EFTA Court
1, rue du Fort Thüngen
L-1499 Luxembourg

E-8/25

Claimant:

Aréas Dommages
47-49 rue de Miromesnil
FR-75380 Paris Cedex 08

represented by:

Paragraph 7 Attorneys at Law
Landstrasse 60
9490 Vaduz

Defendant:

Gable Insurance AG in Konkurs
Pflugstrasse 20
9490 Vaduz

represented by the trustee in bankruptcy:

BWB LEGAL

concerning:

Request for an Advisory Opinion by the Princely Court of Appeal (*Fürstliches Obergericht*), Vaduz, Liechtenstein, in accordance with Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (national proceedings no. 07 CG.2023.218 – document number 39)

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by Gable Insurance AG in Konkurs

In the national proceedings pending under case number 07 CG.2023.218, the Princely Court of Appeal (*Fürstliches Obergericht*) requests the EFTA Court to give an Advisory Opinion pursuant to Art. 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) on 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). By letter dated 6 June 2025, the EFTA Court notified Gable Insurance AG in Konkurs represented by its trustee in bankruptcy that the parties to the national proceedings are entitled to submit to the Court written observations on the questions referred for an Advisory Opinion.

Within the time limit of two months, Gable Insurance AG in Konkurs hereby submits the following

WRITTEN OBSERVATIONS

to the EFTA Court.

In detail, Gable Insurance AG in Konkurs wishes to observe as follows:

I. Executive Summary

1 The present request for an Advisory Opinion (**"the Request"**) concerns the interpretation of Directive 2009/138/EC (**"the Directive"**). The Request has been made in national proceedings pending before the Princely Court of Appeal (**"the referring Court"**) in Vaduz, Liechtenstein, between the French insurance undertaking Aréas Dommages (**"Aréas"** or **"the Applicant"**) and the insurance undertaking Gable Insurance AG in Konkurs (**"Gable"** or **"the Defendant"**). This dispute concerns a claim by the Applicant against the Defendant's assets in its bankruptcy proceedings (07 KO.2016.672; **"Gable bankruptcy proceedings"**).

2 The case pending before the referring Court essentially revolves around the privileged status of insurance claims according to Article 275(1) of the Directive (implemented in Liechtenstein in Art. 10(1)(52) of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*)[1]). The parties are of different opinions regarding the definition of the term "insurance claim" in Article 268(1)(g) of the Directive.

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1 Gesetz vom 12. Juni 2015 betreffend die Aufsicht über Versicherungsunternehmen (Versicherungsaufsichtsgesetz; VersAG) (LR 961.01).

3 The main question is as follows: Is the claim filed by the Applicant against the Defendant's assets in its bankruptcy proceedings an insurance claim to be given precedence in accordance with Article 275 (1) of the Directive, even though the Applicant, in a four-party constellation, (i) has entered by statutory subrogation into the legal position of an injured third party, which has a direct right of action against Gable as the liability insurer of the party responsible for the injury, (ii) it does not belong to the specific groups of persons the Directive aims at protecting and (iii) its claim is not based on an insurance contract?

4 The referring Court refers to the judgments in three earlier proceedings before the EFTA Court in connection with the Gable bankruptcy proceedings (judgment of 10 March 2020 in *Gable Insurance AG in Konkurs* (**"Gable I"**), E-3/19; judgment of 25 February 2021 in *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics* v *Finanzmarkaufsicht* (**"Gable II"**), E-5-20; judgment of 5 February 2025 in *Söderberg & Partners AS* v *Gable Insurance AG in Konkurs* (**"Gable III"**), E-17/24). The question also arises as to the relevance of these judgments for the current case.

5 In reply to the question above, the Defendant proposes the following answer: As the Applicant does not belong to the specific groups of persons the Directive aims at protecting and its claim is not based on an insurance contract, its claim does not satisfy the conditions for an insurance claim within the meaning of Gable I. The similarities between the present case and Gable II are substantial and decisive, whereas the fact that the Applicant is statutorily subrogated to the claim constitutes an important difference from Gable III. Therefore, the claim filed by the Applicant against the Defendant's assets in its bankruptcy proceedings is not an insurance claim to be given precedence in accordance with Art. 275(1) of the Directive, just like the claims of the economic operators in Gable II are not according to the EFTA Court's decision.

II. Legal Background

A. EEA Law

6 The Directive was incorporated into the Agreement on the European Economic Area (**"EEA"**) by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011[2] and is referred to at point 1 of Annex IX to the EEA Agreement.

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2 OJ L 262, 6.10.2011, p. 45.

7 Recitals 16, 17, 117 and 127 of the Directive state (emphasis added by the author):

> *(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.*
>
> *(117) Since national legislation concerning reorganisation measures an winding-up proceedings is not harmonised, it is appropriate, in the framework of the infernal 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.*
>
> *(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.*

8 Article 268(1)(g) of the Directive defines the term "insurance claim" as follows (emphasis added by the author):

> *'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.*

9 Article 274(2)(e), (f) and (g) of the Directive provides that the law of the home Member State shall determine (emphasis added by the author):

> (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;*

10 Article 275(1) of the Directive provides (emphasis added by the author):

> *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.

11 Article 292 of the Directive provides (emphasis added by the author):

> *The effects of reorganisation measures or winding-up proceedings on a pending lawsuit concerning an asset or a right of which the insurance undertaking has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending.*

B. National Law

12 Article 10(1)(52) of the Insurance Supervision Act defines the term "insurance claim" as follows (emphasis added by the author):

> German original:
> *'Versicherungsforderung': jeder Betrag, den ein Direktversicherungsunternehmen Versicherungsnehmern, Versicherten, Begünstigten oder geschädigten Dritten, die ein direktes Klagerecht gegen das Versicherungsunternehmen haben, aufgrund eines Versicherungsvertrages oder einer anderen Tätigkeit, auf welche dieses Gesetz anwendbar ist, im Rahmen der Direktversicherung schuldet. Dazu gehören auch für diese Personen zurückgestellte Beträge, wenn einzelne Elemente der Forderung noch ungewiss sind, sowie Prämien, die ein Versicherungsunternehmen zurückzuzahlen hat, weil ein Rechtsgeschäft nach dem für dieses massgeblichen Recht vor Eröffnung des Konkurs- oder Liquidationsverfahrens nicht zustande gekommen ist oder aufgehoben wurde;*

> Translation provided by the Liechtenstein Government:[3]
> *'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 proceeding.*

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3 The Liechtenstein Government provides English translations for certain Liechtenstein acts on <https://regierung.li/text/16318/law> (last visited on 30 July 2025).

