



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 2021

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1 Introduction

The present 6th interim report of the Trustee in Bankruptcy relates to the 2021 calendar year (reporting period). It builds on the previous five interim reports.

With the continued General Review Hearing on 20 December 2021 another milestone could be reached. At this hearing, the Trustee in Bankruptcy could make a declaration on 777 lodged claims. A direct consequence of the continued General Review Hearing was the dispatch of 223 decisions to (alleged) creditors whose claims were contested (in terms of their reason, amount and/or rank).

Service of decisions to (alleged) creditors whose claims were contested in whole or in part at the court hearing of 30 September 2020 (continuation of the General Review Hearing of 12 December 2018) has not yet been completed. Currently (**as of 04/04/2022**), service of 850 out of a total of 1,269 decisions has been completed.

So far, eight order actions (“Anordnungsklagen”) have been brought. Four of them are currently (**as of 04/04/2022**) pending in court.

By 20 December 2021, the Trustee in Bankruptcy had finally assessed, *i.e.* admitted or contested, claims in a total sum of CHF 167.5 million. In sum, the Trustee in Bankruptcy has admitted claims in the amount of CHF 55.1 million, with CHF 26.4 million of said amount as privileged insurance claims. Currently (**as of 04/04/2022**), another lodged 1,021 claims have been registered which could not yet be (finally) assessed. They amount to a total sum claimed in the amount of CHF 211.5 million. All in all, 13,548 claims in the amount of CHF 376.7 million have been lodged as of now.

In the reporting period an approximate amount of GBP 9.9 million in reinsurance benefits could be realized. Against the liabilities, there are currently assets which in their realized form (liquid assets and investments) amount to roughly CHF 97.6 million. **As of 31 December 2021**, the liquid assets and investments are currently as follows:

Investment class	31/12/2021	31/12/2020	Δ in currency	Δ in %
Liquidity	CHF 6,324,185.42	CHF 8,505,933.84	CHF 2,181,748.42	-25.6%
Investments	CHF 91,272,784.06	CHF 81,354,411.88	CHF 9,918,372.18	12.2%
Total	CHF 97,596,969.48	CHF 89,860,345.72	CHF 7,736,623.76	8.6%

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 of responsibility claims (if any). The first two will be described below. In connection with the liability that the bankrupt company's former directors might have the bankrupt company is currently examining whether to take legal action. No action will be brought against the former auditors.

2.1 Cash at banks and securities

The accounts and securities accounts at LGT Bank in Liechtenstein AG (LGT) and Neue Bank AG did not change during the reporting period. At Liechtensteinische Landesbank AG (LLB) the securities account was increased at the expense of liquidity by GBP 7.0 million. This was due to significant payments received from reinsurance benefits.

If the mere market yield is the reference, a positive yield of 1.5% could be generated in the reporting period. This amounts to CHF 1.4 million. The value development of the investments at LLB was, however, affected negatively by the trend of the exchange rates of the accounting currency GBP against the bigger positions in EUR, NOK and DKK. Finally, this resulted in a nominally negative net performance of CHF 1.2 million across the entire investment portfolio.

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 been collected 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 which have been collected by the coverholders on behalf of the bankrupt company, but have not been passed on to the same). This state has not significantly changed. At least two payments (altogether totalling approximately GBP 197,000.00) were received during the reporting period.

This means that of the roughly CHF 85 million of claims mentioned in the interim balance sheet as at 30 June 2016 on a going concern basis and at liquidation values, about CHF 5.1 million could be collected so far. The Trustee in Bankruptcy most of all expects returns from insurance premiums in Norway in the future. An agreement about the transfer of about NOK 7.0 million (CHF 750,000.00) could already be reached with a former coverholder in December 2021, which sum was received in the

2022 calendar year (and will thus not be added to the total amount before the next interim report). Further returns in a significant amount are not likely to be achieved unless legal action is taken. Court proceedings were initiated against a former coverholder in France during the reporting year.

2.2.2 Claims against reinsurance undertakings

As of 31 December 2021, the bankrupt company had received a total of GBP 28,645,463.81 in reinsurance benefits. During the reporting period, reinsurance benefits in the amount of GBP 9,893,893.30 were received.

