunction with Art. 275 of Directive 2009/138/EC). The policyholders concerned had assigned their insurance claims against the Defendant to the Applicant by way of legal transaction.

However, this assignment does not change anything with regard to the qualification of the claim as a privileged insurance claim within the meaning of Art. 161 of the Insurance Supervision Act (VersG):

18 Pursuant to **§ 1393 et seqq. of the Liechtenstein General Civil Code ("ABGB")**, all alienable rights may be the subject of an assignment:

> "*§ 1393 The subject of assignment*

[5] Art. 275(1)(a) of Directive 2009/138/EC.
[6] Art. 161(1) of the Insurance Supervision Act (VersAG).

All alienable rights may be the subject of assignment. Rights that adhere to the person and therefore expire with the person may not be assigned.

[...]"

19 In accordance with **§ 1394 ABGB**, the rights of the assignee, with regard to the transferred claim, are identical with the rights of the assignor:

"Effect § 1394

The rights of the assignee, with regard to the transferred claim, are exactly the same as the rights of the assignor."

The content of the assigned claim is thus determined on the basis of the content of the claim to which the assignor is entitled against the debtor.[7] The assignment does not entail any change in the assigned claim in terms of the content thereof. Therefore, the content of the assigned claim is determined on the basis of the content of the claim to which the cedens is entitled against the debtor. The place and the time of performance also remain unchanged, as do all other terms of the claim.[8]

20 The assignment as defined by §§ 1392 ABGB is a "change of the right with the addition of a new creditor." **A transfer is thus simply made of the creditor position and the legal entitlement, and all other mutual obligations resulting from the contractual relationship between the cedens and the debtor however remain unchanged.** The cessionarius acquires the claim as the previous creditor held it. An involvement of the debtor is not necessary for the assignment to occur, because this process does not change anything with regard to the content of the claim.[9]

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[7] *Ertl* in *Rummel*, ABGB Kommentar[3] § 1394 marginal note 1.
[8] *Heidinger* in *Schwimann / Kodek*, ABGB Praxiskommentar, re § 1394 ABGB marginal notes 1 and 3.
[9] *Heidinger* in *Schwimann / Kodek*, ABGB Praxiskommentar, re § 1392 ABGB marginal notes 2 and 4.

21 **§ 1395 ABGB** hence provides that the assignment contract causes a new obligation to arise merely between the assignor (cedens) and the assignee of the claim (cessionarius):

> *"§1395*
>
> *An assignment contract causes a new obligation to arise only between the assignor (cedens) and the assignee of the claim (cessionarius) and not between the latter and the debtor of the claim so assigned (cessus). Therefore, the debtor is authorised to pay to the first creditor or to settle the matter in another manner with him, as long as he has no knowledge of the assignee."*

The debtor (cessus, debitor cessus) himself / his obligation ultimately remains unaffected by the assignment (apart from the fact that the debtor, after having been notified of the assignment, may henceforth pay only to the assignee in settlement of his debt). Otherwise, the debitor cessus is not involved in the assignment, nor may he be involved in it, **given that his legal position is not changed by the assignment.**

22 For the specific case, this thus means:

The policyholders concerned have direct claims against the Defendant based on the NHO property policies, *i.e.* insurance claims with a right to the compensation of various damage claims, directly on the basis of an insurance contract directly with Gable, directly directed and directly enforceable against Gable as the direct insurer.

The assignment to the Applicant **had no effects on the claim, it continues to be a claim against Gable which is directly based on an insurance contract, and the obligation of Gable vis-à-vis the direct policyholder continues to result directly from the NHO property policies mentioned above** - the only "effect" of the assignment of this claim - which a policyholder clearly has in the

form of an insurance claim directly against Gable - is that this claim is consequently now being asserted by the Applicant.

In "substantive" terms, with regard to the validity, legal basis or other qualifications of the claim, the assignment has no effects.