13 Article 161(1), first sentence, of the Insurance Supervision Act provides (emphasis added by the author):

> German original:
> *Die Vermögenswerte zur Bedeckung der versicherungstechnischen Rückstellungen bilden im Konkursverfahren eine Sondermasse nach Art. 45 der Insolvenzordnung zur Befriedigung der Versicherungsforderungen.*
>
> Translation provided by the Liechtenstein Government:
> *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.*

14 Article 19 of the Bankruptcy Code (*Konkursordnung*)[4] provides (emphasis added by the author):

> German original:
> *1) Rechtsstreitigkeiten, welche die Geltendmachung oder Sicherstellung von Ansprüchen auf das zur Konkursmasse gehörige Vermögen bezwecken, können nach der Konkurseröffnung gegen den Gemeinschuldner weder anhängig gemacht noch fortgesetzt werden.*
> *2) Rechtsstreitigkeiten über Absonderungsansprüche und über Ansprüche auf Aussonderung nicht zur Konkursmasse gehöriger Sachen können auch nach der Konkurseröffnung, jedoch nur gegen den Masseverwalter anhängig gemacht und fortgesetzt werden.*
> *3) Rechtsstreitigkeiten über Ansprüche, die das zur Konkursmasse gehörige Vermögen überhaupt nicht betreffen, insbesondere über Ansprüche auf persönliche Leistungen des Gemeinschuldners, können auch während des Konkurses gegen den Gemeinschuldner oder von ihm anhängig gemacht und fortgesetzt werden.*
>
> Translation:
> *1) Lawsuits aiming to assert or secure claims against assets belonging to the bankrupt estate cannot be commenced or reopened against the debtor.*

4 Gesetz vom 17. Juli 1973 über das Konkursverfahren (Konkursordnung; KO) (LR 282.0).

2) Lawsuits over claims for preferential treatment for secured creditors or for segregation of property not belonging to the bankrupt estate may be filed after the commencement of bankruptcy proceedings and reopened but only against the trustee in bankruptcy.
3) Lawsuits over claims that do not concern the assets of the bankrupt estate at all, in particular claims for personal performances by the debtor may be filed against or by the debtor during the bankruptcy proceedings and reopened.

[15] Article 20 of the Bankruptcy Code provides (emphasis added by the author):

German original:
1) Alle anhängigen Rechtsstreitigkeiten, in denen der Gemeinschuldner Kläger oder Beklagter ist, mit Ausnahme der im Art. 19 Abs. 3 bezeichneten Streitigkeiten, werden durch die Konkurseröffnung unterbrochen. Auf Streitgenossen des Gemeinschuldners wirkt die Unterbrechung nur dann, wenn sie mit dem Gemeinschuldner eine einheitliche Streitpartei bilden (§ 14 Zivilprozessordnung).
2) Das Verfahren kann vom Masseverwalter, von den Streitgenossen des Gemeinschuldners und vom Gegner aufgenommen werden.
3) Bei Rechtsstreitigkeiten über Ansprüche, die der Anmeldung im Konkurse unterliegen, kann das Verfahren vor Abschluss der Prüfungstagsatzung nicht aufgenommen werden. An Stelle des Masseverwalters können auch Konkursgläubiger, die die Forderung bei der Prüfungstagsatzung bestritten haben, das Verfahren aufnehmen

Translation:
1) All pending lawsuits in which the debtor is either plaintiff or defendant are suspended with the opening of bankruptcy proceedings, with the exception of the disputes designated in art. 19 par. 3. The suspension only affects joint parties of the debtor if they are necessary parties of the debtor (§ 14 Code of Civil Procedure).
2) The proceedings may be reopened by the trustee in bankruptcy, by the joint party of the debtor and by the opponent.
3) In lawsuits over claims which should be lodged in the bankruptcy proceedings, the proceedings may not be reopened before the hearing for proving debts is concluded. Instead of the trustee in bankruptcy the bankruptcy creditors who have disputed the claim may resume the proceedings.

[16] Article 45 of the Bankruptcy Code provides:

German original:
1) Gläubiger, die Ansprüche auf abgesonderte Befriedigung aus bestimmten Sachen des Gemeinschuldners haben (Absonderungsgläubiger), schliessen, soweit ihre Forderungen reichen, die Konkursgläubiger von der Zahlung aus diesen Sachen (Sondermassen) aus.
2) Was nach Befriedigung der Absonderungsgläubiger von den Sondermassen übrig bleibt, fliesst in die gemeinschaftliche Konkursmasse. Haften mehrere Pfänder für die nämliche Forderung, so werden die daraus erlösten Beträge im Verhältnisse ihrer Höhe zur Deckung der Forderung verwendet.
3) Absonderungsgläubiger, denen zugleich ein persönlicher Anspruch gegen den Gemeinschuldner zusteht, können ihre Forderung gleichzeitig als Konkursgläubiger geltend machen.

Translation:
1) Creditors with claims for separate satisfaction from certain items of the debtor (secured creditors) exclude other bankruptcy creditors from payment out of these objects (separate estates) up to the value of their claims.
2) The residue from the separate estate after satisfaction of the secured creditors proceeds into the common bankrupt estate. If several distrainors are liable for the same claim, the amounts realised from them shall be used to cover the claim in proportion to their amount.
3) Secured creditors who at the same time have a personal claim against the debtor may also lodge a claim as a bankruptcy creditor.

[17] Article 47 of the Bankruptcy Code provides:

German original:
Soweit das Konkursvermögen nicht zur Befriedigung der Masseforderungen und der Ansprüche der Absonderungsgläubiger (Art. 45) verwendet wird, bildet es die gemeinschaftliche Konkursmasse, aus der die Konkursforderungen in der gleichen Klasse nach Verhältnis ihrer Beträge zu befriedigen sind.

Translation:
Inasmuch as the bankruptcy assets are not used to satisfy claims against the estate or secured creditors it represents the common bankrupt estate, from which the bankruptcy claims in the same class be satisfied proportionately to their amounts.

III. Facts and Procedure

18 Gable was a Liechtenstein direct insurance undertaking that marketed non-life insurance products in several European countries, including France. On 17 November 2016, by order of the Princely Court of Justice (*Fürstliches Landgericht),* sitting as a bankruptcy court, bankruptcy proceedings were opened concerning Gable.

