Please include the case number in all communications
17 CG.2023.219
Document number 28

ORDER

The First Chamber of the Fürstliches Obergericht (Princely Court of Appeal), composed of the Presiding Judge Dr Wilhelm Ungerank LL.M. and Associate Judge Konrad Lanser and Senior Judge Linn Berger as further members of the Chamber, in the

Case

applicant:	Söderberg & Partners AS, Lysaker torg 15, NO-1326 Lysaker represented by Bruckschweiger Gstoehl König Mumelter Rebholz Wolff Zechberger Rechtsanwälte, Landstrasse 60, 9490 Vaduz
defendant:	Gable Insurance AG in Konkurs, Alvierweg 2, 9490 Vaduz represented by Batliner Wanger Batliner Rechtsanwälte AG, Pflugstrasse 20, 9490 Vaduz
concerning:	determination of an insolvency claim (value of the action for costs purposes: CHF 73 267.00)

in the defendant's appeal of 15 April 2024 (document number 16) against the judgment of the Fürstliches Landgericht (Princely Court) of 14 March 2024 (document number 15) following the hearing of the applicant (document number 21) in closed session on **11 July 2024**, in the presence of court clerk Eva Marte, has

ordered:

The appeal proceedings are stayed and, pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), LGBl 1995/72, a reference is made to the EFTA Court in Luxembourg for an Advisory Opinion as follows:

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?

Grounds

1. Facts:

The applicant is a joint-stock company under Norwegian law with a registered office in Lysaker, Norway, registered since 4 December 1992 with the Brønnøysund Register Centre under *organisasjonsnummer* 965 575 162, which previously operated under the names of S & P Norwegian Broker AS and Norwegian Broker AS. It is an insurance intermediary.

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

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

The applicant lodged this claim in the insolvency proceedings concerning the defendant before the Princely Court, case 05 KO.2016.672, as an insurance claim, to which precedence was to be given, and requested that it be entered as a privileged claim.

The defendant (the insolvency estate administrator) contested the claim in full, in terms of the amount, and also in relation to the category claimed "1/Right to separation".

Thereupon, the applicant brought an action against the defendant before the Princely Court in Vaduz, case 17 CG.2023.219, seeking a declaration that, in the defendant's insolvency, the applicant is entitled to an insolvency claim amounting to NOK 623 600.00 (= CHF 73 267.00) and, in that regard, that the claim constitutes a claim in the first category, that is to say, a privileged insurance claim within the meaning of Article 161 of the Insurance Supervision Act.

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

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

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

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

In the appeal, the only question disputed as a matter of law is whether the applicant's claim constitutes an insurance claim or not.

2. European legal framework

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 L 335, 17.12.2009, p. 1, was incorporated into the EEA Agreement by Decision No 78/2011 of the EEA Joint Committee of 1 July 2011, LGBl (Liechtensteinisches Landesgesetzblatt (Liechtenstein Legal Gazette)) 2012/384.

Recital 127 of the Directive is worded as follows:

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.

Title IV of this Directive ("Reorganisation and winding-up of insurance undertakings") includes the following provisions:

Article 268(1)(g) ("Definitions"):

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, including an amount set aside for those persons, when some elements of the debt are not yet known.
The premium owed by an insurance undertaking as a result of the non-conclusion or cancellation of an insurance contract or operation referred to in point (g) of the first subparagraph in accordance with the law applicable to such a contract or operation before the opening of the winding-up proceedings shall also be considered an insurance claim.

Article 275 ("Treatment of insurance claims"):

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

    (a) *with regard to assets representing the technical provisions, insurance claims shall take absolute precedence over any other claim on the insurance undertaking; or*
    (b) *with regard to the whole of the assets of the insurance undertaking, insurance claims shall take precedence over any other claim on the insurance undertaking with the only possible exception of the following:*
        (i) *claims by employees arising from employment contracts and employment relationships;*
        (ii) *claims by public bodies on taxes;*
        (iii) *claims by social security systems;*

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

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

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

Article 277 ("Subrogation to a guarantee scheme"):

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

3. National legal framework

The Directive mentioned was transposed into national law in the Principality of Liechtenstein by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (Insurance Supervision Act (*Versicherungsaufsichtsgesetz;* VersAG; available online together with all other Liechtenstein legislation at www.gesetze.li)) LGBl 2015/231.

The relevant provisions of the Insurance Supervision Act are worded as follows:

C. Definitions

Article 10

Definitions and terminology

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

C. Bankruptcy

(...)
Article 161

Satisfaction of insurance claims

1) The assets covering technical provisions shall constitute a separate estate in bankruptcy proceedings in accordance with Article 45 of the Insolvency Code to satisfy insurance claims. The court shall order that the register of assets allocated to the separate estate be established immediately and submitted to the FMA. The FMA shall determine the separate estate for the time when bankruptcy proceedings are opened. Reflows and income from the assets dedicated

to the separate estate and premiums for the insurance contracts included in the separate estate that are received after bankruptcy proceedings have been opened shall fall into this separate estate.

