

G A B L E

I N S U R A N C E

BWB Rechtsanwälte AG
Attorneys at Law Ltd

Am Schrägen Weg 2
LI-9490 Vaduz

T +423 239 78 78
office@bwb.li

Gable Insurance AG in liquidation

Interim Report of the Trustee in Bankruptcy as at 31 December 2020

Table of Contents

- 1 Introduction..... 3
- 2 Assets..... 5
 - 2.1 Cash at banks and securities 5
 - 2.2 Outstanding claims arising from the insurance business..... 5
 - 2.2.1 Claims against coverholders..... 5
 - 2.2.2 Claims against reinsurance undertakings..... 6
- 3 Liabilities..... 7
 - 3.1 Privileged insurance claims 8
 - 3.1.1 Filings of claims from an insurance benefit..... 8
 - 3.1.2 Filings of claims by national guarantee schemes 8
 - 3.2 Bankruptcy claims 9
- 4 Current state of the bankruptcy proceedings – Liquidation of the insurance business 10
 - 4.1 Policyholders 10
 - 4.2 Coverholders and claims handlers 10
 - 4.3 Reinsurers..... 10
 - 4.4 Guarantee schemes..... 11
 - 4.5 Regulators..... 11
 - 4.6 Pending legal disputes..... 11
 - 4.7 Legal challenges..... 11
 - 4.7.1 Guarantee insurances..... 12
 - 4.7.2 Second EFTA Court proceedings..... 13

1 Introduction

The present interim report of the Trustee in Bankruptcy relates to the 2020 calendar year (reporting period). The year 2020 was characterized by two EFTA Court proceedings in Luxemburg (case numbers E-3/19 and E-5/20) which had been conducted in connection with the present bankruptcy proceedings. The Trustee in Bankruptcy already gave a detailed account of the course and the outcome of the first proceedings in the previous interim report. Only few months after the conclusion of the first proceedings, the Princely Supreme Court (Fürstlicher Oberster Gerichtshof) referred questions to the EFTA Court in national official liability proceedings which were recently answered. The advisory opinions prepared by the EFTA Court are of great importance to the verification of the lodged claims. The decisions have in particular resulted in a clarification of the requirements for a privileged insurance claim. This classification may be decisive with regard to whether creditors will receive partial satisfaction of their claims or whether they might get no satisfaction at all in the bankruptcy proceedings. In the end, the decisions rendered by the EFTA Court have paved the way for the fact that premium refund claims and certain recourse claims must be treated as non-privileged bankruptcy claims.

On the other hand, 30 September 2020 marked the day when with the continued General Review Hearing an important milestone could be reached. At this hearing, the Trustee in Bankruptcy could make a declaration in respect of 11,588 lodged claims. A direct consequence of the continued General Review Hearing was the dispatch of 1,269 decisions to (alleged) creditors whose claims had been contested in whole or in part. Service of a majority of these decisions will be made in the coming weeks and months. To date, two order actions (“Anordnungsklagen”) have been brought.

By 30 September 2020, the Trustee in Bankruptcy had finally verified, *i.e.* admitted or contested, claims in a total sum of CHF 144.8 million. In sum, the Trustee in Bankruptcy has admitted claims in the amount of CHF 64.8 million, with CHF 24.5 million representing privileged insurance claims. Currently, another 1,661 claims have been registered which have not yet been (finally) verified. They amount to a total claim sum of CHF 278.6 million. All in all, 13,414 claims in the amount of CHF 423.4 million have been lodged so far.

Against these liabilities, there are currently assets which in their realized form (liquid assets and investments) amount to approximately CHF 90 million. Fortunately, cash at banks and securities saw a very positive development despite a difficult environment. It is equally positive that in the reporting period an additional approximate amount of GBP 7.2 million in reinsurance benefits could be realized. This amount is already included in the mentioned sum of about CHF 90 million.

As of 31 December 2020, liquid assets and investments are currently as follows:

Investment class	31/12/2020	31/12/2019	Δ in currency	Δ in %
Liquidity	CHF 8,505,933.84	CHF 6,745,659.10	CHF 1,760,274.74	26.1%
Investments	CHF 81,354,411.88	CHF 81,404,010.99	CHF -49,599.11	-0.1%
Total	CHF 89,860,345.72	CHF 88,149,670.09	CHF 1,710,675.63	1.9%

2 Assets

The assets of the bankrupt company are composed of cash at bank and securities, of outstanding claims arising from the insurance business, in particular reinsurance benefits, and responsibility claims (if any). The first two will be described below. The further course of action in connection with the liability that the bankrupt company's former directors might have has not yet been decided. No action will be taken against the former auditors.

