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## Introduction

The problem statement requires the answer to focus on a legal solution for Benedict Maximov & his group of companies so that the impending deal with KuasaNas is not jeopardized. Nevertheless, before moving into the intricacies of insolvency law certain facts need to be brought out. None of the companies are in default, have been servicing the debt, and it is unlikely, that but for the claims made by the Romanian Drivers, either Efwon Trading or Efwon Investments would have been on the brink of default. Therefore, this is not a problem of capital structure i.e., excessive leverage. (Refer Annexure)

Whilst a legal solution is being attempted, one of the pre-requisites for Maximov is to negotiate with the Romanian Drivers, ascertain their claims, and reach an amicable solution. This is not only to quantify the amount that will form part of the claim in any restructuring that is attempted, but also to facilitate their continued work for Efwon Romania. The case is silent on the amount of claim by the Drivers, and about the fact, that in case the Drivers leave the company whether other drivers are available. For competing in F1, the drivers need a Super Licence, and the licenses are only available for reigning champions or for drivers who have done well in lower category races. In case of a deal with KuasaNas, new drivers can be engaged in Malaysia, but the deal is not a certainty.

In the unlikely scenario of other drivers not available a viable restructuring plan is not possible. United States Bankruptcy Code (“**US**”), Title 11, Chapter 11, §1129(a)(11) states, the court shall confirm a plan only if confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. EU Directive 2019/1023 (“**EU Directive**”) on preventive restructuring frameworks, Recital 24 states that, to avoid restructuring frameworks being misused, the financial difficulties of the debtor should indicate a likelihood of insolvency and the restructuring plan should be capable of preventing the insolvency of the debtor and ensuring the viability of the business; corresponding to Article 8(1)(h). UK Scheme of Arrangements require certainty of implementation and finally, EU Regulations 2015/848 (“**EIR Recast**”) under Article 60 state that an insolvency practitioner for effective administration of the proceeding request a stay with respect to any other member of the group provided that a restructuring plan for all or some of the members has been proposed under Article 56(2)(c) and presents a reasonable chance of success. Thus, irrespective of the path we traverse, it is imperative that the restructuring plan is capable of implementation.

## Status of case in Romania and its implications

The Drivers have brought claims citing defects in safety and management. The machines and drivers are dependent on four key items: electronics, aerodynamics, suspension, and tyres. Control of aerodynamics and suspension is partly based on physical characteristics of the machinery and partly on sophistication of electronics. Thus, defects “*may not”* have arisen on account of management and safety; the claims are disputed, may be contested, and are contingent and unliquidated in nature. Insolvency in Romania is possible when the debtor has insufficient cash to pay the undisputed, liquid, and enforceable debts[[1]](#footnote-1). Moreover, a threshold value (RON 40,000) is defined as the minimum to allow a petition[[2]](#footnote-2). In the case the claims do not meet the requisite criterion, yet, and though the case does not specify a value of claim, as they are “substantial” we can assume that they meet the threshold value.

Furthermore, the lawyers representing Drivers have filed for insolvency, as an “interim-measure”, pending order of admission, have got freezing injunctions over the company’s assets and income. Under Insolvency Act, whether an insolvency petition is a voluntary petition (i.e., filed by the debtor or its management), or an involuntary petition (i.e., filed by other person or entity), the insolvency commences when the insolvency court issues a decision against such debtor to open proceedings.[[3]](#footnote-3) In case of voluntary petition the insolvency court adjudicates within five days. In an involuntary it usually takes longer, up to two-three months or more[[4]](#footnote-4). Thus, as of now there is no open insolvency proceeding and since this is just an interim strategy, possibly the lawyers too know they may not succeed.

Thus, a two-pronged approach needs to be adopted in Romania. As a first step the procedure called *ad-hoc* mandate or judicial moratorium (*concordat preventive*),[[5]](#footnote-5) should be adopted. The judicial moratorium represents an agreement between the debtor and the creditors whereby the debtor proposes a plan for the revival of its business and for covering its debt and the creditors accept to support the debtor’s efforts to this end. The ad-hoc mandate represents a confidential procedure opened upon the debtor’s request whereby an ad-hoc proxy, appointed by the court, negotiates during 90 days of its appointment with the creditors with a view to reaching an agreement for overcoming the financial distress of the undertaking.

The judicial moratorium represents a more flexible mechanism, in comparison with the insolvency proceedings, for a company in distress to reorganise its activity, and is contractually enforceable against all creditors. All enforcement proceedings are suspended pursuant to the homologation of the judicial moratorium. Moreover, the syndic judge may extend period of payment by 18 months subject to the debtor offering appropriate security. During this 18-month extension, no interest, penalties, or any other expenses shall be incurred in connection with such repayments.

Simultaneously, the toolbox of laws, available across globe need to be analysed and evaluated for filing for an insolvency procedure, and successfully come out of it, so that Maximov can strike a deal with KuasaNas, in time. We also need to analyse whether a default is imminent?

## Is a default imminent in 2019?

The source of Efwon Romania’s revenue is from broadcasting. Revenue from sponsorship accrues to Efwon Trading. Though terms of loan are not known, assuming either of the scenarios; payments in equated instalments or end of tenor bullet repayment, the amounts become due and the default imminent only in 2020, if the instalment and interest of 2019 is paid out of the sponsorship money. (Refer Annexure) However, it is likely that kicking the can down the road to 2020, may result in increased uncertainty, make the deal unpalatable for KuasaNas and result in loss in revenue from a potential source of sponsorship as well as resultant gain that would arise from an equity stake sale.