19 Aréas is a French insurance undertaking. An administrative unit of a French department took out property/building insurance with Aréas. This administrative unit commissioned waterproofing/insulation work on a public building from a contractor who had taken out professional liability insurance with Gable. Gable's policy holder caused damage to the administrative unit's building during this construction work. The administrative unit received compensation for its damage from its insurer, Aréas. As the injured third party, the administrative unit had a direct right of action against Gable according to French provisions, which was transferred to Aréas under French law. Aréas asserted this claim, which it had received by way of statutory subrogation (assignment by operation of law), in Gable's bankruptcy proceedings.

20 The trustee in bankruptcy recognised Aréas's claim of EUR 562,682.40 arising from the loss event as a fourth-class bankruptcy claim, contesting its classification as an insurance claim within the meaning of Art. 268(1)(g) of the Directive and thus that it was to be given precedence in accordance with Art. 275(1) of the Directive. The trustee in bankruptcy contested Aréas's claim for reimbursement of legal costs in the amount of EUR 3,000.00 both on the merits and with regard to its classification as an insurance claim to be given precedence.

21 Thereupon, Aréas brought an action against Gable before the Princely Court of Justice seeking a declaration that, in Gable's bankruptcy proceedings, Aréas was entitled to a claim amounting to EUR 565,682.40 that was considered as a privileged insurance claim within the meaning of Article 161 of the Insurance Supervision Act. The Princely Court of Justice, by judgment of 7 August 2024, dismissed Aréas's claim.

22 Aréas then brought an appeal against the above-mentioned judgment requesting that the referring Court declare that Aréas's (alleged) claim does constitute a privileged insurance claim.

23 Against this background, the referring Court stayed the appeal proceedings and requested the EFTA Court to give an Advisory Opinion on the following two questions:

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 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?

IV. Legal Assessment in respect of Question 1

A. Introduction

24 According to Article 161(1) of the Insurance Supervision Act, assets representing the technical provisions shall constitute a special estate in order to satisfy insurance claims. With regard to this special estate, insurance claims take absolute precedence over any other claim against the insurance undertaking. If the special estate is sufficient, the insurance claims are satisfied in full. Any surplus is then transferred to the general bankrupt estate in order to satisfy the other creditors. If, on the other hand, the special estate is insufficient, the insurance claims are satisfied on a pro rata basis, while the other creditors remain unsatisfied. It is therefore of the utmost importance whether or not a certain claim is considered an insurance claim.

25 In the Defendant's view, the Applicant's claim in the present proceedings is no insurance claim and is not to be given precedence. In other words, Question 1 is to be answered in the negative.

26 Gable will justify its position by first summarising the judgments already handed down by the EFTA Court in connection with its bankruptcy proceedings and by then examining their relevance to the present case. It will argue that the Applicant's claim does not meet the conditions for an insurance claim as stated by the EFTA Court in

Gable I. It will then show that the present case is almost identical to that in Gable II, wherefore the Applicant's claim must not be given precedence as was the case for the Gable II applicants' claims. In a final step, the Defendant will explain the differences between the present case and that in Gable III and clarify that, due to them, the assignment by operation of law in the present case must have a different effect on the status of the claim in question than the assignment by legal transaction in Gable III, while safeguarding the objectives pursued by the Directive.

B. EFTA Court judgments (Gable I, II and III)

1. Proceedings concerning E-3/19 (Gable I)

27 In the proceedings in case E-3/19, which were initiated at the request of the Princely Court of Justice, the EFTA Court issued its judgment on 10 March 2020.

28 In these proceedings, the EFTA Court dealt, among other things, with the interpretation of the term *"insurance claim"* in the context of bankruptcy proceedings of an insurance company. It stated that the term "*insurance claim*" is defined by four cumulative requirements (Gable I, para. 38):

(i) an amount that is owed;
(ii) by an insurance undertaking;
(iii) to insured persons, policy holders, beneficiaries or an injured party having a direct right of action against the insurance undertaking;
(iv) on the basis of an insurance contract.

29 According to the EFTA Court, it is clear from the Directive that an amount must be "due" on the basis of an insurance contract. The insured event must therefore have occurred during the validity of the insurance contract in order for an insurance claim to arise (Gable I, para. 38).

2. Proceedings concerning E-5/20 (Gable II)

30 The proceedings concerning E-5/20 were based on national state liability proceedings that French insurance companies had initiated against the Financial Market Authority Liechtenstein (*Finanzmarktaufsicht*) ("**FMA**"). They were in turn based on the Gable bankruptcy proceedings or, more specifically, on the filing of claims by these insurance companies in the Gable bankruptcy proceedings. The said creditors anticipated that their claims into the estate would not be satisfied in full, which is

why they wanted to hold the FMA liable for the likely "gap" (and thus damage). They specifically blamed the FMA for deficiencies in its supervision of Gable (breach of supervisory duties). The outcome of Gable II was the basis for the Liechtenstein courts ultimately dismissing the state liability claim with final and binding effect. It goes without saying that the national state liability proceedings as such are not relevant for the assessment of the present claim; however, the legal statements made by the EFTA Court on this occasion, which also related to the claims filed by the said creditors in the Gable bankruptcy proceedings, are very relevant.

31 Like the Applicant in the national proceedings to this case, the French insurance companies mentioned above had also filed claims in the Gable bankruptcy proceedings and demanded that they be classified as insurance claims, without themselves belonging to the group of specially protected persons (insured persons, policy holders, beneficiaries, injured parties with a direct claim against the insurance undertaking). Like the Applicant, they derived their claims from such protected persons.