23 Irrespective thereof, in the main proceedings / in the insolvency proceedings of Gable Insurance AG, the Trustee in Bankruptcy in particular also contests the hierarchy of the claim. In the main proceedings, the Defendant does not deny that the asserted claims are in principle/originally privileged insurance claims. However, the Defendant takes the view that, **as a result of the assignment**, the claims in dispute are no longer privileged claims as defined by Art. 161 et seq. of the Insurance Supervision Act (VersAG).

This is not correct:

c) EFTA Court E-5/20

24 The Trustee in Bankruptcy bases its (erroneous) legal view on the judgment of the EFTA Court in case E-5/20 (*SMA SA und Société Mutuelle d'Assurance du Bâtiment et des Travaux Public vs. Finanzmarktaufsicht Liechtenstein,* judgment of 25 February 2021). However, this decision is based on a set of facts / an insurance scenario which is not comparable (in addition it relates to public liability proceedings against the Financial Market Authority of the Principality of Liechtenstein) and the interpretation made by the Trustee in Bankruptcy is completely false and too broad.

The application of the case-law of the EFTA Court in case E-5/20 to the present matter is completely flawed:

25 For, by contrast to the scenario in the present matter, the decision EFTA E-5/20 deals with a scenario in which precisely no claims of a policyholder which are based directly on an insurance contract are asserted against the insurer. The

case EFTA E-5/20 is thus not about the claims of an insurance contractual partner of the bankrupt company / a person insured by Gable against the bankrupt company.

Rather, they are ***recourse claims*** asserted against Gable by ***a different insurer*** (but not a policyholder), and these recourse claims ***are not based on an insurance contract*** (with the bankrupt company).

26 Rather, the case E-5/20 assesses a three-party scenario (actually a four-party scenario) which is typical of liability insurances (in France):

The policyholder / insured person is a **construction entrepreneur** that causes damage to a construction work. The insured entrepreneur has an entitlement against his **liability insurer** that the latter compensate the injured party. At the same time, the **injured party** has an entitlement against his "**construction insurer**" to have the damage compensated.

In the specific case, **the insurer** of the injured third party ("construction insurer"), which had provided the corresponding benefits, asserted recourse claims against the liability insurer of the construction entrepreneur (= the bankrupt company), because the construction insurer is *ex lege* entitled to recourse claims against the construction liability insurer of the damaging party.

27 In the case submitted to it, the EFTA Court argues that in the event of the assertion of any such **recourse right** resulting from an *ex lege* "assignment" of a claim against the bankrupt company, there is **no** privileged insurance claim. **An economic operator** such as the applicant construction insurer which is **not** entitled to any claims on the basis of an insurance contract with the bankrupt company may not invoke the protection of Art. 161 of the Insurance Supervision Act (VersAG) / the provisions of European law underlying the said Article.

28 In E 5/20, the EFTA Court thus did not express an opinion on the subject of assignment, by way of a legal transaction, of a clearly privileged insurance

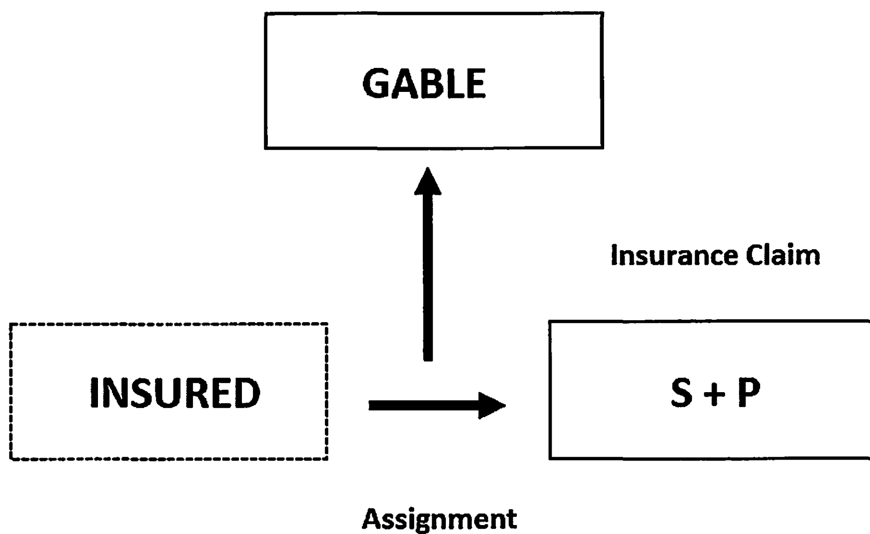
claim. Rather, it had to examine whether a *recourse* claim within the meaning of the scenario to be dealt with in E 5/20 originally qualifies as a privileged insurance claim at all within the meaning of the mentioned law, which was denied. Specifically, the EFTA Court deals with three possible scenarios in E 5/20:

> "*The Applicants claim to be creditors of Gable Insurance in three different capacities relating to the Décennale system. First, the claims of the Applicants result from their capacity as construction insurers who have* ***recourse*** *to Gable Insurance as the insurer of a person responsible for a construction work. Second, the Applicants, in their capacity as insurers of a person responsible for a construction work, have* ***recourse*** *to Gable Insurance, in its capacity as insurer of another person responsible for the construction work, by reason of joint and several liability. Third, the Applicants, in their capacity as insurers of a person responsible for a construction work, have* ***recourse*** *to Gable Insurance in its capacity as insurer of a subcontractor." (EFTA 5/20 marginal note 23).*

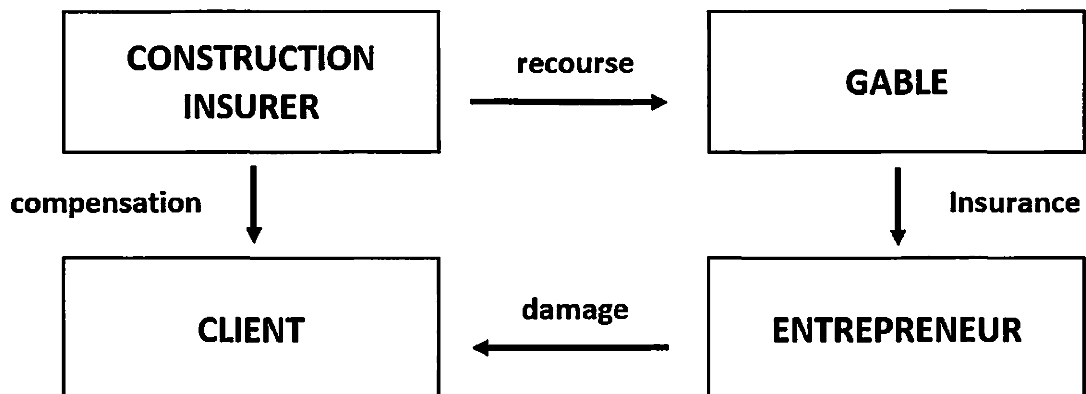
The scenarios dealt with in E 5/20 are thus not at all comparable with the scenario applicable in the present matter, *i.e.* a simple assignment, by way of legal transaction, of a claim to be clearly qualified as an insurance claim.

29 For illustrative purposes:

Scenario in the present legal matter



E5/20 scenario



d) No general application to all "assignments"

30 The Trustee in Bankruptcy thus draws the completely flawed conclusion from EFTA 5/20 that any kind of assignment ultimately entails that an insurance claim loses its privilege. For, according to the Trustee in Bankruptcy, an insurance claim is not considered an insurance claim unless it is directly asserted by a policyholder. Any kind of assignment, according to the Trustee in Bankruptcy, entails that an insurance claim which is originally privileged "loses" this very privilege.

However, this legal view is flawed for the mere fact that, in case E-5/20 which was assessed by the EFTA Court, **it was not the assignment which "annihilated" the qualification as an insurance claim, rather, in case E-5/20, claims were asserted which at no point in time were insurance claims based on an insurance contract with Gable**.