## The instruments in our toolbox

Professor Ray Warner says there is no single instrument to solve for insolvency across jurisdictions; The law of nowhere applies to a multinational insolvency and we need to construct our own “dragon-star-fighter”[[6]](#footnote-6) to arrive at a solution. According to the insolvency folklore, US Chapter 11 and English schemes of arrangement have been a popular recourse for international insolvencies, due to ease of grant of jurisdictions. The new kid on the block is the EU Directive with features like US Chapter 11. Nevertheless, to arrive at an ideal combination of laws and a potential solution we analyse each of the laws listed below, the hurdles that we may encounter, and finally how to surmount those problems.

1. US Title 11 Chapter 11 (“**Chapter 11**”)
2. EU Directive
3. English scheme of arrangements
4. EIR Recast
5. UNCITRAL model law on cross border insolvency (“**MLCB**”)

## US Chapter 11 – Popularity does not necessarily equate to right choice!!

The US Chapter 11, *prima-facie*, seems to have all the tools that we need to emerge from the situation in Romania. It provides us with automatic stay, nullifies ipso-facto clauses, allows adjustment of secured debt, right to reject burdensome contracts, and power to sell assets free and clear of any lien, through a plan of reorganization. However, the procedure is expensive with court intervention. In brief the advantages and disadvantages of using Chapter 11 are detailed below within the bounds of our case:

The venue for bankruptcy proceedings is based on domicile, residence, principal place of business of either debtor or its affiliate. [28 USC §1408]. It is also determined by the nerve centre test and can be easily created by giving a retainer to a US lawyer.

* Efwon Investments already has a domicile in the United States. Also, Maximov being an American seems to be taking decisions for all Efwon companies in the chain, passing the nerve centre test i.e., from where the debtor’s activities are directed and controlled. Refer *Fairfield Sentry* wherein the nerve centre was found to be in BVI, *Hertz Corp vs. Friend* wherein the court said that courts should focus on actual place where the control resides and *OAS S.A., et al* wherein it was said that court may consider the location of debtor’s nerve centre.

The proceedings are debtor in possession unless there is a fraud or gross mismanagement; thus, Maximov will still be in control of operations [§1101(1)]. The trustee/debtor in possession shall have all the rights and powers and shall perform all the functions and duties of a trustee. [§1107] Moreover, unless the court, on a request of party in interest, orders otherwise the trustee operates the business – [§1108] and finally, the debtor has exclusivity to file a plan for 120 days and can be extended to 18 months - [§1121(a) & (b)]

* Thus, Maximov does not lose control and gets the first shot at filing the plan.

A worldwide automatic stay comes into effect on filing for insolvency; can be lifted in certain cases for lack of adequate protection i.e., where value of property may decline. [§362]. Upon commencement, an estate is created which comprises of all the property wherever located and by whomever held [§541].

* Thus, Maximov can try and seek recognition in United Kingdom and Romania thru MLCB and attempt to get a stay across the globe on all enforcement action including that of Monaco lender. However, a Chapter 11 proceeding when exported to United Kingdom may not be effective on Monaco lender on account of Gibbs Rule explained in *Section G* below. Also, basis *Rubin vs Eurofinance* there is a possibility that a judgment of US proceeding may not be enforced in United Kingdom if the Monaco lender did not submit to US jurisdiction.

Additionally, there is an existing injunction in Romania, and it is unlikely that Romanian courts will grant any recognition based on MLCB in such a situation. This is because according to Article 6 of MLCB, the notion of public policy is grounded in national law. Public policy may relate to any mandatory rule of national law or to fundamental principles of law, in particular constitutional guarantees. Thus, any step that may restricts the citizen of a country to claim damages may be in violation of fundamental rights[[7]](#footnote-7).

Moreover, the loan to Efwon Investments is secured “partly” on several homes of Maximov across the world. American bankers are considering foreclosing on the security. Thus, Maximov wants to protect “his position” and the “position of Efwon Investments”. It seems that lenders will have an Equitable Lien over Maximov’s houses. Thus, the stay may not extend to Maximov’s houses. Furthermore, these houses are across the world wherein some other lender, outside of the Efwon consortium, may have first charge, or to enforce security one may require registration of charge in the national register. Thus, the stay will only work for Efwon Investment’s assets and not for Maximov’s assets unless specifically stay is sought and granted by the court; the grant of stay is extremely unlikely, the only possible exception being if Maximov intends to liquidate the houses to fund the reorganization plan.

Use of Chapter 11 gives the right to assume, reject or assign executory contracts. Ipso-facto clauses too are nullified. [§365]

* In case *ipso-facto* clauses exist in the licenses accorded by FIA to the Romania team or in the broadcasting revenue license handled by Formula One Group, such *ipso-facto* clauses may be nullified only if Chapter 11 proceedings are recognized in Romania thru the MLCB. As discussed above it is highly unlikely that a recognition would be granted in Romania on grounds of public policy. Thus, pending recognition, ipso-facto clauses will continue to apply.

Additionally, though the drivers are “contracted”, a possibility exists that they are treated as employees under Romanian law, as they have a lasting relationship being in continuous service for 10 yrs. In *Lawrie-Blum v Land Baden Wurttemberg* the European court had said that an essential feature of employment is “that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration”.

Furthermore, United States, usually does not have employment contracts except for unionized workforce under collective bargaining agreements (“CBA”); though, pre-petition employee expenses of 180 days are granted administrative priority. CBAs cannot be treated as executory contracts; any proposal to modify the same must be in good faith, fair and equitable. Thus, it is not certain that Romania will accept the treatment of drivers contract as envisaged by United States. Although, not in reference to executory contracts, but for *ipso-facto* clauses, courts have held, in *Fibria Celulose S/A v Pan Ocean Co. Ltd.* that parties should not have expected that under the chosen English Law, the English court would apply Korean law. On the same analogy it should not be expected that Romanian courts will apply the US law pertaining to CBA.