32 On the basis of the EFTA Court's judgment in Gable II, the trustee in bankruptcy had no choice but to classify the claims filed by the French insurance companies as fourth-class bankruptcy claims and deny them the privileged status they had asserted as insurance claims. This is because the EFTA Court clearly stated in the aforementioned judgment that the French insurance companies were neither parties nor beneficiaries of an insurance contract concluded with Gable. Economic operators such as these insurance companies could not be considered as policy holders or beneficiaries within the meaning of the Directive. In conclusion, the EFTA Court therefore made the following statement (in para. 44 of the aforementioned judgment):

> *"However, the Applicants in the present case do not have an insurance claim against Gable Insurance, as their alleged claims are not on the basis of an insurance contract."*

33 The case constellation on which this EFTA Court judgment was based can be described schematically as follows:[5]

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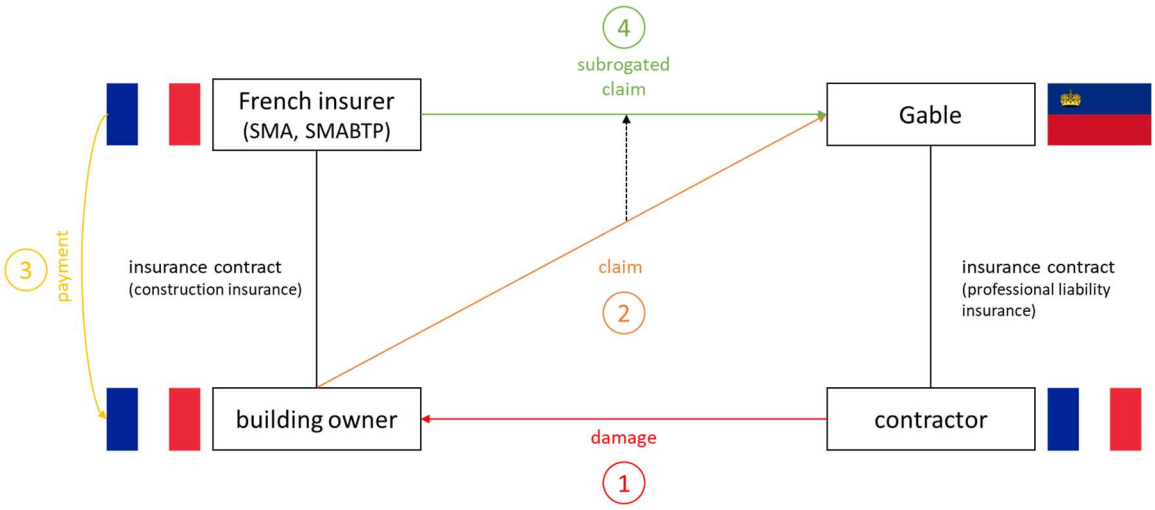
[5] In Gable II, the applicants claimed to be creditors of Gable in three different capacities. For the present purposes, only the first capacity or constellation as described in the following paragraphs is relevant. The Defendant would like to stress that the relevant properties of the applicants' claims as mentioned in these observations were the same in all three constellations and that the decision of the EFTA Court that the applicants' claims were to be denied privileged status refers to all three constellations.



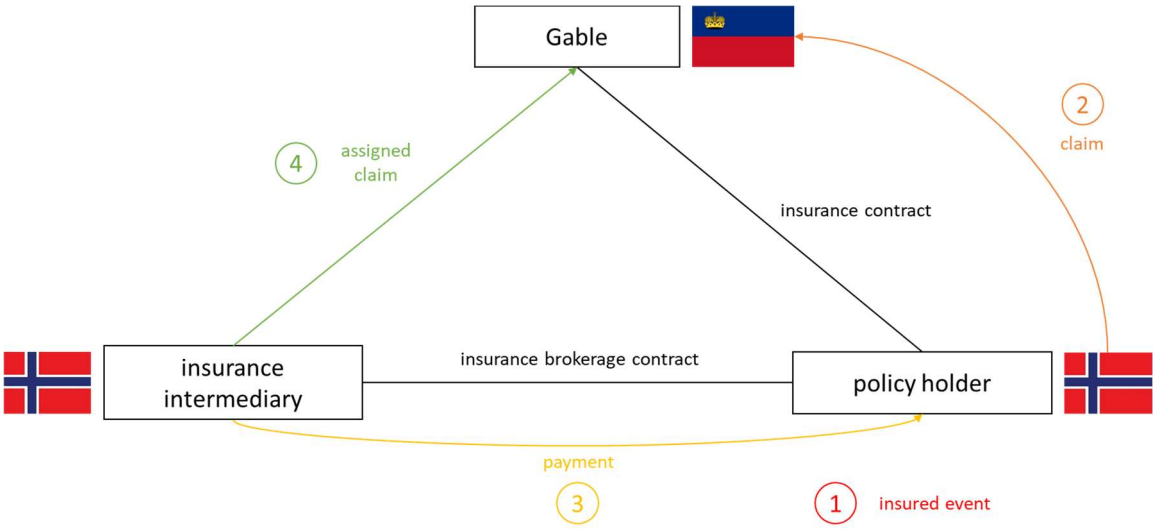
34 The EFTA Court thus explicitly denied the claims filed by the French insurance companies in the Gable bankruptcy proceedings the quality of privileged insurance claims. It did so in the full knowledge that they had filed claims that they had received from injured parties with a direct right of action against the Defendant by way of statutory subrogation (i.e. assignment by operation of French law). The injured third parties (building owners) had privileged insurance claims. These privileged insurance claims were transferred by operation of law to the French insurance companies due to their prior compensation of the injured third parties. Nevertheless, the EFTA Court expressly did not categorise the claims asserted by the "fourth party" (the French insurance companies) and subrogated to them by law as insurance claims. It gave the following additional reasons for this (in para. 45 of the aforementioned judgment):

> *"Certain provisions of the Directive are intended to ensure orderly and effective insolvency, as well as winding-up proceedings, including giving priority to policy holders and beneficiaries. [...] economic operators are not protected from losses incurred from the insolvency of insurance undertakings."*

3. Proceedings concerning E-17/24 (Gable III)

35 In its recent judgment in case E-17/24, the EFTA Court ruled that in circumstances such as those in the main proceedings to the case, in which the claim was assigned to a third party by way of a legal transaction, this claim must be treated as an insurance claim to be given precedence.