31 The legal view taken by the Trustee in Bankruptcy is furthermore in stark contrast to § 1394 ABGB which provides that an assignment does not alter the qualification of a claim.

The **assignment, by way of legal transaction,** of the **claim of a direct policyholder and contractual partner of Gable directly based on an insurance contract between the policyholder and Gable** thus does not change the fact that the original insurance claim which has a privileged status must continue to be qualified as such and thus continues to be privileged.

32 The argument put forward by the Defendant to the effect that the privilege in Art. 161 of the Insurance Supervision Act (VersAG) must be seen as "highly personal" and that it protects the insured person exclusively, has no basis in the law or in the provisions of European law. Nor is such an argument plausible in light of the protective purpose of Art. 161 of the Insurance Supervision Act (VersAG):

33 Art. 161 of the Insurance Supervision Act (VersAG) is designed to make sure that the interests of policyholders are protected in case of the insolvency of the insurance undertaking. This thus acknowledges the position of policyholders, which is worthy of protection and which comprises not only a financial but also a time-related component:

It is indeed praiseworthy that the policyholders, as a result of the provision in Art. 161 of the Insurance Supervision Act (VersAG), have a certain degree of certainty that they will be compensated for part of the damage they have suffered, even if their contractual partner is insolvent. However, compensation is actually often helpful only if it is rendered promptly. If a policyholder must submit himself to a lengthy registration process and insolvency proceedings (abroad) (the bankruptcy proceedings over the assets of Gable Insurance AG were opened almost 8 years ago, in November 2016) and if such policyholder possibly receives compensation for part of the damage he has suffered only after several years, this represents a heavy burden for the policyholder and real insurance coverage is thus in no event guaranteed.

However, if a third party intervenes and provides **immediate assistance in return for the assignment of the insured claims**, which claims are then asserted by the assignee in the insolvency proceedings, this is in the direct interest and serves the protective purpose of Art. 161 of the Insurance Supervision Act (VersAG).

34 However, if the legal view prevailed that any such immediate assistance ultimately entails the loss of the insurance privilege, **any intervening third parties, in particular those with no legal or contractual obligation to render such immediate assistance, are indeed punished by the fact** that (contrary to the legally enshrined legal effects of an assignment by way of legal transaction) **the privileged insurance claim acquired by way of legal transaction suddenly loses the qualification as a privileged claim (which**

***in fact* equals a total loss)**. This sabotages the intention of Art. 161 of the Insurance Supervision Act (VersAG).

Any undertaking and any person will be wary in the future to provide prompt compensation of damage voluntarily and in the interests of the insured persons and to take over the (privileged) insurance claims of the compensated party after benefits have been provided or to provide benefits at all, if, consequently, it has to be expected that there is a total loss of the claims so taken over. The policyholders are thus put in a situation that they have to take comprehensive care of their claims themselves and that they might lose them. In any case, they may have to wait for the provision of insurance benefits for a long time.

In addition, they also lose the completely legitimate possibility to liquidate their insurance claims, e.g. by way of a sale. Even if the policyholders possibly have to accept a deduction in this regard, any such transaction and disposition in respect of the insurance claim might be beneficial to the policyholder, given that monies are in any case paid immediately (and not after years).

e) Necessary distinction

35 Incidentally, the Trustee in Bankruptcy itself ultimately confirms the legal view that an assignment does not in any event entail the loss of the insolvency privilege, but that it is precisely the underlying scenario which is decisive:

36 In its *Interim Report of the Trustee in Bankruptcy as at 31 December 2022* to the Princely Liechtenstein Court of Justice dated 18 April 2023, BWB inter alia sets out that an assignment in principle "destroys" the insurance privilege, but that there is an exception in the case of guarantee schemes. If guarantee schemes satisfy creditors with justified insurance claims and if their (privileged) insurance claims are assigned to them, they will be classified as privileged

creditors. The reasons for this "exception" are derived by the Trustee in Bankruptcy from Art. 277 of Directive 2009/138 (Solvency II).[10]