Other advantages that Chapter 11 offers to Maximov are that the property can be sold free and clear of creditor interests with court approval. In case creditor interest is disputed, the creditors interest will attach to proceeds of sale. [§363] Further, unsecured credit can be obtained, if required, with court hearing credit can be obtained by securing debt by a senior or equal lien on property. [§364]

* Maximov can use 363 sales to his advantage when he is sure that sale to KuasaNas is a certainty. In that case he kills two birds with one stone. However, he will have to structure his 49% in the new company as well as any proceeds that he may be entitled to for sale of his 51% stake.

Vis-à-vis the plan and its approval, the rules are possibly the best amongst the league of nations. Maximov can use Chapter 11 to cramdown, restructure debt etc. Substantially similar claims or interest are put in a class – [§1122] Plan has to follow absolute priority rule, may (i) impair or leave unimpaired any class of claims; secured or unsecured; (b) assume, reject of assign any executory contract; (c) settle or adjust any claim or interest; (d) provide for sale of all or substantially all of the property; (e) modify rights of secured claim holders – [§1123]. Also, though the holder of a claim or interest may accept or reject a plan, a plan is accepted if it complies with provisions of the law and is in good faith, and each impaired class receives an amount that is not less than the amount it would have received in liquidation and there is at least one impaired class that has accepted the plan. [§1129(a)] A class accepts a plan if two-thirds in amount and one-half in numbers approve. [§1126 (c) and (d)] To mitigate holdouts, the court shall confirm the plan if it does not discriminate unfairly and is fair and equitable with respect to each class of claims i.e., for secured creditors the lien attaches on proceeds and the value of deferred cash payments equates to the total the amount of claims. [§1129(b)] The confirmation of plan is binding on debtor and all parties in interest. [§1141]

Finally, though not specified in Chapter 11, the US laws under court’s general equitable powers provide for substantive consolidation (including deemed substantive consolidation) i.e., treatment of two or more debtors as one. This can result in pooling of assets and liabilities so that creditors of each entity share in an equal distribution. Also, it eliminates all inter-entity claims, thereby avoiding the need to resolve them. Thus, a single plan is made for all related entities with the creditors of multiple entities voting together as a class and requisite majorities are determined on a global basis.

Summarising, though Chapter 11 intuitively was the preferred option, an insolvency proceeding based on it may not be able to seek recognition in Romania on public policy grounds and it may not be able to impose its terms on the Monaco lender; thus, will be of limited use in solving the problem at hand.

## EU Directive – A year too late and has other drawbacks too!

In our case The EU Directive comes into being in Romania in January 2020[[8]](#footnote-8) whereas the solution we need is for early 2019. Thus, to use this tool Maximov must stay current on his dues by paying off creditors either from the sponsorship money received at Efwon Trading or from his own pocket and keep the negotiations on with the drivers and KuasaNas in the interim. However, the larger question is does the EU Directive has so many advantages that Maximov would like to wait till January 2020 and add an additional element of risk wherein the deal itself becomes uncertain?

The EU Directive is like the US Chapter 11 on a macro level but is more cost efficient. The one big difference is that in certain situations it is not purely debtor-in-possession. In EU member states (“Romania”) debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and day-to-day operations of the business. The appointment of a practitioner in the field of insolvency by a judicial or administrative authority is on a case-by-case basis, except in certain circumstances where it is mandatory. One such exception is when a reorganization plan has to be drafted, but where a general stay of individual enforcement actions, in accordance with Article 6(3), was in existence, and thus it becomes necessary to appoint a practitioner to safeguard the interest of the parties. [Article 5]

* In the instant case Drivers had an existing freezing injunction on company’s assets and thus appointment of practitioner will be required. However, Maximov can continue to run the business, albeit with a bit of oversight, for the plan.

The EU Directive categorically states that the framework may consist of one or more procedures, measures, or provisions, some of which may take place out of the court, without prejudice to EU Directive. [Article 4(5)]

* Thus, as described in *Section B* above, Maximov can continue negotiating with drivers outside of the process too.

One drawback of Chapter 11 was the uncertainty of recognition in Romania given the injunctions obtained by Drivers. EU Directive enables judicial or administrative authorities to grant new stay of individual enforcement action at the request of the debtor when insolvency proceedings which could end up in liquidation of the debtor have not yet been opened. [Article 6(c)]. Additionally, a stay of individual enforcement action in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of creditors, of insolvency proceedings which could end in the liquidation of the debtor. [Article 7(2)] Furthermore, since preventive restructuring framework is available only to debtors [Article 4(7)] and to creditors and employees’ representatives only subject to agreement of the debtor, the existing injunction, filed in the capacity of either a creditor or an employee by the Drivers can be converted to preventative restructuring. [Article 4(8)]

* Thus, Maximov can get a fresh stay and bar any enforcement by creditors/Drivers.

An advantage of EU Directive is that the stay may apply for the benefit of third-party security providers, including guarantors and collateral givers. [Recital 32 of EU Directive] However, judicial, or administrative authorities can refuse to grant a stay where it lacks the support of the required majorities of creditors or in circumstances where debtor is unable to pay debts as they fall due.