36 The case constellation on which this EFTA Court judgment was based can be described schematically as follows:



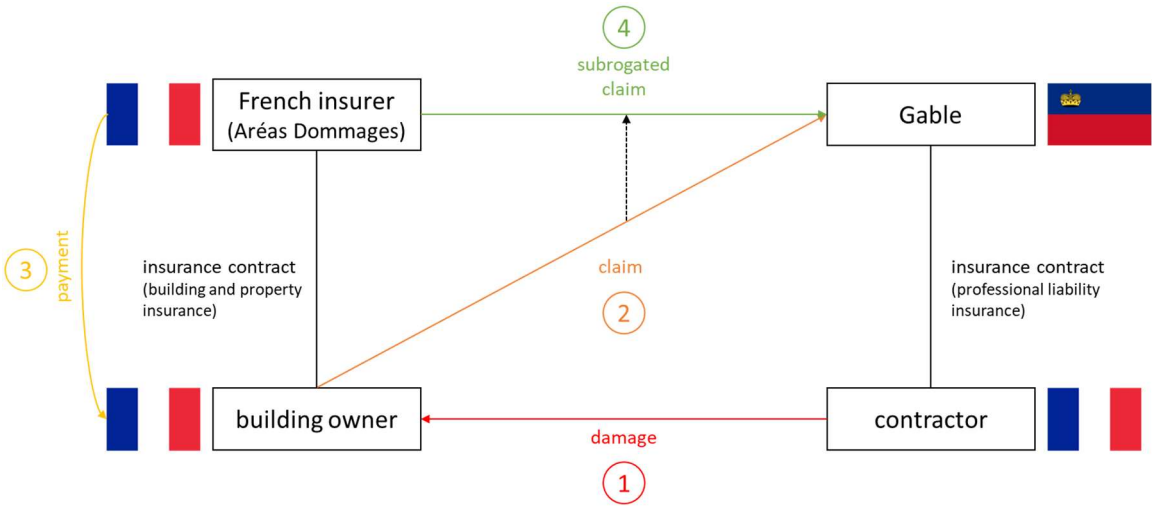
37 The applicant in the national proceedings, a Norwegian insurance intermediary who brokered insurance contracts between the Defendant and Norwegian policy holders, was therefore not an insured person, not a policy holder, not a beneficiary and not an injured (third) party having a direct right of action against Gable. Nor had it concluded an insurance contract with Gable. Rather, in the dispute in the national proceedings, the applicant, as the intermediary of the insurance contract between Gable and the policy holders concerned, made payments to these policy holders to satisfy their claims against Gable on its own initiative and in return had these claims against Gable assigned to it.

38 The question therefore arose before the EFTA Court as to whether the conditions for the existence of an insurance claim with privileged status within the meaning of the case law of the EFTA Court were fulfilled despite this legal transfer of claims – the EFTA Court answered this question in the affirmative.

C. The case in question

1. <u>Are the conditions for an insurance claim met?</u>

39 The case in question can be schematised and summarised as follows:



40 A contractor with professional liability insurance from Gable caused damage to a building while carrying out work (**step 1**). According to the national insurance legislation in France, the building owner as an injured third party had a direct right of action against Gable, based on the liability insurance contract between the contractor who caused the damage and Gable (**step 2**). At the same time, however, the building owner also had its own property/building insurance with a French insurance company, i.e. Aréas. Based on this insurance contract, Aréas had to compensate the building owner for the damage (**step 3**). In turn, Aréas was subrogated by French law to the rights of the building owner vis-à-vis the liable contractor insured by Gable (**step 4**).

41 In view of the four cumulative requirements for the classification of a claim as an insurance claim the EFTA Court has stated in its interpretation of Art. 268(1)(g) of the Directive in Gable I, para. 38, the following two issues arise:

42 First, Aréas is not an insured person, not a policy holder, not a beneficiary and not an injured party having a direct right of action against Gable. Rather, it is an insurance undertaking obliged to indemnify its policy holder, which in turn is an injured party with a direct right of action against Gable. Based on its insurance contract with its policy holder, Aréas had to make payments to it and, upon that, stepped into its policy holder's position by operation of law, i.e. by statutory subrogation.

43 Secondly, Aréas's claim against the Defendant is obviously not based on an insurance contract concluded with Gable.

44 At first glance, it seems that only two of the four conditions of an "insurance claim" are met: Gable as an insurance undertaking (condition ii) owes an amount (condition i). However, Gable does not (anymore) owe that amount to a protected person

(i.e. an insured person, a policy holder, a beneficiary or an injured party having a direct right of action against the insurance undertaking as listed in condition iii), but to an economic operator (i.e. Aréas). There is no insurance contract between Gable and Aréas (condition iv).

45 The question therefore arises whether the third and fourth condition of an "insurance claim" are fulfilled despite the statutory subrogation or, in other words, whether the statutory subrogation does not affect that the privileged status of the claim.

46 In order to answer this question in the affirmative, it would, on the one hand, be necessary for Aréas to be treated as a protected person despite its lack of such status under Article 268(1)(g) of the Directive, because it is asserting a claim that originally fulfilled all the criteria for a privileged insurance claim but was conveyed by operation of law to it as a fourth party later on. The Defendant holds that the Directive aims at the protection of specific categories of persons (i.e. insured persons, policy holders, beneficiaries or injured parties having a direct right of action against the insurance undertaking) Aréas does not belong to.

47 In Gable III, the EFTA Court holds the view that Article 268(1)(g) of the Directive should not be read strictly literally and therefore a claim may be an insurance claim with privileged status even if it is *"no longer directly owed to one of the categories of persons to which the provision in question refers"*(Gable III, para. 41). It favours a contextual interpretation that is "*supported by the objectives pursued by the Directive which […] above all seek the adequate protection of policy holders and beneficiaries"* (Gable III, para. 44). In Gable II, para. 45 and 46, the EFTA Court stresses that it is not the objective of the Directive to grant special protection to economic operators from losses resulting from the bankruptcy of an insurance undertaking, whereas policy holders and beneficiaries should be given priority. As will be shown below (para. 53 ff.), the constellation in the present case and that in Gable II are almost identical, wherefore Aréas is to be regarded as exactly such an economic operator. A contextual interpretation of condition iii) in Art. 268(1)(g) of the Directive may therefore in the case at hand – in contrast to the case in Gable III – lead to the conclusion that Aréas does not fulfil it as well as a literal reading does.

48 Even if one asserted that the Applicant's claim in the present case fulfilled condition iii for an insurance claim with privileged status, one could still not answer the question whether statutory subrogation leaves the privileged status unaffected in the affirmative, as condition iv for an insurance claim is not met: Aréas's claim is not based on an insurance contract. It is common ground that Aréas has not concluded

an insurance contract with Gable to the extent relevant for the proceedings before the referring Court nor is it insured under an insurance contract concluded by a third party as policy holder with Gable. This is clearly stated in the description of the facts in the Request and becomes obvious from the schema in para. 39. Here as well the parallel to Gable II comes into play (see particularly para. 62).

49 The Defendant concludes that the Applicant's claim does not meet the conditions for an insurance claim within the meaning of Art. 268(1)(g) that is to be given precedence in accordance with Art. 275(1) of the Directive.