In terms of their amount, the claims of the bankrupt company against its reinsurers by far represent the largest asset which has not yet been realized. At the moment, reinsurance claims in the total amount of GBP 33.1 million have been reserved.

3 Liabilities

Up to now, three hearings as part of the General Review Hearing were held. During the first hearing which was held on 12 December 2018, the Trustee in Bankruptcy made a declaration on the correctness and order of precedence of a total of 166 (non-privileged bankruptcy) claims (most of them belonging to the bankruptcy class 4) in the amount of CHF 22.6 million of which claims in the amount of CHF 1.2 million were admitted and claims in the amount of CHF 21.4 million were contested.

On 30 September 2020, the second court 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 order of precedence of a total of 11,588 lodged claims (damage and premium refund claims). Taken as a whole, they make up lodged claims amounting to CHF 120.6 million. 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.

On 20 December 2021, the third court hearing was held (continuation of the General Review Hearing of 12 December 2018). The Trustee in Bankruptcy made a declaration to the Bankruptcy Court on the correctness and order of precedence of a total of 777 lodged claims (damage and premium refund claims) in a claim amount of CHF 24.3 million. While the Trustee in Bankruptcy could fully admit 554 claims, it had to contest 223 claims in terms of their amount partially or fully and/or with regard to the lodged class. The admitted claim sum is CHF 3.2 million and the contested claim sum is CHF 21.1 million. Out of the admitted claim sum, approximately CHF 2.6 million relates to (privileged) insurance claims and approximately CHF 596,360.00 million relates to (non-privileged) bankruptcy claims.

At the moment (**as of 04/04/2022**), another 1,021 lodged claims have been registered with the Trustee in Bankruptcy which to date have not been or have not been finally assessed. The creditors of these claims are asserting a total of about CHF 211.5 million. The Trustee in Bankruptcy continues the assessment process of these claims.

In addition, a low four-digit number of lodged damage claims is in the process of being handled. Therefore, a greater number of additional claims is expected to be lodged.

The Princely Court of Justice (Landgericht) informed those creditors in writing whose claims (a total of 223) were contested partially or fully and/or with regard to their class on 20 December 2021. Service abroad shall be made by means of legal assistance.

In sum, currently (as of **04/04/2022**), 13,548 claims amounting to CHF 376.7 million have now been lodged in the bankruptcy proceedings. 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 12,527 claims amounting to CHF 167.5 million (*i.e.* admitted or - partially - contested them), and the final assessment of 1,021 claims amounting to CHF 211.5 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 167.5 million which have now been finally assessed, approximately CHF 108.2 million are (privileged) insurance claims. The Trustee in Bankruptcy has hitherto admitted CHF 26.4 million as (privileged) insurance claims.

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

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 concerned with claims assign their claims to them in return for the provision of benefits, as a result of which primarily the FSCS and the DGF become the most important creditors.

To date (as of **31 December 2021**), the FSCS has made payments for damage claims in the approximate amount of GBP 66.1 million and refunded premiums in the approximate amount of GBP 12.6 million. The Trustee in Bankruptcy has admitted approximately GBP 9.1 million in premium refunds as non-privileged bankruptcy claims. It has not yet made a declaration on the other claims. An amount of GBP 33.0 million has currently been reserved for the unsettled damage claims.

At the General Review Hearing held on 30 September 2020, the Trustee in Bankruptcy admitted a claim amount of about DKK 137 million lodged by the DGF (this currently amounts to approximately CHF 18.8 million). The DGF filed an updated list of claims (as of 31 December 2021) by which an additional approximate amount of DKK 3.5 million was filed (this currently amounts to approximately CHF 474,000.00). The damage claim reserve for the hitherto about 100 unsettled damage claims amounts to approximately DKK 22.3 million (this currently amounts to approximately CHF 3 million).