* Therefore, any enforcement by creditors due to equitable lien over Maximov’s houses can be stayed, if basis EU Directive, the stay can be exported to United States and the jurisdictions where houses are located. Similarly, as the case is not clear whether investment in Efwon Trading was made by Maximov directly, or thru Efwon Investments, in either of the circumstances, a stay can be exported under MLCB. Also, from the facts of the case Maximov’s inability to pay arises because of the injunction else he was current on the payments.

Executory contracts and ipso-facto clauses are addressed in the EU Directive. Creditors cannot withhold performance, terminate, accelerate, or modify essential executory contracts to the detriment of the debtor, for pre-petition debts. ‘Essential executory contracts’ mean contracts which are necessary for the continuation of the day-to-day operations. However, the creditors are granted safeguards to prevent unfair prejudice. Similar treatment may be extended to non-essential executory contracts [Article 7(4)] and creditors are not allowed to withhold performance, or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of, a request for the opening of preventive restructuring proceedings or a request for a stay of individual enforcement actions. [Article 7(5)]

* This implies that the broadcasting rights handled by Formula One Group and licenses accorded by FIA to the Romania team can neither be terminated nor be modified. [Recital 40 of EU Directive].

Thus, now we have the basic ingredients in place i.e., Maximov in control though with oversight, a stay that takes care of executory contracts and ipso facto clauses as well as overrides the stay of Drivers, a possibility of stay being exported to United States, United Kingdom (more on UK related matters later in *Section G*) and other jurisdictions. The next step is to analyse the basic contours of resolution plan that are provided by EU Directive and whether it bolsters our case for the use of the EU Directive. These are summarized below:

Irrespective of who applies for a preventive restructuring procedure, debtors have the right to submit restructuring plans. Under certain conditions creditors and practitioners in the field of restructuring too have the right to submit restructuring plans. [Article 9(1)]

* Thus, Maximov gets a first shot at presenting a plan.

The restructuring plans submitted in accordance with Article 9, or for confirmation by a judicial or administrative authority in accordance with Article 10, contain the information on the affected parties, their claims, and interests [Article 8(1)(c)] Also, affected parties have a right to vote on the adoption of a restructuring plan [Article 9(2)] and affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria. [Article 9(4)] Also, Recital 46 of EU Directive, provides for regulating the treatment of contingent claims and contested claims for the purposes of allocating voting rights.

* Thus, the Drivers will form a separate class with a right to vote basis determination of contingency and will not be able to block as explained below; other classes will be formed from various types of secured creditors (once the plan is exported)

Workers' claims are treated in a separate class of their own. [Article 9(4)]

* In case Drivers represent themselves as workers[[9]](#footnote-9) due to long tenure with Efwon Romania they will be a separate class. In addition, the restructuring plan should be mindful of the *Estro* case i.e., there exists no choice on which employees are to be carried forward to restructured company (assuming other drivers are available).

However, a restructuring plan shall be adopted by affected parties, provided that a majority in the amount of their claims or interests is obtained in each class; a majority in the number of affected parties may also be proposed. However, the majorities required shall not be higher than 75% of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class. [Article 9(6)]

Restructuring plans which affect the claims or interests of dissenting affected parties are binding on the parties only if they are confirmed by a judicial or administrative authority. [Article 10(1)(a)] Also, where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test. [Article 10(2)(d)]

Restructuring plan which is not approved as provided in Article 9(6), may be confirmed by a judicial or administrative authority upon the proposal of a debtor or with the debtor's agreement, and become binding upon dissenting voting classes where the restructuring plan fulfils at least the following conditions: (a) it complies with Article 10(2) and (3); (b) it has been approved by a majority of the voting classes of affected parties, provided that at least one of those classes is a secured creditors class and (c) it ensures that dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class. [Article 11(1)]

* Thus, on the presumption that insolvency proceeding can be exported by use of MLCB, cross-class cramdown will be effective to confirm the resolution plan even if it is opposed by the Drivers provided it satisfies the best-interest-of-creditors-test.

In lieu of formal vote the restructuring plan can be adopted by an agreement with the requisite majority. [Article 9(7)]

* This clause may be very useful in case any obstacles are faced while exporting the insolvency proceedings to US and UK and thus a mechanism of formal vote is not in existence

The restructuring plan confirmed by a judicial or administrative authority are binding on all affected parties. [Article 15]

* Thus, Maximov’s plan will be binding on all.

An appeal against a confirmed restructuring plan shall not have suspensive effect. Judicial authorities can suspend the execution of the restructuring plan or parts thereof where necessary and appropriate to safeguard the interests of a party. Where a plan is confirmed with amendments compensation is to be granted to the party that incurred monetary losses and whose appeal is upheld. [Article 16]

* Thus, even on an appeal Maximov’s plan can be safeguarded.

EU Directive allows derogation from the absolute priority rule, for example where it is considered fair that equity holders keep certain interests under the plan despite a more senior class being obliged to accept a reduction of its claims, or that essential suppliers covered by the provision on the stay of individual enforcement actions are paid before more senior classes of creditors [Recital 56 of EU Directive]

* Though the case is silent on equity contribution of Efwon Trading into Efwon Romania, a subsidiary in Romania i.e., a SRL or a SCS can only be incorporated in Romania with a minimum capital of Euro 45. Thus, Maximov does have an equity interest and that can be protected. Furthermore, with the help of MLCB these proceedings may be transferred to UK though obstacles exist as detailed in *Section G*. Also, Maximov either in his personal capacity or thru Efwon Trading has equity interests because the value of equity interest to set up a company in United Kingdom is greater than zero. These equity interests too may be protected under this clause in conjunction with Recital 32 of EU Directive if proceedings can be exported to UK. Similarly, this may extend on export of proceedings to the US.