2.1 Cash at banks and securities

The number of accounts and securities accounts did not change during the reporting period.

In the first quarter of the reporting period, the COVID-19 pandemic caused significant price fluctuations in respect of the securities investments. The investment strategy adjusted in 2017, however, proved robust, which is why there was no need for a change in the strategy. As a consequence of the significant recovery of the markets in the rest of 2020, a net surplus of about CHF 4.7 million could be generated in the reporting period which corresponds to a performance of roughly 5.9%, if the British pound, the reference currency of the bankrupt company's securities accounts, is taken as the basis.

2.2 Outstanding claims arising from the insurance business

The outstanding claims arising from the insurance business are composed, on the one hand, of the insurance premiums which have already been received by the coverholders, but have not yet been passed on to the bankrupt company and, on the other hand, of the claims against reinsurance undertakings.

2.2.1 Claims against coverholders

In the previous reports, the Trustee in Bankruptcy thoroughly described the large lack of value of this asset item (so called "*trapped funds*", i.e. insurance premiums collected by the coverholders on behalf of the bankrupt company, but not passed on to it). This state has not significantly changed. Only two minor payments (GBP 5,280) were received during the reporting period.

This means that of the claims amounting to roughly CHF 85 million, mentioned in the interim balance sheet as at 30 June 2016 on a going concern basis and at liquidation values, a mere total of about CHF 5.0 million could be collected. In the future, the Trustee in Bankruptcy primarily expects returns from insurance premiums in Norway. Further returns in a significant amount are not likely to be achieved unless legal action is taken. Taking legal action in France and/or England is currently under review.

2.2.2 Claims against reinsurance undertakings

As of 31 December 2020, the bankrupt company received a total of GBP 18'922'563.03 in reinsurance benefits. In this context, reinsurance benefits in the amount of GBP 7,242,814.34 could be collected in the reporting period alone.

In terms of their amount, the bankrupt company's claims against its reinsurers by far represent the largest asset which has not yet been realized. At the moment, reinsurance benefits in the total amount of around GBP 50 million have been reserved.

3 Liabilities

On 12 December 2018 the first hearing in the Bankruptcy Court was held (General Review Hearing). At the time, the Trustee in Bankruptcy made a declaration on the correctness and ranking of precedence of a total of 165 (non-privileged bankruptcy) claims (most of them of belonging to bankruptcy class 4) in an amount of CHF 24.2 million of which claims in the amount of CHF 13.3 million were admitted and claims in the amount of CHF 10.9 million were contested.

On 30 September 2020, the second hearing in the Bankruptcy Court was held (continuation of the General Review Hearing of 12 December 2018). The Trustee in Bankruptcy made a declaration to the Court on the correctness and ranking of a total of 11,588 lodged claims (damage claims and premium refund claims). Taken as a whole, they make up lodged claims in the amount of CHF 120.6 million.

On 30 September 2020, the Trustee in Bankruptcy could fully admit a total of 10,319 claims, whereas it had to fully or partially contest 1,269 claims. The admitted claim sum is CHF 51.5 million and the contested claim sum is CHF 69.1 million. Out of the admitted claim sum, CHF 24.5 million relates to privileged insurance claims and CHF 27.0 million relates to non-privileged bankruptcy claims.

At the moment (**as of 08 March 2021**), another 1,661 claims have been lodged with the Trustee in Bankruptcy and they have not yet been (finally) verified. The creditors of these claims assert a total sum of CHF 278.6 million.

On 30 September 2020, the General Review Hearing was postponed indefinitely for the time being. It has not yet been decided when the next court hearing will be held which will be the last Review Hearing.

The Trustee in Bankruptcy will continue the verification process of 1,661 claims which have been lodged but not yet (finally) verified. In addition, several thousand lodged damage claims are still in the process of being handled. Therefore, the lodging of a greater number of additional claims is to be expected.

The Princely Court of Justice (Landgericht) informed those creditors in writing whose claims (a total of 1,269) were fully or partially contested on 30 September 2020. Service abroad will be made by means of legal assistance.

In sum, 13,414 claims amounting to CHF 423.4 million have been lodged in the bankruptcy proceedings so far. This also includes individual claims from guarantee funds which, in turn, consolidate hundreds

or (ten) thousands of individual claims. The Trustee in Bankruptcy already made a declaration in respect of (*i.e.* admitted or (partially) contested) 11,753 claims amounting to CHF 144.8 million, and the final assessment of 1,661 claims amounting to about CHF 278.6 million is outstanding.