2. Differences between the present case and Gable II

50 The schematic representation of the constellation in the present proceedings (see para. 39) corresponds to the constellation that formed the basis of the main proceedings in Gable II as shown in para. 33. The only difference between the constellation in the present proceedings and that in Gable II is that the injured building owner in the present proceedings had taken out property/building insurance with the present Applicant, Aréas, whereas the injured building owners in Gable II had taken out construction insurance with the former applicants, other French insurance undertakings. Property/building insurance is a voluntary insurance in France, however, if such an insurance policy is taken out and the conditions for cover are met, the insurance company is obliged to grant indemnity. Therefore, Aréas was obliged to settle the damage suffered by its policy holder on the basis of their insurance contract.

51 In the main proceedings in Gable II, the injured building owners had not taken out property/building insurance, but rather construction insurance. In France, such insurance is mandatory for construction work: a building owner cannot (at least in theory) decide whether or not to take it out but has to do so. When the conditions for cover were met, the former applicants were obliged to compensate their policy holders on the basis of their construction insurance contracts. So while the situation is different regarding the taking out of insurance (voluntary versus mandatory), it is the same once policies are written and conditions for cover met: Insurance undertakings are obliged to pay their policy holders.

52 First, the differences described are therefore marginal. Secondly, they are irrelevant because in both cases insurance cover had to be granted for property damage to buildings.

3. Similarities between the present case and Gable II

53 In all other respects, the constellation in question corresponds to that in the main proceedings of Gable II.

54 Insofar as the referring Court mentions in its Request that the factual situation here has not already been dealt with in Gable II, this statement represents an unjustified relativisation in view of the minimal differences described. The fact is that the case constellations are almost identical:

55 Here as there, the applicants (French insurance companies) received their claims from an injured (third) party with a direct right of action against Gable (in contrast to Gable III where the applicant derived its claims from policy holders). Injured (third) parties with a direct right of action against the insurance company are entitled to have their claim against Gable classified as a privileged insurance claim (provided, of course, that the other three conditions are also met).

56 By compensating the injured party, the insurance company (here: Aréas; there: other French insurance companies) enters as a fourth party into the legal position of the injured (third) party by operation of law. The legal basis is Art. L121-12 of the French Insurance Code (*Code des Assurances*):

> *"The insurer who has paid the insurance benefit shall be subrogated, up to the amount of that benefit, to the rights and claims of the insured against third parties who, through their fault, have caused the damage which gave rise to the liability of the insurer."*

57 According to Article L124-3 of the French Insurance Code, the injured (third) party also has *"a direct right of action against the insurer who guarantees the liability of the person responsible".*

58 Consequently, the Applicant can take action against Gable as the liability insurer of the contractor responsible for the damage. It is irrelevant whether the obligation to indemnify the injured third party arose from a property/building insurance policy or a construction insurance policy. The consequences of the compensation payment are identical – statutory subrogation (assignment by operation of law) to the claim against Gable takes place.

59 It is true that the Liechtenstein court's request for an Advisory Opinion in Gable II does not explicitly mention the entry of the applicants there into the legal position of the injured (third) party by statutory subrogation, i.e. the assignment by operation of law. However, that case was described by the requesting Liechtenstein court in Gable II as follows: "*The insured of Gable Insurance AG is liable by operation of law to the building owner and the construction insurer. Since Gable Insurance AG has agreed to insure this liability, the plaintiffs as the construction insurer can take direct action against Gable Insurance AG in order to claim the compensation they have pre-financed and paid.*" They have *"recourse"* to Gable as insurer of the liable party.

60 The construction insurer has therefore obviously entered into the legal position of the building owner as the injured (third) party vis-à-vis the liability insurer by way of statutory subrogation, just as in the present case the property/building insurer has entered into the legal position of the building owner as the injured (third) party vis-à-vis the liability insurer by way of statutory subrogation. The fact that the Liechtenstein court in its request in Gable II only referred to "*recourse*" and not to "*assignment by law*"/*"statutory subrogation"* is in all likelihood due to the fact that in its description of the various case constellations it comprehensibly focussed on the different roles of the parties there and did not go into more detail on how the applicants entered into the legal position of the injured (third) party vis-à-vis Gable – namely always in the same way regardless of the case constellation: by statutory subrogation as a result of payment of the damage incurred. In consequence of this assignment by law they had a right of recourse against Gable. It is purely coincidental that the referring Liechtenstein court in Gable II chose the term "*recourse*" without mentioning the "*assignment by law*"/*"statutory subrogation".* The latter is, in any case, the mandatory prerequisite for the former.

61 In its description of the facts in the Gable II judgment, the EFTA Court holds (Gable II, para. 21): "*The construction insurer pre-finances this compensation after which he has the right of recourse against the entrepreneur who is actually responsible (or his liability insurer) within the limits of the compensation paid.*" It can be concluded from this that the EFTA Court was well aware of the "functioning" of statutory subrogation through the payment of damages, i.e. the assignment by law. The Defendant therefore sees no need to clarify the statements of the EFTA Court in Gable II to ensure their applicability to the present case: The statements from Gable II are relevant and directly applicable to the present proceedings as the factual situation in the case at hand has already been dealt with there.

62 Aréas is justified in taking recourse against Gable. However, since it has "*not concluded an insurance contract*" with Gable and is not an insured person "*under an insurance contract concluded by a third party as policy holder with Gable Insurance*" (Gable II, para. 24), the fourth of the four cumulative conditions for the existence of an insurance claim within the meaning of Art. 268 (1)(g) of the Directive, as stated by the EFTA Court in Gable I, is not met. In Gable II, the EFTA Court made the identical observations regarding the applicants there (Gable II, para. 24 and 43) and drew the identical conclusion that condition iv was not fulfilled (Gable II, para. 44). Accordingly, Aréas as the Applicant in the main proceedings, just like the applicants in the national proceedings regarding Gable II, does not have an insurance claim against the Defendant that is to be given precedence in accordance with Article 275(1) of the Directive.

63 In summary, the Defendant considers Gable II to be relevant for the present proceedings. It therefore did not consider a request for an Advisory Opinion from the EFTA Court to be necessary in the present case and attempted to convince the referring Court of this view, but was obviously unsuccessful. It remains the case that, in Gable II, the EFTA Court had to assess an almost identical case constellation. It clarified that insurance companies in the situation of the applicants there have no insurance claim against Gable. This statement necessarily means that Aréas's claim in the present proceedings does not have the privilege of being a preferential insurance claim either. In any case, there is no apparent reason why the present constellation should be treated differently from that in Gable II.