It is evident that EU Directive can take care of the Romanian leg of Efwon Group. *Prima-facie* recognition in United States and United Kingdom thru MLCB also seems feasible as all three countries have adopted the MLCB though recognition in United Kingdom will face bottlenecks as discussed in *Section G* below. However, the ***caveat*** is whether Maximov is willing to wait it out till December 2019 without jeopardizing the KausaNas?

Thus, EU Directive would not be of use in this case, given the extended timeline, and recognition issues in United Kingdom. Therefore, we analyse whether EIR Recast may be a better option in *Section H*. However, before moving to *Section H* we analyse why exporting proceedings will be a difficult based on EU Directive. The export of proceedings is thereafter briefly discussed in *Section I* and *Section J.*

## EU Directive, a hindrance for recognition in UK. The search for an UK solution nudge us towards EIR Recast

According to the case Brexit happened in December 2019 whereas we are in search for a solution in early 2019. Britain left the EU formally on 31st January 2020. A withdrawal agreement was agreed between the UK and the EU on 17 October 2019 and implemented on 23rd January 2020 by the European (“**Withdrawal Agreement**”) Act 2020. It provided for the EIR Recast to continue to apply to insolvency proceedings provided the main proceedings were opened before 31st December 2020[[10]](#footnote-10). Thus, prima-facie it may seem that nothing needs to be done. Nevertheless, the recognition may not be granted. This is because the recognition would be given to “EIR Recast” and not to EU Directive; the last line of Article 1 of EIR Recast states that it applies to proceedings referred to in Annex A and EU Directive is not listed in Annex A.

Recital 12 of EU Directive makes it amply clear. “Regulation (EU) 2015/848 of the European Parliament and of the Council (4) deals with issues of jurisdiction, recognition and enforcement, applicable law and cooperation in cross-border insolvency proceedings. Its scope covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons”. Recital 13 of EU Directive adds that “this Directive should be without prejudice to the scope of Regulation (EU) 2015/848. It aims to be fully compatible with, and complementary to, that Regulation, by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness. It does not change the approach taken in that Regulation of allowing Member States to maintain or introduce procedures which do not fulfil the condition of publicity for notification under Annex A to that Regulation. Although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments”.

Thus, until the Romania Preventive Restructuring is part of Annex A it will not be granted automatic recognition in UK. Therefore, we will have to use either the MLCB to seek access, recognition, and relief i.e., under the UK cross-border insolvency regulations (CBIR) or schemes of arrangement under Part 26 of the Companies Act 2006 as there is a sufficient connection with England. Historically, English Law schemes have been a popular tool for restructuring EU companies.

In the instant case recognition thru CBIR seems to be an attractive option. However, when it comes to recognition of foreign judgments, UK seems to be very territorial and does not follow the spirit of modified universalism; there is no substantive relief on recognition of effect of a foreign scheme. As EU Directive is not part of Annex A and is not “public-proceeding” it will be considered as a scheme. Furthermore, Gibbs Rule may come into play if the law in the financing document with the Monaco bank is the English Law. Recently in the case of *OJSC International Bank of Azerbaijan and the CBIR 2006 – Bakshiyeva vs Sberbank of Russia,* the Gibbs rule was upheld. Justice Hildyard concluded that “there is presently and at this level no real doubt as to the continued application of the rule of Gibbs” and similarly, “no real doubt that the foreign insolvency, even one recognized formally in this jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or given them overriding effect over ordinary principles of English Contract Law”.

In case we consider schemes of arrangement we have some red flags too. Whether the scheme will be recognized in the third-party country i.e., Romania and United States? English court will not sanction a scheme if it is unlikely that the scheme will be enforced. English courts use the opinion of independent experts to determine whether there is a reasonable prospect of enforcement. An injunction of Drivers will be manifestly against public policy in Romania as discussed in *Section E*. Also, with impending Brexit (we do not know in early 2019 the consequences of Brexit) whether schemes can be recognized under Judgement’s Regulations would be a question mark. In US too terms of scheme may not be binding if it is not recognized as foreign main proceeding under Chapter 15 though the requirement can be waived away by trustees. Though, it is theoretically possible to shift COMI to UK, we will add another problem to the mix; the use of EU Directive delays the filing of insolvency by a year and a UK COMI may not solve for our problem of Romanian Drivers. To surmount the UK recognition problems, EIR Recast may be the ideal choice and thus we analyse EIR Recast in *Section H* below.

## EIR Recast - the best weapon in the armoury!!

EIR Recast isn’t the most glamourous piece of legislations in the insolvency world. It is not touted as a law for restructuring. It applies to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, “reorganisation” or liquidation, a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed. Moreover, where the proceedings are commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor’s insolvency or the cessations of the debtor’s business activities. [Article 1] Furthermore, the definition sections define the phrase “debtor in possession” i.e., a debtor in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs. [Article 2(3)] Finally, Article 76 which applies to insolvency proceedings of a group of companies states that provisions of that Chapter also apply to debtor-in-possession.

* Thus, Maximov can stay in control of its business, like Chapter 11 or the EU Directive

The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (‘main insolvency proceedings’). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis, and which is ascertainable by third parties. [Article 3(1)]

* COMI discussed in detail in *Section I* below. Thus, proceedings in Romania would be the main proceedings

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. [Article 13]/[Article 72]

* In case the Drivers claim to be employees[[11]](#footnote-11) due to long tenure in the workforce and other drivers are available for hire, the restructuring plan should be mindful of the *Estro* case i.e., there exists no choice on which employees are to be carried forward to restructured company.