37 The Trustee in Bankruptcy thus specifically admits claims of national guarantee schemes of England (GBP 67.6 million), of Denmark (DKK 136.7 million = approximately GBP 18.1 million), of Italy / Switzerland (approximately CHF 1.2 million) and of Ireland. These guarantee schemes take over payment obligations of an insolvent insurance undertaking on the basis of the contracts in default, *i.e.* in the place and stead of the bankrupt, they thus make those payments which would have had to be made by the said insurance undertaking but for the insolvency, and in return for the provision of the benefits they accept the assignment of the claims of the policyholders in order to assert such claims in the insolvency proceedings.

38 **This is exactly what the Applicant has done.**

Indeed, there are guarantee schemes within the meaning of Art. 277 of the Solvency II Directive under Norwegian law, but they offer (or - at the point in time of relevance herein - they offered) **no coverage for claims of insured persons against foreign insurers that are not Norwegian**.

In the specific case, it was thus the Applicant which sort of **voluntarily took on the function of a guarantee scheme** for just those insured persons who had contractual relationships with, or claims based thereon against, Gable.

39 The Trustee in Bankruptcy thus generally recognises that an assignment does not in any case entail a loss of the claim privilege. In particular, if national guarantee schemes provide benefits and the rights of the insurance creditors are subrogated to them, their claims should be privileged as well.

[10] Interim Report of the Trustee in Bankruptcy as at 31 December 2022 dated 18 April 2023 (extract).

40 The Trustee in Bankruptcy bases this "exception" directly on Art. 277 of Directive 2009/138 ("Solvency II").

First, Art. 275(1) of Directive 2009/138 provides that the Member States shall ensure a regime for the privileged treatment and satisfaction of insurance claims in the event of the default of an insurance undertaking, and the said Article was transposed into national law in Liechtenstein in Art. 161 et seq. of the Insurance Supervision Act (VersAG).

Art. 277 of Directive 2009/138 then provides:

> "*The home Member State* [of the insurance undertaking] *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).*

41 Pursuant to Art. 277 of the Solvency II Directive, Member States may thus provide in national law that the claims of policyholders asserted **by a guarantee scheme which is legally provided for** (which is generally financed by contributions from insurance undertakings) (which have been transferred before by the policyholders or as a result of a legally prescribed legal assignment to the guarantee scheme, probably after the policyholders have been adequately compensated) are **not** privileged as provided for by Art. 275 of the Directive.

The background to this is that on the basis of such a guarantee scheme a **balancing of risks** between insurance undertakings is created / that the risk of the default of an insurance undertaking is, to a certain extent, transferred to the other market players and shall thus be "guaranteed" by them. From that point of view, it is comprehensible and consistent that the Member States ***may*** decide that a default risk shall ultimately remain with the participants of the guarantee scheme.

42 Liechtenstein has decided **against** the restriction of the possibility to continue to treat assigned insurance claims as privileged insurance claims. **In the absence of any legal provision to the contrary, the assignment of an insurance claim to a guarantee scheme thus does not change anything with regard to the privilege of the assigned claims.**

This, however, must in any case also apply to the Applicant.

43 For, if the assignment of a (privileged) insurance claim to a guarantee scheme which is legally provided for does not change anything with regard to the privilege of a claim / if the privilege as a result of the transfer of the claim shall cease only if there are express legal provisions to this effect, it is all the less understandable why precisely such an assignment should affect the qualification of the claim as a privileged claim in the present matter.

This applies all the more so because the Applicant, with regard to the claims and insured persons of relevance herein, due to a lack of coverage by Norwegian guarantee schemes (at the point in time then) took on the function of such a guarantee scheme in the interests and for the protection of all policyholders in respect of which it has provided intermediary services!