3.1 Privileged insurance claims

3.1.1 Filings of claims from an insurance benefit

Of the claims in the amount of CHF 144.8 million which have now been finally verified, approximately CHF 86.2 million represent privileged insurance claims. The Trustee in Bankruptcy has hitherto admitted CHF 24.5 million as privileged insurance claims.

Apart from that, a great number of unsettled damage claims particularly in France, England and Italy are in the process of being handled.

3.1.2 Filings of claims by national guarantee schemes

The national guarantee schemes in England (FSCS), Denmark (DGF), Italy (CONSAP) and Ireland (ICF) have already made a great number of payments. They make the policyholders and/or the groups with claims concerned assign their claims to them in return for the provision of benefits, and, as a result, primarily the FSCS and the DGF have become the most important creditors.

To date (**as of 31 December 2020**), the FSCS has made payments for damage claims in the approximate amount of GBP 60.2 million and refunded premiums in the approximate amount of GBP 12.6 million. A significant two-digit million amount (GBP) continues to be reserved for the unsettled damage claims. The Trustee in Bankruptcy has so far admitted approximately GBP 9.1 million in premium refunds as non-privileged bankruptcy claims and has not yet made a declaration (*i.e.* admitted or contested) the other claims.

At the General Review Hearing held on 30 September 2020, the Trustee in Bankruptcy admitted a claim lodged by the DGF in the amount of about CHF 20.3 million. This amount represents paid damage claims of Danish policyholders (the DGF does not make any premium refunds) so that they were admitted as privileged insurance claims. The damage claim reserve for the not yet settled damage claims amounts to approximately CHF 4.8 million.

The Italian CONSAP provides damage coverage in the area of motor vehicle liability insurance. The Swiss National Guarantee Fund (NGF) which makes the compensation payments has filed an initial claim in the present bankruptcy proceedings. At the General Review Hearing held on 30 September 2020, the Trustee in Bankruptcy admitted a claim in the amount of CHF 864,281.00 as a

privileged insurance claim. This sum represents the 232 damage claims settled with CONSAP on 31 December 2019. The CONSAP continues to handle unsettled motor vehicle liability damage claims so that the NGF will file additional claims.

The Irish ICF has recently made the first payments in the Irish liability insurance damage claims. No claim has been filed yet.

3.2 Bankruptcy claims

Of the claims in the amount of CHF 144.8 million which have now been finally verified, around CHF 58.6 million are non-privileged bankruptcy claims. The Trustee in Bankruptcy has so far admitted CHF 40.3 million as non-privileged bankruptcy claims.

At this point, reference can be made to the information provided in the previous interim report in that, as a result of the EFTA Court judgement rendered on 10 March 2020 in the first EFTA Court proceedings (E-3/19), premium refund claims must almost exclusively be classified as non-privileged bankruptcy claims. In addition, the recent EFTA Court judgment in the second EFTA Court proceedings (E-5/20) will result in the fact that recourse claims filed by insurance companies must be treated as fourth-class bankruptcy claims.

4 Current state of the bankruptcy proceedings – Liquidation of the insurance business

The trend described in the previous interim report continued in 2020: Even though a great number of unsettled damage claims still need to be handled, the focus of the activity is on the management of larger cases which take up a lot of time. Generally, a multitude of persons are involved (claims handlers, technical experts, reinsurers, guarantee schemes), which results in a lot of time spent on coordination and communication.

During the reporting period, the activity of the Trustee in Bankruptcy was characterized by the consequences of the EFTA Court judgment rendered on 10 March 2020, the preparation of the General Review Hearing held on 30 September 2020 and the increasing number of questions ever since put to the Trustee in Bankruptcy by creditors whose claims were (partially) contested. In addition, the first few order actions have been received.

The Trustee in Bankruptcy expects additional order actions to be filed in the course of 2021.

4.1 Policyholders

Damage claims continue to be received by the Trustee in Bankruptcy and the competent coverholders and claims handlers. However, the number is in continuous decline. The new damage claims primarily relate to long-term warranty and indemnity insurance in France.

4.2 Coverholders and claims handlers

As regards coverholders and claims handlers, there have been no significant changes. The situations continue to differ: In each country in which the bankrupt company sold insurance products, the initial situations and developments were different.

In some countries (England, France, Denmark, Italy, Spain), coverholders also got into financial difficulties due to the present bankruptcy proceedings and were put into liquidation (and some of them were deleted). A solution in terms of a substitute had to be found for each of them.