The Italian CONSAP provides damage coverage in the area of motor vehicle liability insurance. The Swiss National Guarantee Fund (NGF) which assumes the compensation payments has filed an initial claim in the present bankruptcy proceedings in the amount of CHF 864,281.00 which the Trustee in Bankruptcy admitted as a privileged insurance claim at the General Review Hearing held on 30 September 2020. Since the CONSAP continues to handle unsettled motor vehicle liability damage claims, the NGF will file additional claims in the future.

In January and October 2021, the Irish ICF made payments in (so far) 18 Irish liability damage claims for the first time. No claim has been filed yet.

3.2 Bankruptcy claims

Of the claims in the amount of CHF 167.5 million which have now been finally assessed, around CHF 59.4 million are (non-privileged) bankruptcy claims. The Trustee in Bankruptcy has so far admitted CHF 28.7 million as (non-privileged) bankruptcy claims.

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

Given that a large number of individual claims have now been handled (some of them could be handled rather easily), the Trustee in Bankruptcy is now facing the handling of an increasing number of complex and large claims. Due to the General Review Hearing which was continued in the reporting period, the Trustee in Bankruptcy is expecting additional order actions (“Anordnungsklagen”) in the course of 2022. At the moment, four review proceedings are pending.

In addition, the EFTA Court rendered its second judgement in connection with the present bankruptcy proceedings in the reporting period. The judgement of 25 February 2021 (case no. E-5/20) was already discussed in the previous interim report. During the entire reporting period, the Trustee in Bankruptcy has been dealing with the consequences resulting from this judgement, in particular the uncertainties about the treatment of the different three-party scenarios.

4.1 Policyholders

New damage claims continue to be filed. This is mainly the case in France, but also in Italy and in England. The number of outstanding damage claims, *i.e.* damage claims which are still in the process of being handled, is in continuous decline.

4.2 Coverholders and claims handlers

As regards the coverholders and claims handlers, things have remained the same since the previous interim report. Reference can be made to the mentioned interim report.

4.3 Reinsurers

In the 4th interim report, the Trustee in Bankruptcy outlined its strategy in connection with the reinsurance benefits. This strategy was pursued in the reporting period.

The importance of the reinsurance benefits as an asset item in the present bankruptcy proceedings is illustrated by the mentioned figures. To date, returns in the amount of GBP 28.6 million have been made. In the year 2021 alone, reinsurance undertakings made payments from reinsured damage claims in the amount of GBP 9.9 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 met with the Liechtenstein supervisory authority (FMA) to report on the current developments of the bankruptcy proceedings within the reporting year regularly again. As in the previous year, there was no direct contact with the various foreign supervisory authorities in 2021.

4.6 Pending legal disputes

Following the two continued General Review hearings held on 30 September 2020 and 20 December 2021, a total of eight order actions have been brought so far. Four of the subsequently initiated review proceedings have now been completed, while four other review proceedings are still pending.

Outside of Liechtenstein, the bankrupt company is currently involved in 168 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.

4.7 Legal challenges

In the previous reports, the Trustee in Bankruptcy gave account of the handling of various legal challenges. A great number of the aspects discussed therein continue to be of importance to bankruptcy processing.

In the reporting period, the main focus point was the findings by the EFTA Court in its judgement of 25 February 2021 (case no. E-5/20) on the qualification of the claims by two French insurance undertakings (hereinafter referred to as the "Applicants") which filed these (and other) claims in the present bankruptcy proceedings. These findings resulted in uncertainties about the treatment of three-party scenarios in particular. The following is a report on this.

In its previous interim report the Trustee in Bankruptcy already described the starting point for the preliminary ruling proceedings at the EFTA Court (case no. E-5/20) as well as the considerations and the ruling of the EFTA Court. As expected, the national main proceedings were definitely and finally terminated when the appeal lodged by the Applicants was dismissed.

In the mentioned interim report, the Trustee in Bankruptcy highlighted the consequences of the outcome of these EFTA Court proceedings on the further course of the bankruptcy proceedings. In summary, and insofar as this is relevant in the present context, the EFTA Court has found that the Applicants shall have no insurance claims against the bankrupt company, because their (recourse) claims against the bankrupt company are not based on an insurance contract. Therefore, the

Applicants' claims cannot be privileged and cannot benefit from prior satisfaction out of the special estate. Rather, they must be classified as fourth-class bankruptcy claims.