44 To put it otherwise: If the Applicant were a Norwegian (or Liechtenstein) guarantee scheme, the Defendant would readily admit as privileged claims the claims which are the subject matter of the present action. In such a case, no assignment would "destroy" the privilege.

There is no legal basis to support that the assignment of privileged insurance claims to a (national) guarantee scheme is to be treated differently from the assignment to the Applicant. **The option that, in the event of the assignment to a national guarantee scheme, the privilege of a claim, as a consequence of the assignment, may be excluded through express legal order, is**

unambiguously the exception from the rule which provides that the principle is that an assignment thus does not affect a privilege.

45 In this context, the decision E5/20 is also consistent, because the scenario dealt with therein is ultimately based on a balancing of risks between the insurance undertakings involved, which is mandatory under the law in the case of a multi-party liability scenario as dealt with in case E5/20. An obligation, which is legally provided for, to assume liability thus justifies (or - in the event of pertinent legal provisions in the case of national guarantee schemes - may justify) an "exclusion" from the privilege as provided for by Art. 275 of the Solvency II Directive.

With regard to the voluntary assignment, by way of legal transaction, of a clearly privileged insurance claim, there is no such justification, nor is there any such legal basis, but rather any such legal view (without any pertinent legal basis) is in an irresolvable contradiction with §§ 1398 et seqq. ABGB and there is no provision under European law to justify an interpretation of the insurance privilege as "highly personal" and thus, ultimately, not assignable.

CONCLUSION

In the present main proceedings, an assessment must be made with regard to **an insurance claim of a policyholder on the basis of an insurance contract with the bankrupt company, which insurance claim is privileged** within the meaning of Art. 10(1)(52) and Art. 161 of the Insurance Supervision Act (VersAG).

This privileged insurance claim was then assigned to the Applicant by way of a legal transaction, which transaction must be assessed exclusively under Liechtenstein law pursuant to §§ 1392 et seqq. of the Liechtenstein General Civil Code (ABGB). In this context, a simple interpretation of the pertinent wording

comes to the clear conclusion that the **assignment does not change anything with regard to the nature, the quality or with regard to the legal bases of the insurance claim, *i.e.* its privilege as defined by Art. 161 of the Insurance Supervision Act (VersAG)**.

Neither the Insurance Supervision Act (VersAG) nor the provisions of European law, in particular the Solvency II Directive, contain any provisions on the subject of the assignment of a privileged insurance claim, and any such transaction must thus be assessed under national law only. Neither on the basis of national law nor on the basis of European law is the assignment (by way of legal transaction) of an insurance claim prohibited, is it subject to any conditions or permissible only to certain persons or groups of persons, in particular, there is no provision to the effect that insurance claims within the meaning of Art. 10(1)(52) of the Insurance Supervision Act (VersAG) are of a "*highly personal*" nature or, as a consequence of an assignment, lose the privilege set out in Art. 161 of the Insurance Supervision Act (VersAG).

An insurance claim within the meaning of Art. 10(1)(52) of the Insurance Supervision Act (VersAG) is thus an insurance claim both prior to and after an assignment by way of legal transaction (because, under the law applicable to the process pursuant to §§ 1392 ABGB, the assignment does not change anything with regard to the quality of the claim) and it must thus be treated as privileged within the meaning of Art. 161 of the Insurance Supervision Act (VersAG) both prior to and after its assignment.

Rather, it would be in conflict with the provision of Art. 275 of Directive 2009/138/EC and with the provision of Art. 161 of the Insurance Supervision Act (VersAG) implementing the said provision, if an insurance claim, which, prior to and after the assignment, as a consequence of national law, is an "insurance claim" within the meaning of Art. 10(1)(52) of the Insurance Supervision Act (VersAG), lost the privilege within the meaning of the leg. cit., and if it did so without any legal foundation and thus contrary to the wording of the leg. cit.

Against this background, the question referred by the Princely Liechtenstein Court of Appeal must 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.

Vaduz, on the 08.10.2024

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