4.3 Reinsurers

In the previous interim report, the Trustee in Bankruptcy outlined its strategy in connection with reinsurance benefits. This strategy was pursued in the reporting period.

The importance of reinsurance benefits as an asset item in the present bankruptcy proceedings is illustrated by the figures mentioned above. To date, returns in the amount of GBP 18.9 million were

received. In the year 2020 alone, reinsurance undertakings made payments from reinsured damage claims in the amount of GBP 7.2 million.

4.4 Guarantee schemes

Information on guarantee schemes was already reported elsewhere (see item 3.1.2).

4.5 Regulators

The Trustee in Bankruptcy engaged with the Liechtenstein supervisory authority (FMA) on the current developments of the bankruptcy proceedings several times during the reporting year. As in the previous year, there was no direct contact with the various foreign supervisory authorities in 2020.

4.6 Pending legal disputes

Following the General Review Hearing held on 30 September 2020, the first two order proceedings were initiated in Liechtenstein. While one of the cases has now been completed, the other one is still pending in court.

Outside of Liechtenstein, the bankrupt company continues to be involved in roughly 240 pending legal cases. These court proceedings are related to insurance damage claims and, thus, to the regular liquidation of the bankrupt company's insurance business.

The action brought by the Danish guarantee scheme (DGF) against the bankrupt company in Denmark in December 2017 was recently dismissed. In the proceedings there, the DGF sought to access the reinsurance benefits to which the bankrupt company is entitled against the reinsurer concerned. The competent court in Denmark negated its jurisdiction over the bankrupt company and the reinsurer in January 2021. The DGF did not lodge an appeal against the decision to dismiss the case.

4.7 Legal challenges

In the previous reports, the Trustee in Bankruptcy gave account of the handling of the various legal challenges. Most of the aspects mentioned in said reports continue to be of importance to the course of the bankruptcy proceedings. New questions for which the rights answer must be found arise over and over again. In addition, they have a bearing on the course of action to be chosen with regard to the management of the assets and the determination of the liabilities. In the present interim report, account of the following topics can be given:

4.7.1 Guarantee insurances

In Italy and Norway, among other countries, the bankrupt company also sold insurance products from the class of insurance "*bond*" ("Kaution") (Annex 1, item 15, to the Insurance Supervision Act; Annex I, item 15, to the Solvency II Directive 2009/138/EC). Italian bond policies can be used as an example to illustrate how these products work: Under the bond/guarantee insurances sold in Italy (in Italian: *polizza cauzionale* or *polizza fideiussoria*), the bankrupt company guaranteed to a beneficiary (the public sector, e.g. municipalities, tax or other authorities) that the bankrupt company's policyholder would fulfil the obligations contractually agreed with the beneficiary (e.g. construction of a building/creation of a certain work, certain labour, payment of fees/duties/taxes). The coverage was thus for obligations that the bankrupt company's policyholder owed to a third party (beneficiary).

During the processes of claims handling and claims verification, the particularities of these products were discovered. For example, pursuant to prevailing academic opinion and settled case law, the bond policies sold in Italy do not represent insurance contracts under Italian law, but guarantee agreements ("Bürgschaftsverträge"). On the other hand, the applicable Norwegian legal provisions appear to provide that the guarantee insurances sold in Norway cannot be dissolved.

Against this background, the Trustee in Bankruptcy was faced with the following question: What are the effects of the bankruptcy proceedings initiated in Liechtenstein on these bond/guarantee insurances entered into under foreign laws? In other words: Did the initiation of bankruptcy proceedings have no effect on the contracts entered into, meaning are they still valid, or did the initiation of bankruptcy proceedings result in a dissolution of the contracts?

The question as to the effects of the initiation of bankruptcy proceedings on the bankrupt company's current contracts is governed by Liechtenstein law. This is evident from Art. 274 (2) (d) of Directive 2009/138/EC or Art. 168 (2) (d) of the Insurance Supervision Act which provide that this question shall be governed by the law of the state in which the bankruptcy proceedings were initiated (home Member State).

With regard to a resolution of the specific question at hand, Liechtenstein law makes a distinction as to whether insurance contracts or other contracts are involved. Art. 31 of the Liechtenstein Insurance Contract Act provides that current insurance contracts shall expire by operation of the law four weeks from the day on which the opening of the bankruptcy is announced. For other contracts, the Bankruptcy Code (Art. 34 et seqq. therein) determines what happens to them in the event of a bankruptcy. It is therefore of central importance whether the bond/guarantee insurances (in the present matter, Italian and Norwegian ones) are insurance contracts or not.