At the continued General Review Hearing of 20 December 2021, the Trustee in Bankruptcy had to make an assessment on about 30 claims by the Applicants. Due to the considerations by the EFTA Court, their claims could not be classified as (privileged) insurance claims, but had to be classified as (non-privileged) fourth-class bankruptcy claims. The Applicants filed an order action against this classification in 17 cases.

In the two judgements hitherto rendered by the EFTA Court in connection with the present bankruptcy proceedings (E-3/19 and E-5/20), the EFTA Court maintained and reiterated the definition of an insurance claim in line with Directive 2009/138/EC. Under this definition, four prerequisites must be met cumulatively: i) an amount is owed, ii) by an insurance undertaking, iii) to insured persons, policyholders, beneficiaries or an injured third party having a direct right of action against the insurance undertaking, iv) on the basis of an insurance contract. With regard to the claims asserted by the Applicants against the bankrupt company, the EFTA Court held that the criterion mentioned last was missing.

The claims asserted by the Applicants against the bankrupt company relate to liability insurance cases within the framework of the so-called French "Décennale system" which is applicable to the construction of buildings. This system results in three-party scenarios typical of liability insurances: The injured party is a third party who is neither a policyholder nor an insured person of the bankrupt company. Rather, the policyholder or insured person is the construction entrepreneur (e.g. builder or craftsman) who caused damage to the building. The insured entrepreneur has a co-called right to be exonerated by his/her/its liability insurer: The insurer exonerates the liable entrepreneur from his/her/its liability. If the liable entrepreneur has already compensated the injured party, he/she/it has a payment claim against his/her/its insurer instead of the right to be exonerated. Ultimately, the damage of a third party who is not a party to the insurance contract is covered.

With their claims lodged against the bankrupt company as liability insurer of the liable party causing the damage, the Applicants are asserting recourse claims. In this connection, the question arises as to whether they are allowed to assert claims of injured third parties in line with the Directive mentioned above. It is highly likely that this question must be answered with yes. The more interesting question is in what class any such claims rightly have to qualified (either as privileged insurance claims or as non-privileged bankruptcy claims). The claim asserted by an injured third party qualifies as insurance claim if such injured third party has a direct claim against the insurance undertaking. Under the French

“Décennale system”, the injured constructor has a direct claim - as required under the Directive - against the liability insurance of the responsible entrepreneur by operation of law. As a result of the compensation of the injured third party, the Applicants were subrogated to his/her/its rights by subrogation.

The EFTA Court negated the existence of a privileged insurance claim on the part of the Applicants and referred to the lack of an insurance contract in this regard. In the aftermath of this judgement by the EFTA Court, the Trustee in Bankruptcy is faced with the following questions (among others):

- Did the Applicants, as a result of the compensation of the injured third party (constructor) who under French law has a direct claim against the bankrupt company and as a result of the subsequent subrogation to his/her/its rights, lose the privilege of the insurance claim?
- In other words, are recourse claims in any event not privileged?
- Must the injured third party (constructor) who asserts its direct legal claim directly against the bankrupt company (e.g. because it did not enter into a construction insurance) be treated as a privileged creditor?
- Must the prerequisite for an insurance claim “direct right of action of the injured third party against the insurance undertaking” be interpreted in such a manner that the direct right of action must be based on European/harmonised law, or is it permissible that the right of action is based on national law?
- To what extent does a subrogation differ from an assignment? In other words, does the insurance claim lose its qualification as an insurance claim if it is transferred to a third party by means of assignment?

The lack of answers to these (and other) questions makes it impossible for the Trustee in Bankruptcy to make a definite assessment of all liability insurance claims with which it is faced. Therefore, the Trustee in Bankruptcy intends to submit the relevant questions on the interpretation of European law to the EFTA Court as part of one of the pending review proceedings. It must be expected that the course of this calendar year will see the initiation of additional preliminary ruling proceedings with the EFTA Court.

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BATLINER WANGER BATLINER Rechtsanwälte AG