2) *The list submitted pursuant to paragraph 1 may no longer be changed once bankruptcy proceedings have been opened. The insolvency estate administrator may make technical corrections to the listed asset values with the approval of the Court of Justice.*
3) *If the proceeds from the realisation of the assets are lower than their valuation in the list submitted pursuant to paragraph 1, then the insolvency estate administrator must communicate this to the Court of Justice and justify the variation.*
4) *Repealed*
5) *The insurance claims to be found in the account books of the insurance undertaking shall be deemed lodged. The right of the creditor to lodge these claims as well shall not be affected. The lodgement of claims need not include an indication of ranking.*

Article 161a

Hierarchy of claims

1) *Insurance claims shall take precedence over other bankruptcy claims. This shall be without prejudice to Article 161(1).*
2) *Claims to insurance compensation take precedence over all other insurance claims. Within the same rank, the claims shall be satisfied in proportion to their amounts.*
3) *In derogation from Article 62(1) of the Insolvency Code, the lodgement of claims need not include an indication of ranking.*

In the insolvency proceedings before the Princely Court, sitting as insolvency court, case 05 KO.2016.672, the following provisions of the Act of 17 July 1973 on Bankruptcy Proceedings (Bankruptcy Code) (*Gesetz vom 17.07.1973 über das Konkursverfahren (Konkursordnung)*); KO; applicable in the version before the amendment effected by LGBl 2020/365, are of significance:

Rights to separation

Article 45

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

2) *What remains of the special class of assets following the satisfaction of the creditors entitled to separate satisfaction shall accrue to the common insolvency estate. If the claim at issue is secured by several assets, then the proceeds therefrom shall be used in proportion to their amounts to cover the claim.*
3) *Creditors entitled to separate satisfaction who also have a personal right against the debtor may also assert their claim as an insolvency creditor.*

…

Article 47

Hierarchy of claims

To the extent that the insolvency assets are not used to satisfy the claims of the insolvency estate and the rights of the creditors entitled to separate satisfaction (Article 45), they constitute the

common insolvency estate from which the insolvency claims within the same category shall be satisfied in proportion to their amounts.

Article 48

First category

The following shall belong to the first category: ...

Article 49

Second category

The following shall belong to the second category: ...

Article 50

Third category

The following shall belong to the third category: ...

Article 51

Fourth category

All remaining claims shall fall within the fourth category.

The following provisions of the Civil Code (*Allgemeines bürgerliches Gesetzbuch*) of 1 June 1811 (ABGB; LR Nr. 210.0) are relevant:

3. Cession

Section 1392

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

Section 1393

Subject-matter of the cession

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

Effect

Section 1394

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

4. Reasons for the reference for a preliminary ruling

The fact that Liechtenstein law must be applied to the assignment of the claim effected is not in dispute between the parties in the appeal proceedings. Hence, the appeal must proceed on that basis. As a consequence, section 1394 of the Civil Code applies, according to which the rights of the transferee are precisely the same as the rights of the transferor with respect to the ceded claims. This means that the claim is not altered by way of the assignment, that is to say, it does not result in any change of substance to the assigned claim. According to the definition in

Article 268(1)(g) of the Directive mentioned, 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 (to the extent relevant here); assimilated to that is the premium owed by an insurance undertaking as a result of the non-conclusion or cancellation of an contract or operation. As the applicant, however, is neither an insured person nor a policy holder, beneficiary or an injured party having a direct right of action against the insurance undertaking, a strict interpretation, in accordance with the wording, would thus deprive a claim of its character as an "insurance claim".

The EFTA Court also ruled to this effect in Case E-3/19 *Gable Insurance AG in Konkurs*, paragraph 38, and in Case E-5/20 *SMA SA and Société Mutuelle d'Assurance du Batiment et des Travaux Publics* v *Finanzmarktaufsicht*, paragraph 44, albeit those cases did not concern insurance claims assigned by way of legal transaction.

On this point, the view is taken in the relevant (German-language) legal literature that the legal successors of the holders of insurance claims, e.g. as a result of inheritance, cession or merger are also covered if the legal predecessor had a direct right of action against the insurance undertaking, with it being pointed out in this connection that this interpretation beyond the wording is necessary as a matter of European law, as follows from Article 277 of the Directive mentioned (S. Korinek and M. Reiner in S. Korinek, G. Saria and S. Saria (eds), *Kommentar zum Versicherungsaufsichtsgesetz*, § 308, paragraph 7, with reference to S. Korinek in W. Buchegger (ed.), *Österreichisches Insolvenzrecht*, First Additional Volume, VAG § 88, paragraph 5, and U. Lipowsky in E. Prölss, *Versicherungsaufsichtsgesetz*, 12th edn, § 77a, paragraph 5). Korinek and Reiner (footnote 13 in the

reference cited) base this on the fact that Article 277 of the Directive mentioned evidently presupposes that – apart from the case of claims against guarantee schemes – legal successors of insurance creditors are always considered holders of insurance claims.

This interpretation of Article 277 of the Directive mentioned may be understood in fact to mean, in line with the arguments of the authors mentioned, that, as a rule, the rights of insurance creditors are subrogated to guarantee schemes and, unless the home Member State provides otherwise, these guarantee schemes thereby take on the claims of the insurance creditors as "insurance claims". However, that would thereby create a situation in which persons which are not insured persons, policy holders, beneficiaries or injured parties having a direct right of action against the insurance undertaking, namely, guarantee schemes may assert claims of insurance creditors as "insurance claims" and, consequently, the "subrogation" of the rights of insurance creditors does not deprive their claims of the character as an "insurance claim".

Consequently, an unclear legal situation exists and – as set out – it is decisive for the decision on the legal question, for which reason the Princely Court of Appeal makes the present reference to the EFTA Court for an Advisory Opinion.

5. The staying of the appeal proceedings is based on Article 62(1) of the Liechtenstein Organisation of the Courts Act (*Gerichtsorganisationsgesetz*; GOG).

6. [Only of significance for the main proceedings] The additional questions proposed by the applicant appear not to be necessary, the same applies to the question originally envisaged concerning guarantee systems.

FÜRSTLICHES OBERGERICHT, First Chamber
Vaduz, 11 July 2024
Presiding Judge
Dr Wilhelm Ungerank LL.M.



The accuracy of this copy is confirmed by

Eva Marte

Notice concerning rights of appeal

No appeal may be brought against this order.