The Trustee in Bankruptcy takes the view that the qualification of the bond/guarantee insurances (insurance contracts yes or no) is also governed by Liechtenstein law, irrespective of whether these bond/guarantee insurances were entered into under foreign laws or not. It is true that neither the Liechtenstein Insurance Supervisory Act nor Directive 2009/138/EC provide a specific answer to this. However, the Trustee in Bankruptcy derives this view from the meaning and purpose of the said Directive. With said Directive, the European legislator sought to establish uniform legal consequences in the event that an insurance undertaking with cross-border operations goes bankrupt. Therefore, the law of the home Member State is to govern not only the consequences of the opening of bankruptcy proceedings on the current contracts of the bankrupt insurance undertaking, but also the question as to whether the current contracts are insurance contracts (or other contracts).

Under Liechtenstein law, the Italian and Norwegian bond/guarantee insurances are insurance contracts within the meaning of the Insurance Contract Act, given that the constituents which are typical of insurance are met (risk/danger, obligation by the policyholder (payment/premium), obligation by the insurance undertaking, independent operations, systematic and standardized business operations). The consequence is that they were dissolved by operation of the law as of 16 December 2016 (Art. 31 of the Insurance Contract Act).

As far as the verification of claims is concerned, this specific outcome means that for damage claims the insured event must have occurred prior to the dissolution of the insurance contract (*i.e.* prior to 16 December 2016) so that insurance coverage can be accepted. If this is the case, legitimate claims represent privileged insurance claims. If the insured event occurred after 16 December 2016, there is no coverage, because the insurance contract no longer exists. However, in such a case, the policyholder is entitled to a premium refund (refund of the unused share of the premium, *i.e.* the share which relates to the period after 16 December 2016). With few exceptions, however, premium refund claims merely represent non-privileged bankruptcy claims (bankruptcy class 4).

4.7.2 Second EFTA Court proceedings

On 20 May 2020, a second request from Liechtenstein for a preliminary ruling in relation to the present bankruptcy proceedings was filed with the EFTA Court in Luxembourg. The request was filed by the Supreme Court of the Principality of Liechtenstein (Fürstlicher Oberster Gerichtshof) which, as the appellate court in the national main proceedings, had to make an assessment with regard to the official liability claims of two French insurance undertakings. The Supreme Court felt compelled to stay the national proceedings and to make a request to the EFTA Court for an advisory opinion. The Supreme Court essentially asked the question whether the Solvency II Directive and its preceding Directives confer on economic operators such as the Applicants, which are neither parties to nor beneficiaries of

an insurance contract entered into with the bankrupt company, rights which can form the basis for state liability claims towards a supervisory authority.

In these preliminary ruling proceedings (case number E-5/20), the EFTA Court rendered a judgment on 25 February 2021 in which it answered the question by stating that neither the Solvency II Directive nor its preceding Directives, in circumstances such as those of the main legal dispute, confer to the Applicants any express rights which can give rise to any state liability claims against a supervisory authority. Under the mentioned Directives, these economic operators do not enjoy protection from damage resulting from the insolvency of insurance undertakings.

The outcome of the EFTA Court proceedings has consequences on the course of the bankruptcy proceedings, in particular the verification of claims. The EFTA Court held that the insurance undertakings' (recourse) claims at issue in the matter do not represent insurance claims because they are not based on an insurance contract. Any such claims are therefore not privileged and no priority satisfaction out of the special estate can, therefore, be achieved for them, if they are admitted at all. Rather, they must be classified as bankruptcy claims of the fourth bankruptcy class.

The effects of the EFTA Court judgement go beyond this particular case. In the present bankruptcy proceedings, further (recourse) claims from insurance undertakings need to be verified in the future, and these claims were filed on the same basis (French Décennale insurance system). In these cases too, the Trustee in Bankruptcy will verify the claims as bankruptcy claims of the fourth bankruptcy class.

It is still an unresolved question as to whether the EFTA Court decision has effects on other insurance products as well. The bankrupt company also sold various liability insurances (motor vehicle liability, public liability insurance, etc.) which ultimately cover the damage suffered by a third party who is not a party to the insurance contract. In these scenarios, the injured parties are typically third parties who are neither policyholders nor insured persons. In this context, the question arises in each case whether the claims by injured third parties meet the four requirements for a privileged insurance claim as described by the EFTA Court in the "first" proceedings (E-3/19). The Trustee in Bankruptcy will have to assess the potential effects with regard to each insurance product where three parties are involved.

Vaduz, 31 March 2021

BATLINER WANGER BATLINER Attorneys at Law Ltd