4. <u>Relevance of Gable III for the present proceedings?</u>

64 According to the referring Court, at issue "*in the present case is not an assignment by way of a legal transaction but a statutory subrogation*". It therefore obviously recognises that there is a significant difference between the constellation in Gable III and in the present case, as is evident from a comparison of the schematic representations in para 36 and 39. The applicant there derived its claims from policy holders of Gable by way of legal transaction and not from an injured (third) party by statutory subrogation.

65 However, the referring Court fails to recognise that consequently, the entry into the legal position of an injured (third) party by way of statutory subrogation should be treated differently from the entry into the legal position of a policy holder by way of a legal transaction with regards to the status of the resulting claim of the fourth party.

66 Incidentally, the EFTA Court itself confirms this in Gable III (para. 48):

> "*Moreover, the specific context of that judgment differs from that of the main proceedings in the case at hand, in particular because the applicants' claim in Gable II, according to the referring court's request, did not arise from an insurance contract concluded with Gable Insurance (see Gable II, E-5/20, cited above, paragraphs 24 and 43). Accordingly, that judgment cannot serve as a basis for depriving an assigned insurance claim of its privileged status under Article 275(1) of the Directive."*

67 Assignments by way of legal transaction, as they represent the starting point for Gable III, are based on economic considerations. There must therefore be an incentive for the "third party" to step into the legal position of the policy holder. This incentive would at least diminish or even disappear completely if an insurance claim assigned in a legal transaction were no longer to be given precedence in accordance with Art. 275(1) of the Directive. The opportunity for policy holders and beneficiaries to assign their claims and thus receive benefits immediately despite the bankruptcy of the insurance undertaking would be reduced accordingly (Gable III, para. 46). However, according to recitals 16 and 17 of the Directive, the adequate protection of policy holders and beneficiaries is the central objective of this Directive (Gable III, para. 44). In the Defendant's view, this consideration constitutes a key motivation for the EFTA Court's decision that an insurance claim assigned by way of a legal transaction is still to be given precedence in accordance with Art. 275(1) of the Directive.

68 If, on the other hand, a "fourth party" such as the Applicant in the present proceedings or the applicants in Gable II is obliged by law to step into the legal position of the injured (third) party, it cannot refuse to do so, even if – as in the present constellation – the party against whom it thereby acquires a claim is bankrupt and therefore the legal title acquired as a result of payment of damages by way of statutory subrogation is of little or no financial value. It is therefore not necessary for the adequate protection of policy holders or other beneficiaries named in the Directive that insurance claims assigned by way of statutory subrogation should keep their privileged status under Article 275(1) of the Directive: The parties worthy of protection under the Directive, i.e. policy holders, beneficiaries and injured parties with a direct right of action as mentioned in recitals 16, 17 and 127, are compensated by law anyway. The "fourth party" to whom the claim has been transferred by way of an assignment by operation of law (statutory subrogation), such as the

applicants in Gable II and the Applicant in the current proceedings, is, according to the judgment of the EFTA Court, an *"individual economic operator"* (Gable II, para. 46), for whom "*special protection […] is not necessary to secure the objectives of the Directive, namely the protection of policy holders and beneficiaries and general financial stability*" (Gable II, para. 47).

69 The Defendant therefore considers it consistent with the objectives pursued by the Directive that the statutory subrogation (i.e. assignment by operation of law) of an insurance claim means that the resulting claim of the "fourth party" is no longer to be given precedence, in contrast to the assignment of such a claim by way of a voluntary legal transaction.

V. Legal Assessment in respect of Question 2

70 The referring Court's second Question is only to be referred to the EFTA Court if its answer to Question 1 is in the affirmative. Since in the Defendant's opinion Question 1 should be answered in the negative, there is – at least in theory – no need to answer Question 2. In the event that the EFTA Court does not share this opinion, the Defendant nevertheless sets out its view on Question 2 below.

71 By way of introduction, the Defendant would like to point out that, before deciding on the present referral, the referring Court only submitted Question 1 to the parties for comment, but not Question 2, which is questionable in light of the principle of the right to be heard. The parties have therefore not yet been able to comment on Question 2 and its relevance.

72 According to Art. 274 (2)(e), (f) and (g) of the Directive, the law of the EEA Member State in which bankruptcy proceedings are opened determines how the opening of bankruptcy proceedings affects legal proceedings (e.g. the initiation of court proceedings) brought by individual creditors. The lodging, verification and admission of claims are also governed by the law of the home Member State. Liechtenstein law is therefore decisive for these issues in the specific Gable bankruptcy proceedings.

73 An exception to this principle is made in Art. 292 of the Directive, according to which legal proceedings pending at the time of the opening of bankruptcy proceedings shall be governed by the law of the EEA State in which they are conducted.

74 According to Art. 19 and 20 of the Liechtenstein Bankruptcy Code, actions concerning the bankruptcy estate are subject to a so-called "stay of proceedings"

(*"Prozessunterbrechung"*) from the date of the opening of bankruptcy proceedings. This means that legal actions against the debtor cannot be brought or continued after the opening of bankruptcy proceedings. Upon the opening of bankruptcy proceedings, creditors are prohibited from pursuing legal claims in the "ordinary" manner, i.e. from initiating individual court proceedings by filing a lawsuit with the competent court. Instead, creditors have to pursue legal claims in accordance with the applicable provisions of the bankruptcy/insurance legislation.

75 Applied to the Gable bankruptcy proceedings, this means that the Defendant's creditors must assert their claims by filing their claims with the trustee in bankruptcy, who then reviews the claims and presents the results to the Princely Court of Justice at the so-called "General Review Hearing" ("*Prüfungstagsatzung*"). If the claim filed is contested at the Hearing, in terms of its amount or classification, the creditor has the option of bringing an action against Gable's estate at the Princely Court of Justice in Liechtenstein in accordance with Art. 67 of the Bankruptcy Code. Legal proceedings abroad are not permitted.

76 In view of these preliminary remarks, it is not possible to give a simple, blanket answer to Question 2 of the referring Court. The Question is not sufficiently differentiated, which is due to the fact that the referring Court unfortunately did not involve the parties in its formulation.