The courts in Romania shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them. These actions can be related to civil or commercial matters against the same defendant. The insolvency practitioner/debtor in possession, provided the national laws allows debtor in possession, can bring actions on behalf of the insolvency estate before the courts of Romania provided that the courts have jurisdiction pursuant to Regulation (EU) No 1215/2012. The actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. [Article 6] Moreover, the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat. [Article 18]/ [Article 73]

* Romania allows debtor in possession as described in *Section B* above, namely *ad-hoc* mandate or *concordat preventive*, thus Efwon Romania / Maximov can bring the action of the drivers before the same court as the two actions are closely connected.
* Though, the EIR Recast does not have any provisions on *ipso-facto* clauses or executory contracts, FIA with its beginnings in Europe is likely to be based in Europe and thus in case they invoke any clauses just based on insolvency, these can be brought under Article 6, being deriving directly from insolvency proceedings, and closely linked to them; to paraphrase EIR Recast – a synthetic ipso-facto or executory.
* Two issues that remains unaddressed by use of EIR Recast is a stay on enforcement of the homes of Maximov in United States and other parts of the world and his investment in the United States in Efwon Investments. EIR Recast does not cover guarantors like EU Directive or provides third party release like English scheme of arrangement.

To circumvent this problem and to get a stay on enforcement we must seek to establish the COMI of Efwon Investments in Romania. We rely on two judgements to seek recognition under Chapter 15, described in *Section J*, i.e., *OAS SA et. al* and *Oi Brasil Holdings Coöperatief U.A.* (“**Oi**”).

In *OAS SA* the court said that “purchasers of the 2019 Notes understood that they were investing in Brazilian based businesses and OAS Investments’ place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes…..The purchasers expected to receive repayment from the cash generated by the operations of the OAS Group, and in the event of a default, might ultimately have to enforce their rights in Brazilian bankruptcy proceedings.

In *Oi*, the court said, “Coop's nerve centre and headquarters are clearly located in Brazil. Coop has no operations or business independent of the Oi Group and is operated within the Oi Group as part of a single, integrated economic unit….. This is equally true for evidence concerning Coop's creditors' expectations. For the purposes of a COMI analysis, creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments…. Coop's creditors fall into three buckets: (1) holders of the Coop Notes; (2) PTIF; and (3) other miscellaneous Dutch creditors……. Evaluating creditor expectations, like the broader COMI analysis, is not a box-checking exercise, and each category does not warrant equal weight here. While a detailed analysis of creditor expectations was not conducted at the Prior Recognition Hearing, extensive evidence was submitted on this issue during the trial in this case. A review of that evidence confirms that a reasonable creditor would have looked to Brazil for their recovery at the time of the Prior Recognition Hearing and would still do so now”.

The crux of the above judgements is that the creditors in both cases knew that irrespective of who they lent the money to the repayments are going to come from another entity. Similarly, in Efwon Investment the creditors knew that they would primarily get paid from pledge on investment and revenues from participation in sport as Efwon Investment had no other activity. A similar logic can be extended for the Monaco lender too. Maximov being a natural person, a different strategy needs to be articulated vis-à-vis his homes and investment.

It is also to be noted that in a recent case of Energy Coal S.P.A the courts stated that choice of law provision in a contract will not override the comity afforded in foreign main proceedings vis-à-vis distribution of claims. “US Bankruptcy courts have not hesitated to require foreign creditors to file their claims and to litigate in our courts if they wish a distribution from a US Debtor’s estate. It is equally appropriate to expect US creditors to file and litigate their claims in foreign main proceedings”. Thus, creditors of Efwon investments may not be able to contest on choice of law.

The concept of COMI is steeped in EIR2000 and MLCB and deals with a single company and not a group of companies. The Eurofood judgement (discussed in *Section I*) touched on the aspect of group of companies and was possibly delivered through the prism of liquidation which was the theme of EIR 2000. The court said in *Eurofood*, “Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect”.

*Eurofood* read in conjunction with *OAS SA* and *Oi* and the provisions of EIR Recast, vis-à-vis group insolvency, detailed below guide us to a potential solution to the case problem.

Recital 52 of EIR Recast deals with situations where insolvency proceedings have been opened for several companies of the same group. It prescribes cooperation between all in such an event, i.e., between and amidst insolvency practitioners and the courts, to find a solution that would leverage synergies across the group. [Article 56,57 & 58] Recital 53 adds that the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, if this is not incompatible with the rules applicable to them. [Article 56]

Recital 55 states that an insolvency practitioner of a member of a group of companies should be able to request the opening of group coordination proceedings. [Article 61] Moreover, where the opening of group coordination proceedings is requested, any court other than the court first seised shall decline jurisdiction. [Article 62]

Recital 65 provides for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings and of judgments handed down in such proceedings. Automatic recognition means that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. Recital 66 states that the law of the Member State of the opening of proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main insolvency proceedings and for local proceedings. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and their legal relations.

* The aforesaid provisions of EIR Recast allows Maximov to expand the Romanian proceedings to United Kingdom
* In case a dual qualified practitioner can be found the same person can be nominated as insolvency professional in both Romania and United Kingdom; if not, another proceeding can be opened in United Kingdom with another practitioner and the two can cooperate and coordinate.
* As Romania is the first court that opens the proceeding any other court other than the first seised must decline jurisdiction
* *Lex Concursus* of Romania will apply; thus, the problem of Gibbs Rule described in *Section G* above is obviated; once a recognition is done under EIR Recast, the rule is no longer applicable
* Armed with EIR Recast recognition in Romania and United Kingdom, an application is to be filed under Chapter 15 in United States as described in *Section J* belowand basis *OAS SA* and *Oi* described in this Section seek a stay on US enforcement.

Finally, in Oi case the courts had delved into and sought guidance from Model Law on Enterprise Group Insolvency (“**MLEGI**”), upholding the spirit of Article 7 of MLEGI that in interpretation of this law regard is to be had to its international origin and the need to promote uniformity.

Para 43 of MLEGI states that a group insolvency solution is intended to be developed, coordinated, and implemented through a planning proceeding, and it may or may not require insolvency proceedings to be commenced for all relevant enterprise group members.

Para 48 of MLEGI makes it clear that relief in support of a planning proceeding (art. 20, para. 2) or of recognition of a foreign planning proceeding (art. 22, para. 4, and art. 24, para. 3) may not be granted with respect to the assets and operations of an enterprise group member for which no insolvency proceeding has commenced, unless the reason for not commencing relates to the avoidance of costs and the associated complexity. Thus, in the circumstances covered by the exception, relief might be available with respect to the assets and operations located in the enacting State of the enterprise group member for which no insolvency proceeding has commenced.

Para 124 of MLEGI details the types of relief that might be included in domestic law to support the development of a group insolvency solution. The types of relief specified are typical of, or frequently ordered in, insolvency proceedings; the list is not exhaustive, and the court is not unnecessarily restricted in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case. Additionally, Para 125 makes it clear that execution against the assets of the enterprise group member can be stayed. Moreover, Para 128 *refers* not only to “individual actions” but also to “individual proceedings” to cover, in addition to “actions” instituted by creditors in a court against the debtor or its assets, enforcement measures initiated by creditors outside the court system.

Thus, citing all the above arguments, a relief could be sought from the courts while filing recognition under Chapter 15 that no enforcement actions should be carried out against Maximov’s houses in United States.

## MLCB – A necessity for this case to gain Access, Recognition, and Relief

The recognition under MLCB is governed by Article 15 i.e., a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. The fact that the receiving courts will verify is whether the two conditions mentioned below are fulfilled:

* It is a foreign proceeding as defined under Article 2(a) i.e., a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.
* The foreign representative meets the criterion defined under Article 2(d) i.e., a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

According to The Guide to Enactment and Interpretation, (“**Guide**”) the notion of a “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended as a collection device for a particular group. If a proceeding is collective, it must also satisfy the other elements of the definition, i.e., for the purpose of liquidation or reorganization. In evaluating whether a given proceeding is collective for the purpose of the MLCB, a key consideration is whether substantially all the assets and liabilities of the debtor are dealt with in the proceeding. Also, “foreign proceedings”, include a variety of collective proceedings; compulsory or voluntary, for liquidation or for reorganization. MLCB also cover circumstances in which a debtor retains some measure of control over its assets, albeit subject to supervision by a court or other competent authority.

Whether the “foreign representative” is authorized to act, is determined by the applicable law of the State in which the insolvency proceedings began. Where the person satisfies the definition above the court may rely on the presumption established by Article 16.

Thus, any problems vis-à-vis recognition are not anticipated in United States.

The next step is to determine whether seeking of recognition as a “foreign main proceeding” is possible under Article 17(2)(a). We encounter multiple centres of main interests (COMI) in the instant case. COMI is not defined in MLCB, but it borrows heavily from EU Regulations / EIR Recast which in turn borrow heavily from *Virgos-Schmit* Report. The determination of COMI under the EIR Recast relates to the jurisdiction in which main proceedings should be commenced. The determination of COMI under MLCB relates to the effects of recognition, i.e., the relief available to assist the foreign proceeding.

The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.” The idea is to include all the assets and creditors on a world-wide basis. The term ‘interests’, encompasses not only commercial, industrial or professional activities, but also general economic activities.

In *Eurofood*, a dispute arose between Irish and Italian courts about whether an insolvent subsidiary company with a registered office in a different State from the parent company had its COMI in the State of its registered office or that of the parent company. The European Court of Justice (ECJ) said that that the registered office would be regarded as the centre of a particular company’s main interests. The presumption is found in Article 3. i.e., The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.”

The ECJ held that, the presumption can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect”. It took the view that “the mere fact” that a parent company made economic choices (for example, for tax reasons) as to where the registered office of the subsidiary might be situated would not be enough to rebut the presumption.

In *Interedil*, the ECJ held Article 3 must be interpreted to mean that “a debtor’s COMI must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties.” When management, day-to-day decisions, and supervision of a company takes place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption cannot be rebutted. However, where a company’s central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors must be undertaken to establish, in a manner that is ascertainable by third parties, the location of the company’s actual centre of management and supervision and of the management of its interests. The court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption unless the comprehensive assessment of all relevant factors pointed to the same.

Thus, based on both *Eurofood* and *Interedil* it seems that Romanian proceedings will be recognized as foreign main proceedings. The one objection, that may arise is the fact that Maximov is taking all decisions and is operating out of United States; US thus being the nerve centre. However, basis *Eurofood* this can be rebutted.

Once recognition is granted the relief under Article 20 is automatic. The automatic consequences envisaged in Article 20 are intended to allow time for steps to be taken to organize an orderly and fair cross-border insolvency proceeding. The approach reflects a basic principle of MLCB according to which the recognition of foreign proceedings by the court of the enacting State grants effects that are considered necessary for an orderly and fair conduct of cross-border insolvency. If recognition would, in any given case, produce results that would be contrary to the legitimate interests of an interested party, including the debtor, the law of the recognizing State may provide exceptions to stay. In some countries the courts are authorized to make individual exceptions upon request by an interested party. We are not presented with any exceptional event in the case and thus an extraordinary stay is not foreseen,

Thus, in our case recognition and relief should be possible based on foreign main proceeding in Romania in both United States and United Kingdom.