77 Question 2 may be answered in the affirmative under certain circumstances. In the Defendant's view, this is the case, for example, if the claimant is an injured (third) party who, prior to the date of the opening of bankruptcy proceedings, brought an action against a Gable policy holder (or against Gable directly on the basis of its direct right of action) for damages and was successfully awarded a claim for reimbursement of costs. In such a situation, Gable's policy holder is obliged to pay damages of a certain amount. The associated claim for reimbursement of costs by the injured party then forms part of the defence costs incurred by the policy holder in defending itself against the opposing party's liability claims as an ancillary benefit. Gable insured its policy holder against this liability. In such liability insurance contracts, defence costs are also insured as an ancillary benefit. Gable is contractually obliged to indemnify its policy holder to the extent of its liability towards the injured party, which also includes the costs of defence against the claim (legal costs).

78 The trustee in bankruptcy classifies such claims by injured (third) parties, including associated claims for reimbursement of costs, as privileged insurance claims. However, it should be reiterated that the prerequisite for this is that the injured (third)

party initiated legal proceedings before the date of the opening of the bankruptcy proceedings

79 However, Question 2 of the referring Court must be answered in the negative if, after the date of the opening of bankruptcy proceedings, legal proceedings are brought against Gable abroad, the foreign court subsequently allows such proceedings despite the Defendant's objection and contrary to the stay of proceedings under Liechtenstein law, and even imposes costs on Gable. As stated at the outset, after the date of the opening of bankruptcy proceedings, Liechtenstein law determines which claims are to be lodged against the Gable estate and how they are to be asserted. National law contains an express stay of proceedings. If a foreign court disregards this stay of proceedings despite the Defendant's intervention, the proceedings brought against Gable abroad have no effect whatsoever. In such a situation, the Defendant is not bound by the decision of the foreign court. With the opening of bankruptcy proceedings, creditors are prohibited from pursuing their claims in separate proceedings distinct from the bankruptcy proceedings. Instead, they must file their claims against the Gable estate with the trustee in bankruptcy. This must be done in Liechtenstein, i.e. at the place where the bankruptcy proceedings were opened. A foreign court decision that disregards these principles has no effect in Liechtenstein bankruptcy proceedings, which is why a claim for refund of legal costs such as procedural costs, the reimbursement of which is awarded to the opposing party, cannot constitute an insurance claim in such a situation. It is to be contested both on its merits and with regard to its classification as the Defendant has contested Aréas's respective claim.

80 The following consideration must also be taken into account: If a claim for reimbursement of legal costs arose in proceedings abroad against the debtor that started after the opening of bankruptcy proceedings and was regarded as a valid claim (which, in the Defendant's view, is not the case, as stated above), such a claim would have to be regarded as a claim against the estate. Claims against the estate are claims for expenses incurred during the bankruptcy proceedings, i.e. they concern the costs of carrying out the proceedings. Such claims for costs of the proceedings must be paid immediately and in full. They do not constitute bankruptcy claims (*"Konkursforderungen"*) within the meaning of Art. 47 of the Bankruptcy Code. As insurance claims are a specific class of bankruptcy claims, a claim for legal costs as described above is necessarily not an insurance claim. If such a claim is filed against

the debtor's estate in the bankruptcy proceedings, this is procedurally not correct and the claim must be contested.[6]

81 All things considered, the question referred by the referring Court as Question 2 must be answered in a differentiated manner to the effect that legal costs as an accessory claim to an insurance claim can only also be classified as a privileged insurance claim if they result from proceedings of an injured (third) party with a direct right of action against the party liable or against the liability insurer that were pending at the time of the opening of bankruptcy proceedings.

VI. Conclusion

82 Regarding Question 1 the Defendant's position can be summarised as follows:

83 The Applicant's claim in the present proceedings does not meet requirements iii and iv for an insurance claim as stated by the EFTA Court in Gable I. Although the facts of the case at hand are of course slightly different from those of Gable II (E-5/20), it is not the differences but the similarities that are decisive for the present legal question: Both cases concern originally privileged insurance claims of injured (third) parties having a direct right of action against Gable. In both cases, these claims are transferred to an economic operator who does not belong to the specific groups of persons the Directive aims at protecting. In both cases, the transfer of the claim to the economic operator occurs by way of statutory subrogation (i.e. by assignment by operation of law). In both cases, the economic operator's claim against Gable is not on the basis of an insurance contract. What the EFTA Court decided in Gable II (E-5/20), namely that the claim held by the economic operator after the statutory subrogation cannot benefit from privileged status in accordance with Art. 275(1) of the Directive, must likewise apply to Aréas's claim in the case at hand. The present case also differs from that in Gable III in important respects, which is why it is justified, in particular in view of the objectives pursued by the Directive, that assignment by statutory subrogation results in the loss of the privileged status of the Applicant's claim although assignment by legal transaction would not have had this effect.

84 Regarding Question 2 the Defendant's position can be summarised as follows:

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6 It should be stressed, that, if such a claim was presented to the Defendant as a claim for costs of the proceedings, this would be procedurally correct, but the Defendant would still refuse its payment as the claim arose due to the disregard of the stay of proceedings and is therefore not valid.

85 Legal costs incurred in the assertion of an insurance claim can only be regarded as an insurance claim within the meaning of Article 268(1)(g) of the Directive if the claimant is an injured (third) party who, prior to the date of the opening of bankruptcy proceedings, brought an action against a Gable policy holder (or against Gable directly on the basis of its direct right of action) for damages and was successfully awarded a claim for reimbursement of costs. If these conditions are not met, Question 2 must be answered in the negative.

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86 For the reasons discussed above, Gable Insurance AG in Konkurs respectfully requests the EFTA Court to answer the questions referred as follows:

1. ***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, in circumstances such as those in the main proceedings, subrogated to a fourth party by way of statutory subrogation.***

   If the Court answers Question 1 in the affirmative:

2. ***Legal costs incurred in the assertion of an insurance claim are only to be regarded as an insurance claim within the meaning of Article 268(1)(g) of Directive 2009/138/EC and thus only to be given precedence in accordance with Article 275(1) of that directive, provided that the claim to these costs was awarded in proceedings of an injured (third) party against the party liable for the injury or against its liability insurer and provided that these proceedings began before the opening of the bankruptcy proceedings against the liability insurer.***

Vaduz, 4 August 2025 LIH/GUM

Gable Insurance AG in Konkurs