## The steps required to export proceedings to United States – Chapter 15

We also need to be aware of the steps to be taken for recognition in United States under Chapter 15 as an ancillary proceeding as well as the implications of the steps which are detailed below:

* A case is commenced by filing of a petition for recognition of a foreign proceeding under section 1515 - [§1504]
* A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515. If the court grant recognition the foreign representative may apply directly to a court in United States for appropriate relief – [§1509]
* The sole fact that a foreign representative files a petition does not subject him to jurisdiction of court in United States – [§1510]
* The petition for recognition shall be accompanied by certified copy of the decision commencing foreign proceeding and appointing foreign representative, a certificate affirming the aforesaid and a statement identifying all foreign proceedings – [§1515]
* After notice and hearing, an order recognizing foreign proceeding shall be entered if such foreign proceeding for which recognition is sought is a foreign main proceeding or non-main proceeding in accordance with section 1502, the foreign representative applying for recognition is a person or a body and the petition meets the requirement of section 1515 – [§1517]
* Upon recognition of a foreign main proceeding an automatic stay comes into being. The foreign representative may operate debtor’s business and exercise the rights and powers of a trustee within the territorial jurisdiction of United States. Also, it does not affect the right of foreign representative to file a petition commencing a case under Chapter 11 – [§1520]
* In case required, after recognition of a foreign main proceeding, a case under Chapter 11 may be commenced only if the debtor has assets in the United States. The effects of such a case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States – [§1528]

United States has taken a very broad-based approach to grant recognition based on COMI; the location of debtor’s headquarters; the location of those who manage the debtor; the location of debtor’s primary assets; the location of the majority of the debtor’s creditors; and/or the jurisdictions whose laws will apply to disputes. Basically, the party seeking recognition as a foreign main proceeding has the burden of proving that the debtor’s COMI is in the jurisdiction where the foreign main proceeding is pending. *SPhinX.*

Thus, Maximov should not encounter any problems in exporting the proceedings under the EIR Recast to the United States as foreign main proceedings.

## Conclusion

The following is the summary of strategy to adopted to facilitate the deal with KuasaNas:

* Negotiate with the Drivers in Romania to reach a settlement as case does not inform us whether other drivers are available
* Filing of insolvency proceedings in Romania and use of EIR Recast as described in *Section H* above. Thru the EIR Recast get an automatic recognition in United Kingdom; appointment of the same insolvency practitioner if rules permit else coordinate between two insolvency practitioners.
* Seeking recognition under Chapter 15 as described in *Section J* above. On the strength of case laws i.e., *Oi* and *OAS SA* and provisions of MLEGI seek relief so that no enforcement takes place against Maximov homes and investments in case he has directly invested in Efwon Trading as well as on shares of Efwon Investments. We have missing information in case and thus if Maximov has homes outside of EU and United States, enforcing stay in those jurisdictions where we cannot seek recognition with MLCB may be a challenge. Also, we are not aware whether Maximov is willing to change his personal COMI, though this will delay the process by six months and thus the idea was not examined.
* Once recognition and relief are available in all jurisdictions present a plan i.e.,
  + Coordinate about proposal and negotiation of a restructuring plan [EIR Recast Article 56(2)]
  + The presented plan should have a reasonable chance of success of implementation and is for the benefit of the creditors in the proceedings in which stay is requested. [EIR Recast Article 60]
  + The insolvency practitioner / coordinator shall (a) identify and outline recommendations for the coordinated conduct of the insolvency proceedings; (b) propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies; (c) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it; (d) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions if any and (e) agreements between the insolvency practitioners of the insolvent group members. [EIR Recast Article 72]
  + The plan does not recommend consolidation of proceedings or of insolvency estate [EIR Recast Article 72]

The aforesaid steps should ensure a successful bankruptcy outcome which will enable Maximov to strike a deal with either KuasaNas or any other suitor.

## Annexure





1. Judge Nicoleta Mirela Nastasie, Dr Cristian Draghici, “Mapping Preventive Restructuring Frameworks and EU Directive for the JCOERE Project”, Country Report, Romania [↑](#footnote-ref-1)
2. ibid [↑](#footnote-ref-2)
3. Ioan Chiper, “The Romanian Insolvency Publication and Registration Requirement under Article 21 and Article 22 of European Insolvency Regulation”. [↑](#footnote-ref-3)
4. ibid [↑](#footnote-ref-4)
5. Clifford Chance Global Restructuring and Insolvency Group, “A Guide to Restructuring and Insolvency Procedures in Europe” Romania”. [↑](#footnote-ref-5)
6. An innovative combination of different insolvency laws to accomplish the stated objective [↑](#footnote-ref-6)
7. Article 21 of Romanian Constitution – Every person is is entitled to bring cases before the courts for defense of his legitimate rights, liberties, and interests. The exercise of this right may not be restricted by any law. [↑](#footnote-ref-7)
8. Assumed for the purposes of this answer that it has come into effect in January 2020 as mentioned in the case, though in reality it comes into effect in 2021 [↑](#footnote-ref-8)
9. Refer *Lawrie-Blum v Land Baden Wurttemberg* as described in Section E [↑](#footnote-ref-9)
10. Norton Rose Fulbright, “Impact of Brexit on Insolvency”, United Kingdom, February 2021 [↑](#footnote-ref-10)
11. Refer *Lawrie-Blum v Land Baden Wurttemberg* in Section E above [↑](#footnote-ref-11)